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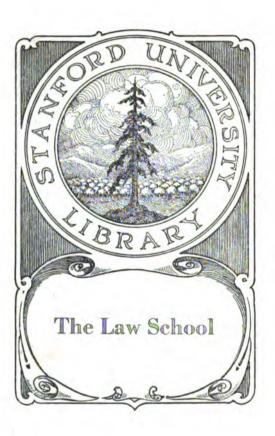
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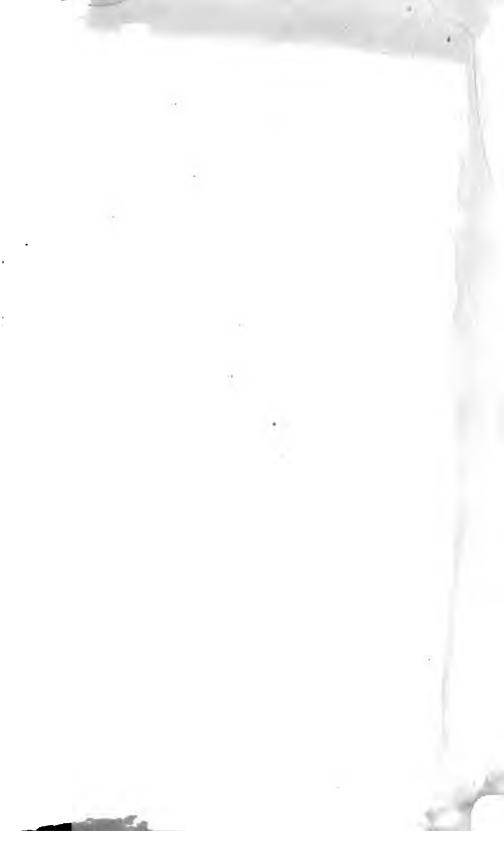
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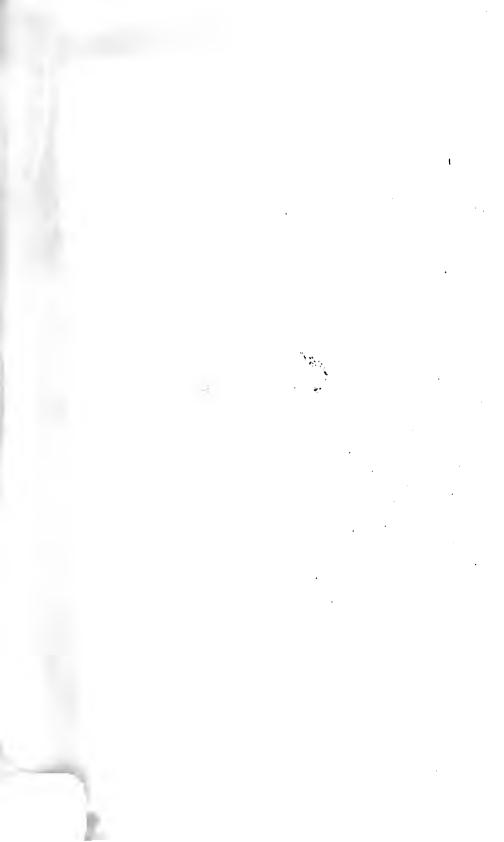
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

Sellens on Detail BY

THOMAS SERGEANT AND JOHN C. LOWBER, Esqus., Bom Reprinted in Full.

VOL. XXI.

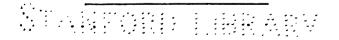
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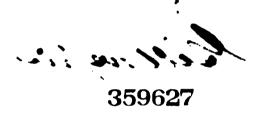
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1864.



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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench.

WITH TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN.

AND

CRESSWELL CRESSWELL, OF THE INNER TEMPLE,
ESQRS., BARRISTERS AT LAW.

VOL. X.

CONTAINING THE CASES OF MICHAELMAS, HILARY, AND EASTER TERMS, IN THE 10TH AND 11TH YEARS OF GEORGE IV. 1829-30.

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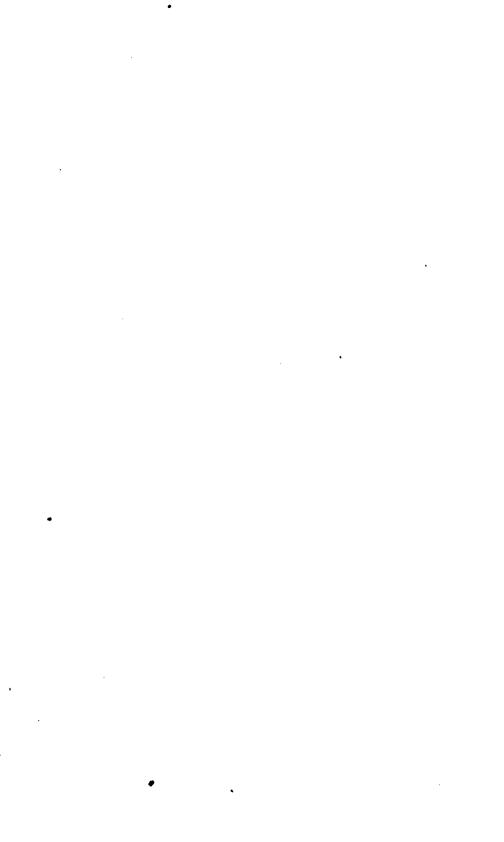
COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

CHARLES LORD TENTERDEN, C. J. Sir JOHN BAYLEY, Knt. Sir JOSEPH LITTLEDALE, Knt. Sir JAMES PARKE, Knt.

ATTORNEY-GENERAL.
Sir JAMES SCARLETT, Knt.

SOLICITOR-GENERAL.
Sir EDWARD BURTENSHAW SUGDEN, Knt.



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ARGUED AND DETERMINED

in the

COURT OF KING'S BENCH,

Michaelmas Cerm;

IN THE TENTH YEAR OF THE REIGN OF GEORGE IV. 1829.

MEMORANDA.

In the course of the vacation Mr. Baron Hullock died. He was succeeded by William Bolland, of the Inner Temple, Esquire, who on Monday, November the 16th, was called to the degree of Serjeant at Law, and gave rings, with the motto "Regi Regnoque Fidelis," and on the following day took his seat on the bench. He was afterwards knighted.

On the first day of this term Thomas Pemberton, James Lewis Knight, William Henry Tinney, of Lincoln's Inn, Esquires, and the Honourable Charles Ewan Law, Esquire, of the Inner Temple, having been in the course of the vacation appointed His Majesty's Counsel learned in the law, were called within

the bar, and took their seats accordingly.

*27

*WILLIAMS v. WARING. Nov. 7.

Where, by a memorandum at the foot of a promissory note, it was made payable at a particular place: Held, that this did not constitute a part of the contract, so as to make it necessary for a party suing on the note to aver and prove a presentment there.

Assumpsix on a promissory note, by the endorsee against the maker. Plea, non assumpsit. At the trial before Jervis, J., at the last Summer assizes for Denbighshire, the note, when produced in evidence, appeared to be in the following form:—

"31st January, 1827.

"Two months after date, I promise to pay to A. B. 251., value received.

"J. Waring.

"At Messrs. B. and Co.'s, Bankers, London."

The whole of the note, including the memorandum in the corner, was in the handwriting of the defendant, the maker of the note, and the memorandum was proved to have been written at the time when the note was made. For the defendant it was contended, that the note should have been described in the declaration as payable at Messrs. B. and Co.'s; and that evidence of present-

(11)

ment there should have been given. The learned Judge overruled the objection,

but gave the defendant leave to move to enter a nonsuit.

Campbell now moved accordingly, and contended, that as the memorandum at the foot of the note was written by the maker at the time of making the note, it was as much parcel of the contract as if it had been in the body of the instrument; and that consequently *presentment at the house where the note was made payable, should have been avered and proved, Trecothick v. [*3 Edwin, 1 Stark. N. P. C. 468.

Lord TENTERDEN, C. J. In point of practice, the distinction between mentioning a particular place for payment of a note, in the body and in the margin of the instrument, has been frequently acted on. In the latter case it has been treated as a memorandum only, and not as part of the contract; and I do not

see any sufficient reason for departing from that course.

BAYLEY, J. The case of Exon v. Russell, 4 M. & S. 505, is expressly in point, for the present plaintiff, with this single excention that the negrorandum in that case was not proved to have been written by the defendant. But it was there at the time when the note was made, and therefore the effect of it was the same; and the plaintiff having averred that the note was payable at the particular house, the Court held that it was misdescribed. That is a sufficient authority for a decision in this case in favour of the plaintiff.

Rule refused.

*MITCHELL and Another v. BARING and Others. Nov. 9. [*4

A foreign bill of exchange was drawn on C. and Co. at Liverpool, payable to A. in London, the drawees having refused to accept, it was accepted by B. in London for the honour of the payee, if regularly protested, and refused when due: Held, in an action against the acceptor for honour, that, by the special form of the acceptance, a presentment for payment to the drawee in Liverpool, a refusal by him, and a protest there, were necessary, and, therefore, that the bill was properly presented for payment there on the day it became due.

Assumpsit on a bill of exchange. The first count of the declaration stated that James Butler Clough on the 18th of July, 1825, in parts beyond the seas, to wit, at Charleston, made his certain bill of exchange, directed to Messrs. Crowder, Clough, and Co., Liverpool, and requested them, sixty days after sight of that his said James Butler Clough's first of exchange (2d, 3d, and 4th unpaid), to pay to Messrs. Le Roy, Bayard, and Co. therein mentioned, or order, in London, the sum of 500l. sterling, value received, and delivered it to the last-mentioned persons who endorsed it to the plaintiffs; that on the 30th of August, 1825, to wit, at London aforesaid, the bill was presented to Messrs. Crowder, Clough, and Co., who then and there had sight of it, and were requested to accept the same, but did not nor would then or at any time before or afterwards accept the same, or pay the sum of money therein specified, but wholly refused so to do; nor did nor would they then or at any other time, accept or pay said second, third, or fourth of exchange, in the said bill mentioned, or any of them, but therein wholly failed and made default; that the said bill was duly protested for non-acceptance, whereof the defendants on, &c., at, &c., had notice, and thereupon the defendants on, &c., at, &c., in order to prevent the said bill from being sent back and returned to Messrs. Le Roy, Bayard, and Co., did accept the said bill under protest, for honour of Le Roy, Bayard, and Co., and undertook that the bill should *be paid for the account of Le Roy, Bayard, and Co. if regularly protested, and refused when due, and did subscribe the said acceptance on the said bill, according to the usage and custom of merchants; that the bill when it became due, to wit, on the 1st of November, 1825, to wit, at London aforesaid, was shown and presented for payment to the persons to whom it was directed; and the said last-mentioned persons were then and there requested to pay the sum of money in the bill specified, according to the tenor and effect of the bill;

but that neither the said persons to whom it was directed, nor any other person on their behalf, did or would pay the bill, but wholly refused and neglected so to do; and thereupon the bill was on the same day and year last mentioned, at London aforesaid, duly protested for non-payment thereof, of all which premises the defendants had notice; by means whereof the defendants became liable to pay the plaintiffs the said sum of money in the bill specified, according to the tenor and effect of the bill, and of their acceptance. And being so liable the defendants in consideration thereof, afterwards, to wit, on, &c., at, &c., undertook and faithfully promised the plaintiffs to pay them the said sum of money in the bill specified, according to the tenor and effect of the bill and of the said defendants' acceptance. Plea, general issue. At the trial before Lord Tenterden, C. J., at the London sittings after last Trinity term, it appeared that the action was brought upon the following bill of exchange, drawn at Charleston, in America, on the 18th of July, 1825. "Sixty days after sight of this my first of exchange, second, third, and fourth unpaid, pay to Messrs. Le Roy, Bayard, and Co. or order in London, 5001. sterling, value received, and place to account, as advised *by James Butler Clough. To Messrs. Crowder, Clough, and Co., Liverpool." It was endorsed by the payees to the plaintiffs. was presented for acceptance to the drawees at Liverpool, but they, having previously stopped payment, refused to accept. The plaintiffs then applied to the defendants, the correspondents of Le Roy, Bayard, and Co., to accept it for their honour, and the defendants accepted the bill in the following terms:-"Accepted under protest, for honour of Messrs. Le Roy, Bayard, and Co., p. 3173, and will be paid for their account if regularly protested, and refused when due." The bill having become due on the 1st of November, 1825, was by the plaintiffs presented for payment to the drawees at Liverpool. They having refused to pay it, it was presented for payment to the defendants on the 3d of November, when they refused to pay it, on the ground that it had not been presented to them for payment on the 1st of November, the day it became due. It was contended on the part of the defendants, that the bill ought to have been protested for nonpayment in London. Several witnesses were called, some of them being notaries and others merchants, who stated, that where a foreign bill drawn upon a merchant residing at Liverpool, payable in London, is refused acceptance by the drawee, the usage is, to protest it for non-payment in London. The bill is put into the hands of a notary, and he formerly used to make protest at the Royal Exchange; but that custom has now become obsolete; the notary now is merely desired by the holder to seek payment of the bill, and on a declaration by the latter, that the drawee has not remitted any funds, or sent to say where the bill will be paid, the notary at once marks it as protested for non-payment. In that case it is presumed, that the drawee in Liverpool, to whom the bill has been *presented for acceptance (who thereby has the means of ascertaining who the holder is), is aware of its being due; and it is his duty to transmit the funds to the holder, or to communicate to him where the bill will be paid in London. For the plaintiffs two notaries from Liverpool were called, who stated, that their uniform practice had been in the case of foreign bills drawn on persons in Liverpool, payable in London, to present for payment at the domicile of the drawee in Liverpool, and protest for non-payment there. Lord Tenterden told the jury, that the general rule which required the protest to be made at the domicile of the drawee must prevail, unless they were satisfied that mercantile usage required the holder to protest in The evidence given by the defendants only showed, that where the holder of the bill resided in London, it was not necessary, according to usage, to send the bill to Liverpool for protest; but that the question in this case was, whether the presentment and protest in Liverpool were not sufficient; and he told them, that if they thought that by the uniform usage the holder of such a bill was bound to protest it in London, they would find for the defendants, otherwise for the plaintiff. While the jury were deliberating his Lordship again addressed them, saying, that in his opinion, by the peculiar form of acceptance

in this case, the question of usage was excluded altogether, for the defendants undertook to pay the bill only if regularly protested, and refused when due. Here the bill could not have been regularly protested and refused when due, unless payment had been demanded from the drawees, whose duty it was to pay it. The latter could not be said to have refused to pay until they had been asked. The defendants, by the express terms of their acceptance, had made a presentment to the drawees necessary. *The presentment at Liverpool was therefore proper, and the plaintiffs were entitled to recover. A verdict

naving been found for the plaintiff. Gurney now moved for a new trial. It was fully established by the evidence, that where a bill payable in London has been drawn upon a party at Liverpool, and refused acceptance, the usage is, to protest it, for want of payment, in London. It is true, that the acceptance in this case is in very special terms. The words "refused when due," import only that the bill should be virtually refused by the drawees making no provision for it. The drawees having had it presented to them for acceptance, must have known when it became payable; and the omission to provide funds at the place where it was payable, was, virtually, a refusal to pay by the drawees. Suppose the drawees to have lived at Calcutta, it would not have been necessary to present the bill for payment at Calcutta. [Lord Tenterden, C. J. It is not very likely that such a bill would ever be accepted for honour in London. BAYLEY, J. Is it not necessary that there should be a presentment for payment?] Not if the drawee has no domicile in the place where the bill is to be paid. If it were made payable at a particular banking-house in London, it would be necessary to present it there; but where no place is designated in the bill, the invariable usage has been, not to present it, but at once to protest it for non-payment: the omission to pay by the drawees (who having refused to accept it must know that it is due) being deemed equivalent to a refusal.

Lord Tenterden, C. J. I was disposed at one time to have left it to the jury as a mercantile question on "the usage, but it occurred to me that this differed from the case of a general acceptance for honour, the terms being very special—"if regularly protested and refused when due." I thought, and still think, that, though there might be an omission, there could not be a refusal to pay unless there was a presentment and demand of payment. The verdict of the jury must certainly be considered as having been given under my direction, and not as the result of their opinion. The fair effect of the evidence of usage given by the defendants was, that if the holder of the bill resided in London, he was not bound to send the bill to Liverpool to get it protested; but it did not prove that a presentment and protest at Liverpool were not sufficient.

BAYLEY, J. In Williams v. Germaine, 7 B. & C. 468, the judgment was arrested, because it was not alleged in the declaration that the bill, when it became due, was presented to the drawees for payment. The language of this acceptance imports that some attempt was to be made in order to obtain payment. That could only be made in the place where the party who ought to pay the bill resided. It is convenient for the purposes of commerce to require a personal application to be made to the individual by whom the payment is to be made, at the place of his domicile, if he has designated no other place. It appears to me, therefore, that Liverpool was the proper place to make the presentment for payment. It is true, that upon the original formation of this bill, the party was entitled to have an acceptance payable in London; but there having been no acceptance by the drawees payable in London, it appears to me that Liverpool, the *place where the drawees resided, was the proper place where the presentment should have been made, no other place being designated on the bill.

LITTLEDALE, J. The words of the defendant's acceptance for honour, "if regularly protested and refused when due," import that there must be a distinct act of refusal; and unless there be a request there cannot be a refusal. It is unnecessary to decide the general question, whether, if the acceptance had been in the usual form, the protest in London would have been sufficient. The more

regular way appears to me to be, to apply personally to the drawee himself, if he has any residence where the bill can be presented. In this case the drawee had a domicile at Liverpool, which was known, for the bill had been presented there for acceptance. There could not be any difficulty, therefore, in presenting it for payment at the same place. However that may be, I think that under the special form of acceptance, it was absolutely necessary, before any claim could be made on the persons who accepted it for honour, to present the bill to the drawees; for it is only on their refusal to pay the bill when it became due, that the defendants undertook to pay it.

PARKE, J. It appears to me, that by the peculiar form of acceptance, inquiry into the alleged custom of merchants was irrelevant and unnecessary. Messrs. Baring say, that they accept the bill for the honour of certain individuals, and will pay it if the bill be regularly protested and refused when due. The collocation of the words is improper; they would stand more correctly, "if refused when due, and regularly protested." The refusal as well as the protest is provided To *constitute a refusal of payment, it was necessary that the bill *11] for. To *constitute a results of payment, to the terms of the bill, should be again presented to the persons who, by the terms of the bill, were required to pay it. If it had been regularly presented to the drawees, and payment had been refused by them, and then regularly protested (which, I should conceive, must be at the place where it was presented and refused), in that case the holder of the bill would have been entitled to recover against the defendants according to the acceptance. Rule refused.

(a) The Attorney-General referred to a work published in 1682, entitled "The Stile of Exchanges; containing both their Law and Custom, as practised now in the most considerable Places of Exchange in Europe, by John Scarlett, Merchant of the Eastland Company." In Chapter 24, entitled "Of Bills of Exchange drawn in one place but payable in another," Rule 17, it is said, "that the possessor of a bill payable by an out-dweller (i. e. a person who dwells in another place than where the bill must be paid), must at the last day of respite (if he get no payment) order a notarius publicus to enter a protest for non-payment; which protest, though not made in presence of the person, nor at the house of the acceptant, is valid and effectual to all intents and purposes; because the possessor of the bill is not obliged to protest against an out-dweller at his house or dwelling, nor to seek him out of the town or city

where the payment is to be made.

"The out-dwellers of Amsterdam have made use of this policy, to make the foregoing rule and protest ineffectual on the day of payment. Pretending ignorance of the person to whom the payment is to be made; they at the place where the payment is to be made, address them selves to a notary public on the last respite day, and there declare to him, that such and such a bill, payable to order, by them accepted, is now become due, whereof none have demanded payment, they therefore protest for their readiness and willingness to discharge the said bill, and accordingly they cause a formal protest to be drawn up, and send the same to the drawer to make use of the same against any other protest for non-payment; but this sleight and cunning

might be prevented if one general office of protest were erected, where all protests should be registered, and so every one might see to whom they are to apply themselves.

"Rule 18, Marius adds, 'that in case an out-dweller refuse acceptance when the bill is sent to him, protest may either be made at the house of the out-dweller, by the person who was ordered to demand acceptance, or else at the place at payment. The friend's letter that demanded acceptance being produced to the notary, is sufficient to ground the protest upon; and

so also in case of non-payment."

*12] *The KING v. The Inhabitants of ST. PAUL, EXETER. Nov. 9.

The allowance of an indenture of apprenticeship, to which the parish officers are actual parties, is required, by the 56 G. 3, c. 139, s. 1, to be signed by two justices, but need not be under seal; but the allowance of an indenture to which the parish officers are not parties, but in respect whereof some expense has been incurred by the public parochial funds, is required by the eleventh section of that statute to be sealed as well as signed by two justices.

Upon an appeal against an order of two Justices, whereby Jane Bishop, a single woman, was removed from the parish of Saint Paul in the city and county of Exeter, to the parish of Tedburn Saint Mary in the county of Devon, the sessions quashed the order, subject to the opinion of this Court on the following case :-

The pauper, Jane Bishop, was, in the year 1818, bound an apprentice by the parish officers of Saint Mary to one H. Belworthy. The indenture by which she was bound, was made in pursuance of a previous order of two justices, to which reference was made by its date, and was duly executed by the said parish officers and by the master. An allowance of the same was written at the foot thereof, which was signed by two justices, but was not under seal. On occasion of this binding, an expense of 17s. was incurred by the public parochial funds of the parish of Tedburn Saint Mary; namely, 7s. as the costs of preparing the indenture, and 10s. which were given to the master with the pauper. The pauper resided in the parish of Tedburn Saint Mary, under this indenture, for about four years.

This case was argued at the sittings in Banc after last term.

Crowder in support of the order of sessions. The sessions have properly held, that the allowance of an indenture of apprenticeship, to which the parish officers *were actual parties, must, by the statute 56 G. 3, c. 139, be "under the hands and seals of the justices."(a) Here the indenture, by which the pauper was bound, was one in respect of which an expense was incurred by the public parochial funds, and is within the very words of the enacting part of the eleventh section. They are undoubtedly more extensive in their import than the words of the recital, and were so treated by Bayley, J., in Rex v. Mattishall, 8 B. & C. 735. It may be said, that the first ten sections apply to parish indentures, and require only that the allowance of those indentures shall be signed by the justices. But the eleventh section enacts in terms, that all indentures, by reason of which any expense shall be incurred by the public parochial funds, shall be void, unless allowed by two justices under their hands and seals. v. Stoke Damerel, 7 B. & C. 563, shows, that an indenture, in respect of which such an expense has been incurred, but to which the parish officers are not parties, must be allowed by justices under their hands and seals. [PARKE, J. There the indenture was one contemplated in the recital of the eleventh section; Rex v. Mattishall, 8 B. & C. 733, only shows, that the statute extends to cases ejusdem generis with those mentioned in the recital. There the parish officers did not provide any premium, but they gave the apprentice clothes.] words of *the enacting part of the clause (which in terms apply to all indentures) must, according to the construction contended for on the other side, be restrained to such indentures as are contemplated by the recital.

Coleridge, contra. The question is, whether by the 56 G. 3, c. 189, s. 11, sealing is rendered necessary to the allowance of a parish indenture by two justices. The mischief intended to be remedied by that statute was the apprenticing poor children improperly, and the proposed remedy was in all cases (either of apprenticing or transferring) to secure the control of the justices. There were two classes as to whom the mischief prevailed; first, parish apprentices eo nomine, i. e. children bound out by the parish officers; secondly, apprentices really (in the whole or in part) bound out by the parish officers, but nominally by their parents or themselves, so as to evade the 43 Eliz. A double set of provisions was introduced, one applicable to each case. The first ten sections provide for the first class of cases. The eleventh section to the second. The first and second sections contain affirmative directions as to what is to be done in binding by the parish officers, and the allowance of the indenture is to be signed by two justices. The fifth section enacts, that unless those directions are complied with (one being that unless such allowances of such indenture shall be signed as thereinbefore mentioned), no settlement shall be gained. The sixth

⁽a) The eleventh section recites, that the salutary provisions enacted by the 43d of Elizabeth were frequently evaded in the binding out of poor children, and the premium of apprenticeship, or a part thereof, was clandestinely provided by parish officers, who were thus enabled to bind out such children without the sanction of justices of peace, and then enacts, "that no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual unless approved of by two justices of peace, under their hands and seals, according to the provisions of the said act (the 43 Eliz.), and of this act."

section imposes a penalty not only on the parish officers who bind, but on the master who receives such an apprentice without such allowances as thereinbefore required. It is obvious that the legislature contemplated the same defaults as occasioning the non-acquisition of the settlement, and the imposition of the *penalty. Now, could the penalty be imposed where all had been done that was required by the first five sections, because something was omitted that was afterwards required, i. e. by the eleventh section? If not, either the same words must be construed differently in the fifth and sixth sections, or it must be held that the eleventh section supervenes on the fifth, and makes it nugatory, for it cannot be contended but that, reading the fifth section alone, the inference must be that a settlement would be gained if the directions there referred to were duly complied with. The law is to be administered by the justices at their petty sessions; and it would be dangerous to give to any act so complicated a construction as to suppose that it requires several conditions on the same matter in one part, and then after summing up, as it were, all the conditions referable to that matter, and imposing disabilities and penalties for the non-performance of them, adds a further condition in a subsequent clause. There is no necessity for this construction; if the intent of the legislature in the two divisions of the statute be followed, then, reddendo singula singulis, all is simple. In fact both the fifth and sixth sections are penal, and should be construed strictly, the fifth, however, more so than the sixth; because the disability created by it affects the innocent party, the child; it is no punishment to the parish officer or the master that no settlement should be gained in virtue of the service, but it may be a great one to the child. A pauper may have no such interest in the place of his settlement as the law will take notice of; but in considering the intention of the legislature, with a view to the construction of a modern statute, other interests must be taken into the account; and no doubt other interests a pauper may often have, especially *an apprentice who has served seven years in a place. It is a general rule that where two statutes are made together, the one contrary to the other, a reasonable construction should be made upon the whole. Brook's Abr., Parliament, pl. 9. Vin. Abr., Statutes Construction, (E) 6, pl. 84, 85, 132. Now here the eleventh section is in the nature of a distinct enactment, for it has a preamble of its own, and it is to be observed that whenever the statute has been brought under consideration, the Court seems to have considered the first ten and the eleventh sections as relating to different subject-matters, Rex v. Bawbergh, 2 B. & C. 225. Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the Court, and, after stating the facts of the case, proceeded in substance as follows:—On carefully considering the 56 G. 3, c. 139 (and after conferring with Lord Tenterden, who concurs in the judgment I am about to pronounce), we are of opinion that the first ten sections apply to cases where the parish officers are parties to the indenture of apprenticeship, and the eleventh section to cases where the parish officers do not join in the indenture, but where some part of the expense attending the indenture is defrayed out of the public parochial funds. That this is the meaning of the eleventh section, appears to us to be manifest from the use of the word clandestinely in that section. The mischief recited in the preamble to that section is, that the premium, or a part thereof, was clandestinely provided by parish officers, who were thus enabled to bind out poor children without the sanction of justices; and for remedying that mischief, it provides *that no indenture, by reason of which such expense shall be incurred, shall be valid, unless approved of by two justices under their hands and seals. The first ten sections, which evidently apply to bindings by the parish officers, require that the indenture shall be approved of by two justices under their hands only. Now parish officers cannot be said to provide the premium clandestinely, when the The eleventh section, therefore, can apply to those cases join in the indenture. only where they are not parties to the indenture, but where they provide some portion of the premium. The indenture of apprenticeship in this case was one Vol. XXI.-3

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(the parish officers being parties to it) contemplated by the first ten sections. The allowance was signed, though not sealed, by the justices. It is, therefore, a valid indenture, and the pauper gained a settlement by serving under it in the parish of Tedburn St. Mary. The order of sessions must, therefore, be quashed.

Order of sessions quashed.

PLAXTON v. DARE and Another. Nov. 10.

Where in trespass, the question was, whether certain land was in the parish of A. or parish B., the land in B. being tithe-free: Held, that ancient leases granted by the ancestor of the plaintiff's landlord in which the land was described as being in parish B. were admissible as evidence of reputation that the land was in that parish. Old rates, made by the parish officers of B. on the occupiers of the land in question, were also produced, and an account containing an overseer's account, in which against the sum for which the occupier of that land had been assessed there were crosses made, were produced: Held, that these were evidence that the sums assessed had been paid by the tenants.

TRESPASS, quare clausum fregit, and taking the plaintiff's cattle, goods, and Plea, not guilty. At the trial before Gaselee, J., at the Summer Assizes for the county of Essex 1829, it appeared that the plaintiff was the occupier of a farm called Cann Hall Farm in the parish of Wanstead, in the county of Essex, as tenant to one J. Colegrave, the owner of the manor. *The defendants were two magistrates, who on the 19th day of July, 1828, on the application of the churchwardens and overseers of the parish of Westham, granted a warrant of distress to levy 21. 8s. poor's rate, alleged to be due from the plaintiff to the parish of Westham in respect of eight acres of land, part of a field called Great Ashfield, claimed to be part of that parish. money having been levied under this warrant, the question between the parties at the trial was, whether that part of the field was in the parish of Westham, or in the parish of Wanstead. The land in the parish of Wanstead was free from tithe. The plaintiff produced ancient leases granted by the ancestors of Mr. Colegrave, and coming from his custody, in which the whole of the field called Ashfield was described as being in the parish of Wanstead. The plaintiff further proved, that the tenants of the land in question had been assessed by the parish officers of Wanstead to the church and other rates; and, in order to show that those tenants had actually paid the rates, produced the accounts of deceased overseers, in which there were crosses made against the sums for which those tenants had been successively assessed. It was objected, that the leases having been granted by the ancestors of the plaintiff's landlord, who at all times had a direct interest in describing the land to be situated in Wanstead, were not admissible in evidence; and, secondly, that the rates were not admissible to prove that the land was in Wanstead, unless the persons rated were shown to have paid the rate; and there was no proof of such payment. On the other hand, it was contended, that the question being one of boundary, the declarations of deceased persons of competent knowledge were admissible in evidence, and that the fact recited in the leases, *that the land was in Wanstead, was equivalent to declarations made by the deceased landlords and the tenants that the land in question was in that parish; and the assessments were admissible on the same ground, without any express proof of payment of the rates; but that the crosses against the names of the tenants in the accounts of the deceased overseers were evidence of payment of the rates. Judge received the evidence, and a verdict having been found for the plaintiff,

Gurney now moved for a new trial. The evidence was improperly received, because the grantors of the leases had an interest in representing that the land in question was in Wanstead, inasmuch as it would in that case be tithe free. The rates were not evidence, unless it were proved that the sum assessed upon the tenants in respect of the land in question had been paid by the tenants.

Lord TENTERDEN, C. J. The question in this case was one of boundary. Reputation was on that point admissible evidence. The leases, therefore, were properly received in evidence. Then, as to the evidence of the tenants of these lands having been rated by the parish officers of Wanstead and having paid rates, it appeared by the overseers' accounts, that crosses were made against the names of the tenants so rated. That is a common mode of denoting payment. Assuming, then, that it was necessary to prove actual payment of the rates, there was evidence of such payment. I therefore think, there is not any ground for saying that the evidence was improperly received.

Rule refused.

*20] *CHRISTOPHER KELL, Gent, one, &c., v. NAINBY. Nov. 10.

An attorney carried on business under the firm of A. and Son; the son was not in fact a partner, but acted as clerk to his father, and received a salary: Held, that A. might maintain an action in his own name, to recover from a client the amount of a bill for business done.

Assumpsit for business done as an attorney. Plea, general issue. At the trial before Gaselce, J., at the Summer assises for the county of Sussex 1829, it appeared that the action was brought to recover the amount of the plaintiff's bill, for business done for the defendant in the years 1827 and 1828. The plaintiff called his son, W. P. Kell, to prove that the business was done. He stated that he was not in partnership with his father, that he acted as his clerk and received a salary in that character. It appeared, however, that "Kell and Son" was on the door of the plaintiff's office, and that during the time the business mentioned in the bill was in progress, letters relating to the business were addressed to the defendant by the plaintiff signed "Kell and Son," and that the defendant had always addressed his letters to Kell and Son. It was contended on this evidence, that the son ought to have been made a co-plaintiff with his father. The learned Judge told the jury, that if the plaintiff and his son had been sued by the defendant for a debt, or for negligence, there was ample evidence to charge the son, on the ground that he had suffered himself to be held out as a partner. Here the plaintiff sued as a creditor of the defendant. It was perfectly immaterial to the debtor that the son had held himself out as a partner, if, in fact, he was not one, and had no claim upon the defendant. The son had sworn that 211 he was not in fact a *partner with his father during the time the business was done for the defendant, and if they believed the son's testimony, the plaintiff was entitled to a verdict. The jury having found for the plaintiff,

Gurney now moved for a new trial. The case was not properly submitted to the jury. It should have been left to them upon the evidence, to consider whether the father and the son were or were not jointly employed by the defendant. There was ample evidence of this being a joint employment. No arrangement between the father and son could alter the nature of that employment. It was wholly immaterial whether the father and son were jointly interested in profit and loss, provided the defendant employed the two. He never knew that they were not in fact partners. The plaintiff, by his letters, represented that they were. It is quite clear that the two would have been liable in an action for

negligence.

Lord TENTERDEN, C. J. The question was properly submitted to the jury. If the son of the plaintiff spoke the truth, he was not a partner with his father. The effect of the evidence might be to show that both the father and son would have been jointly liable for negligence, but that would be on the ground not that they were actual partners, but that they held themselves out as such to the defendant.

LITTLEDALE, J., concurred.

PARKE, J. A party with whom the contract is accually made may sue with-

out joining others with *whom it is apparently made. Here there was no evidence to show that the son was actually employed by the defendant. The son proved that he was not an actual partner; and although he may have appeared to the defendant to have been a partner, unless he were a party to the contract, for the breach of which the action was brought, he need not join in such action. Here he was no party to that contract. Rule refused.(a)

(a) See Teed v. Elworthy, 14 East, 210, and Page v. Hiscox, and Parsons v. Crosby, there cited. And Loyd v. Archboule, 2 Taunt. 334.

J. LEWIS and W. LEWIS v. MARLING. Nov. 11.

Where a patentee of an improved machine claimed as his invention a part of it which turned out to be useless: Held, that this did not vitiate the patent, the specification not describing it as essential to the machine.

Where it appeared in evidence that the patentee himself invested and brought into use the machine for which the patent was granted; but before that time, several other persons had een a model and specification of such a machine, which were brought over from America: Held, that the patentee was nevertheless to be considered the inventor within the meaning of the stat. 21 Jac. 1, c. 3, s. 6, no machine having been manufactured and brought into use from the model and specification, and there being no evidence that the patentee had ever seen them.

CASE for infringing a patent granted to the plaintiffs for improvements on shearing machines for shearing or cropping woollen and other cloths. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the Westminster sittings after last Trinity term, it appeared that the patent in question was granted in 1818, and the plaintiffs in their specification (which was accompanied by a drawing) claimed as their invention, thirdly, "the application of a proper substance fixed on or in the cylinder A to brush the surface of the cloth to be shorn:" and, fourthly, "the described method of shearing cloth across from list to list by a rotatory cutter." The brush for the surface of the cloth was soon found to be useless, and the plaintiffs never sold any machines with it. On *this ground the defendant contended that they had claimed too much, and therefore the patent was void. As to the fourth thing claimed, the defendant contended that it was not new, and proved that a similar machine was in use at New York twenty years ago, and that a specification of it was sent over in 1811 to one Thompson, residing at Leeds, who employed two engineers to manufacture a machine from it; but this was never finished in consequence of the disturbances made by the Luddites. This specification was shown to several persons, but the machine was never brought into use. It appeared also that in 1816 a model for a machine to shear from list to list by means of a rotatory cutter was brought over from America by one Smith, and he showed it to three or four persons in his manufactory, but no machine was ever made from it, nor was it publicly known to exist; and Smith always used machines manufactured by the plaintiffs. It appeared also that many years ago one Coxon had made a machine to shear from list to list, which was tried by a person called on behalf of the defendant, but he did not think it answered, and soon discontinued the use of it. For the defendant it was contended that this evidence deprived the plaintiffs of the right to a patent, as their invention was not new. Lord Tenterden told the jury that the first objection failed, as the plaintiffs had not described the brush to be attached to the cylinder, as an essential part of their invention, and therefore the patent might be good although further investigation proved that part of the invention to be useless. And as to the other, that as the invention of the machine for shearing from list to list by a rotatory cutter had not been generally used or known in this country, the plaintiffs might be considered *the inventors within the meaning of the statute 21 Jac. 1, c. 3, s 6, notwithstanding the specification and the model which had been brought over [*24

from America, and the making of a machine to work in that manner by Coxon, and his Lordship left to the jury the questions whether it had been generally known, and whether the patent had been infringed by the defendant. The jury

found a verdict for the plaintiffs; and now

F. Pollock moved for a rule nisi for a new trial, on the grounds urged at the trial. First, the patent was void on the ground that the plaintiffs claimed as part of their invention the application of a brush for the purpose of raising the nap on the cloth. That proved to be entirely useless, if not prejudicial, and in fact they never sold any machines with the brush attached. The public, therefore, would be misled, if at the expiration of the time for which the patent was granted they attempted to manufacture a machine on the patent principle. answer given to this objection at the trial was, that the specification did not describe the brush as an essential part of the machine. But that is no answer in law, the defendant has a right to consider the case as if the patent had been taken out for that only. In every patent, all that is claimed must be new and useful, Turner v. Winter, 1 T. R. 609, Crompton v. Ibbotson, Danson & Lloyd, 33. [PARKE, J. The specification there stated, that a certain article would produce the desired effect. The evidence was, that nothing else would do it.] Secondly, Lord Tenterden did not leave the question of novelty to the jury in the manner *25] warranted by former decisions. The *substance of the invention was the application of a rotary cutter in shearing cloth from list to list. dence was, that thirty years ago one Coxon made such a machine, in 1811 a specification in which that principle was stated was brought over from America, and a machine commenced but never finished. In 1816 a model of such a machine was brought over, and although no machine was made from it, the model was shown to various persons. The person who brought it over could not, after that, have maintained a patent for it; and if he could not, it is difficult to understand why the plaintiffs should be in a better situation. [PARKE, J. It might be new in use although the principle was known before.] Affidavits were then produced as to the knowledge of that whereof the plaintiffs claimed to be inventors before the patent was granted.

Lord TENTERDEN, C. J. I am of opinion that we ought not to grant a rule to disturb the verdict in this case. It is contrary to the usual practice to grant a rule in such a case on affidavits. If the facts disclosed in them are sufficient to vitiate the patent, it may be repealed by scire facias. As to the objection, on the ground that the application of a brush was claimed as a part of the invention, adverting to the specification, it does not appear that the patentee says the brush is an essential part of the machine, although he claims it as an invention. When the plaintiffs applied for the patent, they had made a machine to which the brush was affixed, but before any machine was made for sale they discovered it to I agree, that if the patentee mentions that as an essential ingrebe unnecessary. dient in the patent article, which is not so, nor even useful, and whereby he *misleads the public, his patent may be void; but it would be very hard to say that this patent should be void, because the plaintiffs claim to be the inventors of a certain part of the machine not described as essential, and which turns out not to be useful. Several of the cases already decided have borne hardly on patentees, but no case has hitherto gone the length of deciding that such a claim renders a patent void, nor am I disposed to make such a precedent. The next point was an alleged misdirection on my part to the jury. To impugn the novelty of the invention, evidence was given that one Coxon had previously made a machine for shearing from list to list; but it was not approved of, and never came into use. Another piece of evidence was, that a model had been sent over from America and exhibited to a few persons, but no machine was made from it, and the very persons who had the model, bought and used machines manufactured by the plaintiffs. It was also proved that a specification had been brought over from America, and two persons employed to make a machine from But that never was completed, so that until the plaintiffs' invention came out, no machine was publicly known or used here for shearing from list to list.

I told the jury, that if it could be shown that the plaintiffs had seen the model or specification, that might answer the claim of invention; but there was no evidence of that kind, and I left it to them to say, whether it had been in public use and operation before the granting of the patent. They found that it had not, and I think there is no reason to find fault with their verdict.

BAYLEY, J. I am of the same opinion. To support a patent, it is necessary that the specification should *make a full and fair disclosure to the public of all that is known to the patentee respecting his invention. If [*27 it does not, the consideration on which he obtains his patent fails. If he represents several things as competent to produce a specific effect, when only one will answer, that is bad; or if he suppresses anything which he knows will answer, that also is bad. But it is objected here, that the plaintiff described the application of a brush as parcel of his discovery. At the time when the patent was obtained a brush was used, and there is no reason to doubt that the plaintiffs at that time thought it necessary. That objection, therefore, fails. On the other point, if the model brought from America had been seen by the plaintiff, he could not afterwards have claimed to be the inventor. But if I discover a certain thing for myself, it is no objection to my claim to a patent that another also has made the discovery, provided I first introduced it into public use. Here there was no ground to doubt that the plaintiffs were the inventors of the machine, and first introduced it into public use.

PARKE, J.(a) The objection to the patent as explained by the specification may be thus stated. The patent is for several things, one of which then supposed to be useful is now found not to be so; but there is no case deciding, that a patent is on that ground void, although cases have gone the length of deciding, that if a patent be granted for three things, and one of them is not new, it fails in toto. The prerogative of the crown as to granting patents was restrained by the statute *21 J. 1, c. 3, s. 6, to cases of grants, "to the true and first inventors of manufactures, which others at the time of granting the patent shall not use." The condition, therefore, is, that the thing shall be new, not that it shall be useful; and although the question of its utility has been sometimes left to a jury, I think the condition imposed by the statute has been complied with, when it has There was no evidence in this case to show that the plainbeen proved to be new. tiffs were not the inventors of this machine, in this country at least. But the statute further requires that it shall not have been used by others, and it is said that the latter part of the condition has not been satisfied. But there was no evidence of the use of such a machine before the grant of the patent, and there is no case in which a patentee has been deprived of the benefit of his invention because another also had invented it, unless he had also brought it into use. Upon these grounds, I think that neither of the objections taken ought to prevail, and that the plaintiffs are entitled to retain the verdict found in their favour.

Rule refused.

(a) LITTLEDALE, J., was in the Bail Court.

MARY DAVIS v. R. CAPPER, Esq. Nov. 12.

Trespass will lie against a magistrate for committing a party charged with felony for reexamination for an unreasonable time, but without any improper motive. Semble, that a warrant of commitment for an unreasonable time is wholly void.

This was an action of trespass against the defendant, a justice of the peace for the county of Gloucester, for assaulting and imprisoning the plaintiff, and detaining her in prison for fifteen days. Plea, not guilty. At the trial before Gaselee, J., at the Summer assizes for *the county of Gloucester 1828, the following appeared to be the facts of the case. On the 5th of January, 1828, the plaintiff, who had lodged in the house of one Ann Hamerton, made a

deposition that her property had been stolen, and that part of it had been discovered in the possession of Ann Hamerton; but the latter was not at that time committed on such charge. On Sunday the 27th of January, Ann Hamerton sent for Russell the superintendent of the Cheltenham police, and told him she had been robbed while Mary Davis lived with her. She produced a letter addressed to the plaintiff at Miss Hamerton's house, and bearing the Cheltenham post-mark; and alleging that upon looking in at the ends, she believed it to contain some allusion to the robbery, induced Russell to break it open. letter, which was anonymous, purported to come from an accomplice in the robbery residing at London, who demanded payment at the hands of the plaintiff as a joint perpetrator of the offence, and stated, that he would await her answer for a fortnight. Miss Hamerton also told Russell, that four days after the robbery a letter had arrived for the plaintiff in the same handwriting, with the London post-mark, and that the plaintiff had refused to show it; she then expressed her suspicions of the plaintiff being concerned in the robbery, and said she thought Russell ought to take her into custody. He then took the plaintiff into custody, and on the following morning carried her before the defendant; and upon the information of Ann Hamerton that she, during the time the plaintiff lived in her house, had lost various articles of bed-furniture and wearing apparel described in the information, and that she had reason to suspect and did suspect that Mary Davis was concerned in the robbery, the defendant *committed her to the bridewell at Northleach, and by his warrant required the gaoler to keep her in custody until the 12th of February, and then to bring her up for The alleged anonymous letter was produced and read before re-examination. the magistrate. On the 12th of February she was taken before two magistrates (the defendant not being one of them) for re-examination, and was re-committed by them. On the 16th of February she was again brought up before the defendant, and he discharged her; on that day the defendant said that there was no evidence against her, that he would have discharged her on the 12th if he had been present at the examination, and that he committed her in the first instance until the 12th, thinking she would by that time have stated who had written the letter. No evidence was given on the part of the defendant.

It was contended by the defendant's counsel, that a magistrate might in his discretion commit for further examination for such time as he thought proper; and that even if he exercised his discretion improperly, trespass would not lie

against him.

The learned Judge was of opinion that the action was not maintainable, but in order to save the expense of another trial, he left it to the jury to say, 1st, Whether the commitment was made bonâ fide for the purpose of further examination, or for the purpose of compelling the plaintiff to state who the writer of the letter was. And secondly, Whether in their judgment, the time for which the defendant had been committed was reasonable. The jury retired, and after being out several hours, stated that they could not agree; upon which they were discharged, and the learned Judge nonsuited the plaintiff.

A rule nisi was afterwards obtained for a new trial, on the ground that there was evidence to go to the jury *that the commitment was for the purpose of extorting a confession, and not for re-examination, and therefore illegal. And secondly, Assuming that the commitment was made bona fide for the purpose of re-examination, that the time for which the plaintiff had been committed by the defendant was unreasonable, and therefore the warrant was illegal.

W. E. Taunton now showed cause. If the defendant in this case maliciously and without any reasonable or probable cause committed the plaintiff, the form of action should have been case not trespass. The defendant had jurisdiction over the subject-matter of the complaint which was made on oath, and, if he had, then if the warrant be lawful on the face of it, trespass is not maintainable. The warrant is in the usual form, the magistrate thereby requiring the gaoler to keep the plaintiff until the 12th of February, to be dealt with according to law. Now, first, the time for which a prisoner shall be committed for re-examination,

is in all cases a question for the discretion of the magistrate, and his judgment exercised bona fide upon that point is conclusive. But, secondly, assuming that to be otherwise, if under any circumstances the warrant can be good, it is a sufficient answer to the action. Now here the defendant may have given credit to the assertion in the anonymous letter, that the writer would wait a fortnight, and therefore committed the plaintiff for that period for further examination. fortnight may be too long a time, but it is not necessarily so. In Scavage v. Tateham, Cro. Eliz. 829, it does not appear that there was any examination, and

if there was not, the magistrate had no power to commit.

*BAYLEY, J. The rule for a new trial must be made absolute. I have no doubt on one question that a magistrate may commit for re-examination. It seems to me quite clear, however, that it ought to have been left to the consideration of the jury whether the commitment was made bons fide for the purpose of re-examination, or for the purpose of extorting a confession. The declaration of the defendant that he committed the plaintiff till the 12th, thinking she would by that time tell who was the writer of the letter, is evidence to go to the jury that he did not commit for the purpose of a re-examination. On the other ground, the authorities are very strong to show that a magistrate ought not arbitrarily to commit, even for re-examination, for such a length of time as the defendant did in this case. The duty of the magistrate is pointed out in Hale's P. C., c. 14, vol. ii. 120. It is there said, "Where a party arrested for felony is brought before a justice, he must either discharge, or commit, or bail But, preparatory to these acts, there are some things that are required of him before he do either. By the statute 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10 (which are re-enacted in Mr. Peel's act), he is to take the information upon oath of the prosecutor and witnesses, and put them into writing; and he is likewise to take the examination, but this is to be without oath, and put into writing. And because it may be unreasonable to take these informations or examinations presently, or possibly it may take longer time, the prisoner may be continued in the custody of the officer, or may be detained in the justice's house, or committed to some near safe place of custody, till the *examination can be taken. But this must be despatched in some convenient time." He then refers to the case of Scavage v. Tateham, Cro. Eliz. That was an action for false imprisonment in London, from the 10th of September to the 29th of September. The defendant justified; that he was mayor and justice of the peace in Pomfret, and that robbery was done there, and the plaintiff was thereof suspected and brought before him, and therefore he detained him in his house during that time to examine him and one Pole, who was not apprehended, concerning the robbery; and afterwards, upon the 29th of September, delivered him over to the new mayor, and traversed the imprisonment in London. And upon demurrer it was adjudged that the inducement to the traverse was not good, for a justice of peace cannot detain a person suspected in prison but during a convenient time, only to examine him, which the law intends to be three days, and within that time to take his examination and send him to prison, for he ought not to detain him as long as he pleaseth, as he here did, eighteen days. That case would seem to show that the law has fixed three days as a reasonable time, but it seems to me that the time for which a party may be committed for re-examination may vary according to circumstances. Those circumstances ought to have been detailed in evidence in this case, and then if it were a mere question of law, the Judge ought to have determined it. If it were a mixed question of law and fact, the Judge and jury ought to have decided it. In Burn's Justice, vol. i. p. 1009, 24th edit., a case Gooding had been convicted at the Lonof Rex v. Gooding is stated in a note. don sessions, in May 1820, for *assisting J. H. Davis to escape from the Giltspur Street Compter, where he had been confined on a charge of forgery. The case was afterwards submitted by his Majesty to the Judges, in consequence of a petition presented by the prisoner, Gooding, alleging that Davis never was in legal custody, and therefore he (Gooding) could not legally be found guilty in aiding his escape; the fact being, that Davis at the time of the escape was under commitment for further examination merely, but no warrant, commitment, or written authority, was ever made out by the lord mayor (who was the committing magistrate) or any other justice of the peace. The only question submitted to the Judges was, Whether a commitment for further examination was legal, not being in writing? Their Lordships were unanimously of opinion that such a commitment for a reasonable time, though not in writing, was good.(a) But they added, that they considered reasonable time to be a mixed matter of law and fact; and that as the facts of the case were not fully detailed, they could form no opinion, in fact, whether the time in the particular case was or was not a reasonable time: but they presumed that it must have appeared at the trial that the time was reasonable, as otherwise he ought to have been acquitted. The Judges, therefore, were of opinion that it would depend on the facts of the case whether the time for which the party was committed was reasonable or not, and that the judgment of the magistrate was not conclusive. Unless the facts, therefore, which induced the defendant to commit for such a length of time be detailed, we cannot say whether the time for which the plaintiff in this case was *committed was reasonable or not. Here the facts are not detailed in evidence; the defendant called no witnesses. therefore of opinion, on both grounds, that the rule for a new trial should be made absolute.

LITTLEDALE, J. I think that this cause ought to be submitted to another jury, in order that they may consider whether the plaintiff was committed for

further examination, or for the purpose of extorting a confession.

PARKE, J. I also think that the rule for a new trial should be made absolute, for the reason given by my brother LITTLEDALE. As to the other point, I concur with my brother BAYLEY, that it is a mixed question of law and fact for the consideration of the jury, whether the time be reasonable or not. That seems to be established by the case of Scavage v. Tateham; for though the decision in that case may have proceeded either on the ground, that the party had been improperly committed to the house of the justice instead of the county gaol, or that he had been delivered over to the mayor without examination, yet it appears from the report rather to have proceeded on the ground that a justice has only power to detain a person suspected in prison during a convenient time to examine him; and that is considered to be the ground of the decision, by Lord Hale, in the passage already referred to. It is clear, that in Rex v. Gooding, the Judges thought the time for which the lord mayor had directed the party to be confined was not to be considered conclusively as reasonable, but that the reasonableness of the time was a question to be decided by the Judge and jury. *36] If, however, there be any doubt upon this point, the defendant *will, upon a second trial, have an opportunity of raising it upon the record.

Rule absolute.

The cause was tried again at the Summer assizes 1829, for the county of Gloucester, before Vaughan, B., who directed the jury to find, first, whether the defendant in committing the plaintiff for the time mentioned in the warrant, acted bond fide, or was influenced by some improper or indirect motive; and if they thought he committed bona fide for re-examination, whether the commitment was for a reasonable time; expressing his own opinion that the time was unreasonable under the circumstances. The jury found that the commitment was bond fide and intended for re-examination only, but that it was for an unreasonable time; and they assessed the plaintiff's damages at 10l. The learned Judge gave leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that trespass could not be maintained for such unreasonable commitment without improper or indirect motive. On a former day in this term,
W. E. Taunton moved to enter a nonsuit. If the magistrate had no juris-

diction to commit, and his defect of jurisdiction had appeared on the face of the

warrant, trespass would have been maintainable, Groom v. Forester, 5 M. & S. 314. But here the warrant was good on the face of it. It had all the requisites of a good commitment, it was under the seal of the magistrate, contained the cause of commitment, and had an apt conclusion. Hale's Pleas of the Crown, 583. In the same work, p. 584, Lord *Hale, speaking of cases of felony, says, "The want of certainty seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment, but it lies in averment to excuse the gaoler or officer, that the matter was for felony." defendant, at all events, had jurisdiction to commit for a reasonable time. warrant is good for such time, and it is void only as to the excess. Trespass will not lie, unless the commitment be altogether bad, so as to entitle the party committed to a discharge on a habeas corpus, although the converse does not hold, for a party may be entitled to his discharge on a habeas corpus, when he could not maintain trespass for false imprisonment. [BAYLEY, J. May not a warrant be good as to part of the time, and void as to the residue?] Here no part is bad, it was a mere irregularity. [Lord Tenterden, C. J. Suppose a magistrate, having power by act of parliament to commit a party for one month, committed for two? It would be void for the second month, because as to that he would have had no jurisdiction. Here the magistrate had jurisdiction to commit for a reasonable time, and it does not appear on the face of the warrant that the time was unreasonable. Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. an action of trespass for false imprisonment against a magistrate, who had committed the plaintiff for re-examination for a period of fourteen days. The jury found that the commitment was bong fide and without any improper motive, but that the time for which the commitment was made was unreasonable. It was contended, on behalf of the defendant, that the form of the action was improper, that it should *have been case and not trespass. We are of opinion, however, that the action was in the proper form. A special action on the case could not have been maintained, because that must be founded upon some improper motive, which the jury in this case have negatived. And whether we consider this commitment is absolutely void from the beginning, as being for an unreasonable time, or consider it as void pro tanto, i. e. for so much of the time as was unreasonable, still an action of trespass would be maintainable, because every continuance of a party in custody is a new imprisonment and a new trespass. It appears, however, to us to be far the better opinion, that in a case like this, where the time is unreasonable, the commitment is void from the beginning. The duty of a magistrate is to commit for a reasonable time, and if he commits for an unreasonable time, he thereby does an act which he is not authorized by law to do. In the case of Rex v. Gooding, Burn's Justice, 24th edition, vol. i. p. 1009, the Judges thought that a commitment for an unreasonable time would be a void commitment. For it is stated in the report, that "they (the Judges) presumed that it must have appeared at the trial, that the time was reasonable, as otherwise he (the rescuer) ought to have been acquitted." That goes to the very point, that a commitment for re-examination, if it be for an unreasonable time, is, therefore, wholly void. For the Judges were of opinion that the party so committed was not in lawful custody, and, therefore, that another who had aided such person in escaping from prison was not guilty of any offence against the law. For this reason, as well as for the other (which I have already stated), we are of opinion that trespass was in this case the proper form of action. Rule refused.

never existed.

*39] *PHILLIPS, Assignee of the Estate and Effects of ROBERT ARTON, a Bankrupt, v. HOPWOOD and Others. Nov. 12.

In March 1825, a trader committed an act of bankruptcy, upon which a commission might have issued under the statutes relating to bankrupts then in force. On the lat of May those statutes were repealed; on the 2d of May the repealing act was repealed, and the former acts thereby revived. In July a commission of bankrupt issued: Held, that it was supported by the act of bankruptcy committed in March.

TROVER by the plaintiff as assignee of the bankrupt for goods and chattels belonging to the bankrupt. Plea, general issue. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last Trinity term, it appeared that the act of bankruptcy was committed on the 6th of March, 1825, and that the commission issued on the 26th of July, 1825. It was contended that there was no sufficient act of bankruptcy to support the commission; for the 5 G. 4, c. 98, which repealed all the former bankrupt acts, came into operation on the 1st of May, 1825; and the 6 G. 4, c. 16, which repealed the 5 G. 4, c. 98, took effect as to such repeal on the 2d of May, and for general purposes on the 1st of September, 1825. It was argued, therefore, that as the bankrupt acts in force at the time when the act of bankruptcy was committed were repealed before the commission issued, the act of bankruptcy did not support the commission. Lora Tenterden overruled the objection; and a verdict having been found for the plaintiff,

J. Williams now moved for a new trial. The statute 5 G. 4, c. 98, took effect on the 1st of May, 1825; the old bankrupt acts then ceased to exist; and all acts of bankruptcy depending upon those statutes, or any of them, ceased to have any effect, and fell with the statutes *on which they depended. It is true that the 6 G. 4, c. 16, repealed the 5 G. 4, c. 98, from the 2d of May; but as the latter statute remained in force for twenty-four hours, the repeal of the earlier statutes was in law as effectual as if the repealing act had remained in force for as many years. Considering the case upon the 5 G. 4, c. 98, all acts of bankruptcy committed before the 1st of May, 1825, became of no avail; and no commission of bankrupt issued afterwards could be sustained upon anything done before that day, Maggs v. Hunt, 4 Bingh. 212, Hewson v. Heard, 9 B. & C. 754. But by the 6 G. 4, c. 16, which came into operation on the 2d of May, 1825, and could have no effect before that time, the 5 G. 4, c. 98, was repealed, and therefore from that time the former statutes which were repealed by the 5 G. 4, c. 98, and which remained repealed during the whole of the 1st of May, were revived. But the statute which so revived them could have no retrospective effect, it would operate only from the 2d of May forward. In Bac. Abr. Statutes (C), it is said, "It is in the general true that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of parliament is, that nova constitutio futuris formam debet imponere non præteritis." And in Vin. Abr. Statutes (E), 9, "A repealing statute being itself repealed, the repealed acts are thereby revived," or according to 12 Co. 7, implicite revived; and therefore the bankrupt acts revived by the 6 G. 4, c. 16, were not revived as to anything done before the 1st of May, 1825, and consequently not as to the act of bankruptcy upon which this commission issued.

Lord TENTERDEN, C. J. I am of opinion that we ought not to grant any rule in this case. We find *certain statutes in force in March 1825, when the act of bankruptcy was committed; and we find the same statutes in force in July when the commission issued. It appears to me that the case is not affected by anything that passed in the interval. The 5 G. 4, c. 98, having been repealed, is to be considered, as far as this question is concerned, as if it had

Rule refused

BOWEN v. FOX and Others. Nov. 13.

Where the certificate of a ship's register has been deposited as a security for advances for the use of the ship: Held, that this gives the holder a lien sufficient to defeat an action of trover for the certificate.

Query, Whether a person holding the certificate under such circumstances, and refusing to give it up when demanded, is guilty of a wilful detention within the meaning of the register act 4 G. 4, c. 41, s. 25.

This was a special action on the case for not delivering up the certificate of registry of a vessel called the Gratitude, of which the plaintiff was part owner. The declaration contained several special counts and a count in trover: Plea, not guilty, and leave and license as to the special counts: issue thereon. At the trial before Burrough, J., at the last summer assizes for Cornwall, the plaintiff failed in proving the special counts, and the question turned on the count in It appeared in evidence, that the plaintiff and one Myers were owners of the Gratitude, which, in 1823, was chartered in London to proceed to Hamburgh, and there take in a cargo of linen for Vera Cruz or Alvarado. sel sailed to Hamburgh, took in her cargo and set sail for Vera Cruz, Bowen being master, and Myers serving as a seaman on board. The vessel, in November 1823, met with bad weather off Ramsgate, and was compelled to put into that harbour, and there Myers quitted her and never returned. In a few days the Gratitude proceeded on her voyage from Ramsgate, but was driven into Falmouth *by bad weather. The defendants resident there applied to the captain to be employed as agents for the ship, to which he consented; and the vessel being in want of repairs, the defendants employed certain persons to do them. Afterwards a butcher who had supplied the vessel with fresh beef arrested the plaintiff, and the defendants undertook that he should be liberated, if he would deposit the certificate of registry in their hands as a security for all advances and charges on account of the vessel. This deposit was made, and the plaintiff was liberated. A few days afterwards, Bowen was again arrested and taken to gaol; he then appointed his brother to be master, and the certificate of registry was demanded of the defendants, who refused to give it up. Whereupon an application was made to a magistrate under the 4 G. 4, c. 41, s. 25, to compel the restoration of the certificate, but he would not interfere. Then Myers appointed another person to be master, to whom the certificate was given by the defendants; an order for that purpose having been obtained from the magistrate who before refused to interfere, and the master so appointed sailed in command of the Gratitude. Myers appeared to be acting in concert with the defendants in the appointment of the new master. The learned Judge told the jury that Myers, as part owner, might appoint a master to the ship, and that he was entitled to have the register; but if the defendants had been guilty of fraud in the transaction, they should find for the plaintiff. The jury found a verdict for the defendants.

Merewether, Serjt., now moved for a new trial, and contended that the detention of the register by the defendants was a wrongful conversion. The 4 G. 4, c. 41, *s. 23, after reciting "that it is not proper that any person, under any pretence whatever, should detain the certificate of registry of any ship or vessel, or hold the same for any purpose other than the lawful use and navigation of the vessel for which it was granted," provides a summary remedy, and imposes a heavy penalty on the person wilfully detaining a register. [BAYLEY, J. Was not the register in this case deposited to secure advances?] Yes; but there was no evidence of any advances made by the defendants. [BAYLEY, J. They had employed the persons who did the repairs.]

Lord TENTERDEN, C. J. It may be a question whether, upon the true construction of this statute, a party can be said wilfully to detain a ship's register, if he does so by reason of a lien upon it. Assuming the right construction to be that the detention would be wilful, notwithstanding the lien, it does not follow that this action of trover was maintainable, being founded on the common

law; for by that law a party cannot reclaim a thing pledged without paying all that is due upon the account for which it was pledged. If the plaintiff intended to avail himself of the right given by the statute, he should have pursued the course pointed out by the statute.

The rest of the court concurring, the rule was

Refused.

*44] *HUNT and Another, Assignees of W. D. and T. GILBERT, Bankrupts, v. MORTIMER and Others. Nov. 13.

Where a trader, having a large order from the East India Company, and not having funds to execute it, borrowed money of B., upon an agreement that B. should receive the money for the order from the East India Company and repay himself; and at the time of the loan B. knew the trader to be insolvent, and before the money became due from the East India Company the trader was arrested several times, and was bailed by B., and so avoided committing an act of bankruptcy until after the money became due, when B. received it: Held, that this was not a fraudulent preference.

Assumpsit for money had and received to the use of the plaintiffs as assign-Plea, the general issue, and notice of set-off. At the trial before Lord Tenterden, C. J., at the London sittings after last Trinity term, it appeared that the bankrupts had for many years carried on business in London as mathematical instrument makers, and in the way of their business received large orders from the East India Company. The defendants had for some time been in the habit of lending money to the bankrupts to assist them in executing such orders, and were repaid out of the moneys received from the East India Company, who paid by bills at six months from the time of the orders being executed. In May 1827 the bankrupts had an order from the East India Company, and being in want of funds to complete it, applied to the defendants, who knew them to be in considerable difficulties, but advanced some part of it and prevailed upon two friends to advance 500l. each, upon condition that they (the defendants) should receive from the Company the money which would afterwards be due to the bankrupts, and repay themselves and their friends those advances. The order was executed, and the money became due from the company the 29th of November, 1827, when it was received by the defendants, and by them applied in the manner agreed upon. Before that time the bankrupts had been arrested several *45] times, and were bailed by the defendants; and there was *some evidence of an act of bankruptcy having been committed by one of the alleged bankrupts before the money was paid by the East India Company. In March 1828 a commission issued against them on an act of bankruptcy committed in December 1827. Lord Tenterden, C. J., told the jury that this appeared to be a bona fide transaction, and was not a fraudulent preference; and that as no commission of bankruptcy issued until more than two months after the money had been paid to the defendants, the assignees were not entitled to recover it unless the bankrupts had, before the time of the payment, committed an act of bankruptcy, of which the defendants were conusant. The jury found a verdict for the defendants; and now

Pollock moved for a new trial, and contended, that although the transaction might be bonå fide, that did not prevent its being a fraudulent preference within the bankrupt act. In many cases a man may act with perfect good faith and yet may violate the spirit of the bankrupt laws, which are intended to procure an equal distribution of his effects amongst his creditors. [Lord Tenterden, C. J. Here the money was advanced for the very purpose of enabling the bankrupts to execute this order, and the defendants were paid, not out of the general funds of the bankrupts, but by the very notes received from the East India Company on account of that order.] That certainly was so; but the defendants, knowing their debtors to be in difficulties, lent them just so much assistance as

would enable them to avoid a bankruptcy until the money had been received from the East India Company. Now, if a creditor enables a trader to avoid bankruptcy until he can receive and pay *over a particular sum of money to that creditor, it is fraudulent as against the bankrupt laws.

Lord TENTERDEN, C. J. I thought at the trial, and continue of the same opinion now, that to hold this transaction to be a fraudulent preference would carry the law on this subject much further than heretofore, and further than it

ought to be carried.

BAYLEY, J. I am of the same opinion.

LITTLEDALE, J. To constitute a fraudulent preference two things must concur; first, insolvency in the trader, and, secondly, a voluntary payment or transfer by him. This payment was not voluntary, but the subject of a special contract made before the money was lent. The reason of the rule is, that all the creditors who have trusted to the general credit of the bankrupt should share his property equally. Here the defendants were no gainers by the transaction. They lent the money, knowing Gilbert's insolvency; and but for the peculiar bargain for repayment would never have advanced it. In that event the fund from the Company would never have been obtained, so that the general creditors are not in any degree injured. It seems to me, therefore, that the direction was right.

There is no pretence for calling this a fraudulent preference. PARKE, J. The money was not lent by the defendants on the general credit of the bankrupts, but on the faith of the moneys which were to be received from the East India Company; and the arrangement between the bankrupt and the defendant had the effect *of an equitable assignment of that particular fund, to which the plaintiffs (who as assignees are entitled only to such effects as the bankrupt had both legally and equitably) have no claim. In this case, it is true, there was no notice of the arrangement to the East India Company; but notice is not necessary in such cases to give an effect to an equitable assignment between the parties, though it is so for the purpose of preventing the title of assignees attaching, on the ground of the bankrupt being the apparent owner of that fund at the time of the act of bankruptcy, within the meaning of that clause of the late bankrupt act, founded on the repealed statute of the 21 Jac. 1. Here no notice was required, because the moneys received from the East India Company were paid over to the defendants long before the act of bankruptcy of both bankrupts. I think therefore that the direction and the verdict were right.

Rule refused.

SHARP v. ASPINALL and PARKER. Nov. 13.

Where a member of a benefit society, complaining of relief having been improperly refused, applies for a summary remedy under the 49 G. 3, c. 125, s. 3, the proceedings must be before two justices resident in the county where the society is held.

TRESPASS. The first count of the declaration alleged that the defendants, in the county of York, unlawfully issued and made their warrant to the constable of Slaidburn, authorizing him to levy the sum of 7s. 6d. by distress, or by distress and sale of the moneys, goods, and chattels, &c., belonging to a certain Friendly Society, called, &c., held at Slaidburn, in the said county, and in default of such distress being found, then to levy the said sum of 7s. 6d. by distress and sale of the property and goods of the said plaintiff, and Isaac Rushton, *therein described as being officers of the said society; under which said warrant the defendants with force and arms entered the house of the plaintiff in the said county, and took away a writing deak of the plaintiff, value 10l., and sold it, although they the defendants had no jurisdiction over the subject-matter of the complaint on which the warrant was grounded, and had no

right to issue the warrant. Second count, for breaking and entering plaintiff's dwelling-house, and taking away his goods. Third count, for seizing and taking away the plaintiff's goods. Plea, the general issue. Secondly, that before, and at, and after the said time, when, &c., in the first count mentioned, one R. B. was a member of a certain Friendly Society held at S., in the West Riding of the county of York, called the Humane Charitable Fraternity, the rules, orders, and regulations whereof had been and were, before the said times when, &c., duly exhibited, confirmed, and filed at the general quarter sessions of the peace in and for the said West Riding, according to the provisions of the statute 33 And the said R. B., so being such member of the said society, did before the said times, when, &c., complain to the said defendant Parker, being then and there one of his Majesty's justices of the peace for the West Riding of the county of York, and residing within the same, and also one of his Majesty's justices of the peace for the county palatine of Lancaster (the said county palatine adjoining the said West Riding), of relief having been refused to him R. B. by the said society, to which he was lawfully entitled. (The plea then stated a summons of plaintiff and Rushton, who were the stewards of the society; that defendant Parker being such justice as aforesaid, and defendant Aspinall being also a justice of the peace for *the West Riding and also for the adjoining county palatine, and residing in the county pulatine, near to S., attended at the time and place mentioned in the summons. That plaintiff and Rushton made default, whereupon the service of the notice was proved on oath, and the justices then proceeded to hear the complaint, and made an order that a certain sum should be paid to R. B., and because plaintiff and Rushton refused to pay it, the defendants issued their warrant, &c.) Replication, de injuria. At the trial before Bayley, J., at the last Summer assizes for Yorkshire, the facts were proved as alleged in the pleadings; and it was contended for the plaintiff that the order upon which the warrant proceeded could not be legally made by two justices, one of whom resided in the county of Lancaster, the statute 46 G. 3, c. 125, giving power to make such orders to two justices "residing within the county, riding, division, &c., within which such society shall be held." other hand it was contended, that the statute was only directory as to that part, and that the order was well made by two justices for the West Riding, although one of them resided in the adjoining county; the statute 28 G. 3, c. 49, authorizing justices of the peace to act for any two or more adjoining counties, provided that such justices are personally resident in one of them. The learned Judge was of opinion that the justices had not jurisdiction, and directed the jury to find a verdict for the plaintiff; but gave the defendant leave to move to enter a nonsuit; and now

Wightman moved accordingly. The proceedings in question have taken place under the third section of the 49 G. 3, c. 125, and not under the first section of *50] that act, *though the plaintiff's counsel took the objection at the trial as if the case was founded upon the first section. The distinction is very important, for the two clauses appear to be essentially different as far as they relate to the present question. By the first section, authority is given to justices residing within the county, in which the society is held, and the words such justices, in the subsequent part of the section, can only refer to resident justices; and if the proceedings had been under that section, the Court would probably consider the residence as a necessary part of the description of the justice to whom authority is given; and in that view of the case, the objection would be fatal, notwithstanding the 28 G. 3, c. 49. But the third section begins by enacting, "that if complaint shall be made to two such justices, of relief having been refused, it shall be lawful for the said two justices, residing within the county in which the society shall be held, and such justices are thereby required, to summon the party complained against, and upon appearance, such justices shall proceed, &c." But the words such justices, in the beginning of the third section, are not to be taken to refer to the justices described in the first section, but to the justices mentioned in the intermediate clause, the second, which begins with a long recital, and is introductory of a new set of enactments, of which the third section forms a part, and which are wholly independent of the first section. then, the words such justices are referred to the last antecedent justices, which are those mentioned in the second section, the application for relief might be made in the first instance to any justices, who would have jurisdiction without reference to residence; and the subsequent words in the third section, in which residence is mentioned, must be considered as only *directory, and not But supposing residence, as mentioned in the third section, to be considered restrictive, still it applies only to that part of the clause which relates to granting the summons; and as the summons in this case was granted by the resident magistrate, it will be valid by the 3 G. 4, c. 23, s. 2, which provides, that wherever power is given to two justices to hear and determine any complaint, the original information may be received by one, and obedience to the adjudication of the two may be enforced by one.

Lord TENTERDEN, C. J. I am of opinion that this point is perfectly clear: the early part of the third section of the statute 49 G. 3, c. 125, requires that, upon complaint made, two justices residing in the county where the society is held may issue a summons, and all the subsequent steps are to be before such justices. If the first proceeding is to be before two resident justices, the decision also must be before them. The direction of the learned Judge was therefore per-Rule refused.

fectly correct.

The KING v. The Inhabitants of ROXBY. Nov. 14.

A hiring from the 13th of May 1819 to the 13th of May 1820 (that being leap-year), and a service under it till the 12th of May, 1820, viz. 365 days: Held, not sufficient to give a settlement. The service must be for a whole year, although it happen to consist of 366 days.

Upon an appeal against an order of two justices, whereby R. Farmery, his wife, and children, were removed from the parish of Roxby, in the parts of Lindsey, in the county of Lincoln, to the parish of Winterton, in *the same parts and county, the sessions quashed the order, subject to the opi-

nion of this Court on the following case:-

The pauper, being unmarried and without children, was hired before Old May-day 1819 (13th of May), to serve James Barratt, in the parish of Winterton, from the said Old May-day to Old May-day 1820, as a servant in husbandry, at 161. wages. The pauper served Barratt, in Winterton, until the 11th May, 1820, when, wishing to visit his friends, fifteen miles distant, and to attend some statutes on the 12th of May on the way there, and avoid returning back to his master, he requested his master's permission to go for altogether; and they ettled the pauper's wages, and part was deducted for the time he had to serve. The pauper slept at his master's house, with his permission, on the evening of the 11th of May, and finally left his master's on the 12th (1820 was leap-year). The Court of quarter sessions considered this a dissolution of the contract.

N. R. Clarke and Fynes Clinton in support of the order of sessions. pauper gained no settlement in Winterton, because he did not serve an entire It is true that he served 365 days; but 1820, being leap-year, consisted of 366 days. Assuming that there was not a year's service before the 12th of May, the question, whether there was a dissolution of the contract, or a dispensation from service by the master, was one for the sessions; and there are ample premises to warrant the conclusion they came to. Here the master could not have compelled the pauper to serve him after the 12th, for he had paid him his

wages, and the pauper had finally left his master.

Patteson and Whitehurst, contrd. There was a good service for a solar year, rejecting the fractional hours, for the pauper served 365 days. And this is the legal mode of computation. The calendar year, indeed, is recognised by the law, but it is never used in legal computation, and the law knows no calendar year except that commencing on the lat of January, and ending on the last day of December. There is no calendar year commencing in the intermediate months. Here the year commenced on the Old May-Day. In Rex v. Ulverstone, 7 T. R. 564, a servant was hired from Whitsuntide to Whitsuntide, when the interval consisted of more than 365 days, and was discharged before the ensuing Whitsuntide, but after having served 365 days; and the service was held sufficient to confer a settlement. In Rex v. Ackley, 3 T. R. 250, a hiring three days after Michaelmas, till the Michaelmas following in leap-year, and a service till a day after Michaelmas-day, making 365 days, was held not to confer a settlement; but that was on the ground that there was not a hiring for a year. As to the other point, Rex v. Potter Heigham, Burr. S. C. 690, 2 Bott. 316, is precisely in point.

Lord TENTERDEN, C. J. The question whether there was in this case a dissolution of the contract, or dispensation with the service, was for the sessions to decide, and they have decided it. I should not be disposed to interfere with their judgment, even if I thought it was wrong, which I do not: as to the other point, I think that the year for which the pauper contracted to serve was one of 366 days. He did not serve that number of days, and therefore there was not

a year's service.

*BAYLEY, J. The statute 24 G. 2, c. 23, s. 2, enacts that leap-year shall consist of 366 days.

Order of sessions confirmed.(a)

(a) See Rex v. Worminghall, 6 M. & S. 350.

The KING v. The Inhabitants of BELFORD. Nov. 14.

The burgesses of the borough of B. were entitled to receive such share of the rent of certain estates as the corporation at large should allow to them. The estates were vested in the corporation at large, and demised by lease, whereby the rents were reserved to the corporation: Held, that a freeman of B., who resided in the borough, and was in the receipt of a portion of the rents, which had been assigned to him by the corporation, did not thereby gain a settlement by estate.

Upon an appeal against an order of two justices, whereby Grace, the wife of John M'Queen, then a prisoner in the gaol of Berwick, and their five children, were removed from the parish of Berwick-upon-Tweed to the township of Belford, in the parish of Belford, in the county of Northumberland, the sessions confirmed

the order, subject to the opinion of this Court on the following case:—

The pauper, John M'Queen, is a burgess of the borough of Berwick-upon-Tweed, and in 1807, being then settled in Belford, came to reside in the parish of Berwick-upon-Tweed, where he continued to be resident at the date of the above order of removal, at which time he was a prisoner in Berwick gaol, and his wife and five children became chargeable to the parish of Berwick-upon-Tweed, having no settlement but such as was derived from him. John M'Queen, for the last three years of his residence in the parish of Berwick, enjoyed as such burgess certain pecuniary benefits arising out of the estates of the corporation lying in the same parish in the manner after mentioned. The mayor, bailiffs, and burgesses, of the borough of Berwick, by virtue of a charter granted in the first year of king James the First, *and confirmed by act of parliament, hold, to the only proper use of them and their successors, a large estate in land, situate in the parish of Berwick-upon-Tweed, which parish is co-extensive with the borough. This estate is chargeable, in the first instance, with the payment of salaries of officers and other corporation expenses imposed by the charter; but has from an early period after the grant of the charter, and from thence hitherto, been distributed into three portions, and each portion applied to distinct purposes. The first portion consists of several farms, which are demised to Vol. XXI.—5

tenants by the mayor, bailiffs, and burgesses; the rent being reserved to the said mayor, bailiffs, and burgesses, or their treasurer for the time being, and This rent, together with the proceeds of other property, collected by him. called the town's ancient revenue, now form a separate fund, out of which the salaries of the officers and other corporate expenses, authorized by the charter, are defrayed. These farms are called treasurer's farms. The second portion is subdivided into several parcels, varying in quantities from an acre and a half to two acres and a half, and in value from 4l. to 9l. per annum. These are called meadows; and at an annual meeting of the burgesses, called a meadow guild, are distributed, as they become vacant by the death or non-residence of the last occupiers, among the senior resident burgesses and widows of burgesses, who succeed to the rights of their busbands as to meadows and stints, though the charter has no provision in behalf of the widows; the oldest resident burgess being entitled to choose the most valuable vacant meadow, and so on in succession down to the junior, till the number of vacant meadows is exhausted. The burgesses may either occupy these *meadows themselves, or let them to tenants, reserving the rents to themselves. The lands forming the third portion were, up to the year 1761, open fields upon which each burgess was entitled to a certain right of depasturing; but at that period they were enclosed, and have ever since been let in guild as farms to tenants for various terms of years, and are now demised by lease under the corporation seal; and the rent has been, since the year 1810, uniformly reserved to the mayor, bailiffs, and burgesses (which is the name of incorporation), their successors or assigns, or to their treasurer for the time being. Previous to that period, however, several instances occur of leases of stint land, wherein the reservation of the rent was made "to the mayor, bailiffs, and burgesses, their successors or assigns, or to their treasurer for the time being, or to the several respective burgesses or burgesses' widows, who should from time to time, during the said term, have shares in the said farmhold, in equal portions." The rent of each farm is divided into a certain number of equal portions, generally eleven, but in a few instances twenty-two. At another annual meeting, called a stint guild, a portion is allotted upon a specific farm to each resident burgess, or burgess's widow, or to as many of these as there are vacant portions. These portions are called stints, and they, like the meadows, vary in value, from 2l. to 9l. per annum: the senior burgesses being in like manner entitled to a preference as the more valuable stints become vacant; the younger burgesses succeeding as vacancies by the death, removal, or promotion of their seniors occur. The portions of the rents called stints are paid annually, by the treasurer of the corporation, to the burgesses who are entitled to them; but, until the *last fourteen or sixteen years, the burgesses in many instances received their stint money immediately from the farmers or lessees of the specific farms upon which their several stints were assigned. The burgesses in guild have by their charter a power of making by-laws for the good rule and government of the corporation, and for the better preserving. governing, disposing, letting, and demising of their lands, &c. In the exercise of this right, the burgesses assembled in guilds make by-laws to regulate the enjoyment of the meadows and stints, and have prescribed the conditions of husbandry under which meadow and stint lands may be broken up and converted into tillage, and (in the case of the meadows) the terms for which they may be let by the individual burgesses to whom they are allotted. They also decide upon the title of those who claim to enjoy meadows and stints, according to such by-laws; and instances occur upon their records of forfeitures both of meadows and stints, either absolute or for limited periods, inflicted by the burgesses in guild for infraction of by-laws, or other gross misconduct. But unless there be such forfeiture, or the party either become non-resident or relinquish his stint or meadow, by choosing one of more value, he may remain in the enjoyment of the stint or meadow, which has at the first been allotted to him, for the term of his life. Some burgesses are permitted to enjoy one stint only, others two stints,

and others again one meadow and one stint. Those who enjoy two stints are said to hold one of the stints for or in lieu of a meadow.

The pauper, John M'Queen, was for the three years next preceding this order of removal, and still is in the enjoyment of one stint assigned upon a farm within *the parish and borough of Berwick, called the Burrs, and annually receives from the treasurer of the corporation, for his portion of the rent, the sum of 3l. 5s. 9d.: he is also in the enjoyment of another portion assigned upon another farm called No. 12, of the outfields, under the description of stint for a meadow; his share of the rent of the last-named farm being 3l. 1s. 9d. The rents of these two farms are now, and have been during the entire period of the purper's sharing in them, reserved to the mayor, bailiffs, and burgesses, or to their treasurer, and these rents are received by the treasurer, and the above sums are paid to the pauper by him. The pauper is not at present entitled to a meadow, but he will be entitled (if he so long lives) to claim one as soon as a vacancy occurs in regular rotation. The pauper, in his character of a burgess of the borough of Berwick-upon-Tweed, is a member of the assemblies of burgesses, called guilds, held under the provision of the charter or otherwise, and therefore entitled to a vote as well in the meadow and stint as in other guilds. The question for the opinion of this Court was, Whether the pauper, John M'Queen, was, during his residence under the above circumstances in the parish of Berwick-upon-Tweed, irremovable therefrom, so as to acquire a settlement in the said parish, to be communicated to his wife and children.

Ingham in support of the order of sessions. The pauper had not any interest in the corporation lands in the parish of Berwick during his residence there as a burgess, which could make him irremovable and confer a settlement on his family. In order to gain a settlement, the pauper must have land of his own in the parish, and *the legal estate must be either vested in him or held in trust for him. It is not enough that the pauper may have a reasonable cause for his residence, as here, for the purposes of his franchise; or may, in popular language, have an interest in the land as the grantee of a rent charge, Rex v. Stockley Pomroy, Burr. S. C. 762; or as a widow before assignment of dower, Rex v. North Weald Bassett, 2 B. & C. 724; or may even occupy in the parish as under a license from the lord of the manor, Rex v. Horndon-on-the-Hill, 4 M. & S. 562; or as one of several nearest of kin before grant of administration, Rex v. Widworthy, Burr. S. C. 109, Rex v. North Curry, Cald. 137, Rex v. Berkswell, 1 B. & C. 542. In all such cases, though the party may be protected in his occupation, or may be entitled to have an account of the proceeds, still it has been held, that there is no such estate, either at law or in equity (the ordinary not being absolutely a trustee for the nearest of kin), as to create a settlement. Now, in this case, the interest of the pauper (taken most favourably) does not amount to more than a right to call on the treasurer to account for the rent of the farm out of which the guild has allotted him a share; and such an interest has been decided to be insufficient. In this case, as in that of all corporations aggregate, the legal estate is in the body at large, not in the individual mem-They are so destitute of any independent interest, that if the corporation be dissolved, they must relinquish all enjoyment of the property, which reverts to the heirs of the donor, Vin. Abr. Corporation, H. 3, Pl. 9. Here the legal estate is in the corporation: the land is demised by them; the rent is reserved *60] to them, *and received by their officer; and though it may be his duty, under direction of the guild, to pay over a portion of that rent to the pau-

per, yet it no more follows that the corporation is on that account to be considered as holding the "stint land" in trust for him, than it is to be considered as holding the "treasurer's farms" in trust for the officers of the corporation whose salaries are defrayed out of the rents. The terms of the demise in either case are the same. (He was then stopped by the Court.)

Alderson and Greenwood, contrd. Here the pauper was irremovable. [Lord. TENTERDEN, C. J. Is there anything to show that the husband of the pauper had a right to occupy so as to be irremovable?] In Rex v. Warkworth, 1 M.

& S. 473, a pauper, as freeman of a town, was entitled, during his residence there, together with the other freemen, to a common of pasture on a neighbouring moor for his own cattle, if he had any; but as it did not appear that he had ever exercised at large the common of pasture, or had any cattle with which to exercise it: it was held to be a mere personal privilege, and to be no interest in the land. There, however, the pauper was not in the enjoyment of the land. Here the receipt of the rent is equivalent to the enjoyment of the land. [Lord TENTERDEN, C. J. In that case the pauper, simply as a freeman, had a right to exercise the right of common. Here the burgesses have no right to occupy the land; the corporation let it.] The pension is a commutation for the right of common. The party is entitled to be present at the guild. If he be removed, he will be deprived of that pension. In Rex v. *Staplegrove, 2 B. & A. [*61 527, the party who had a mere claim was held to be irremovable. [BAY-LEY, J. There the party, being a reversioner, went to reside on what he believed to be his own.]

Lord TENTERDEN, C. J. I am of opinion that the husband of the pauper was not seised of any legal or equitable estate; that being in the corporation. He was only entitled to such a portion of the rents as the body corporate might think fit to allow him. Whether they allowed him a portion of those rents, first throwing the whole together and then dividing them amongst the freemen, or whether they assigned to each freeman the rent of a particular portion of land, seems to me immaterial. The freemen had no right to enter on the land.

BAYLEY, J. Rex v. Warkworth shows that a burgess entitled to a right of common is not settled by residing in the borough. Being a freeman, and entitled as such to certain local privileges, did not give the husband of the pauper any estate, legal or equitable; and if he had no estate in the land, he had no right to occupy. The estate was in the corporation.

PARKE, J. The pauper had nothing but a privilege of taking a portion of

the profits of the land at the will of the corporation.

Order of sessions confirmed.

*The KING v. The Inhabitants of WILLOUGHBY-WITH-SLOOTH-BY. Nov. 14.

An estate in remainder will not confer a settlement. It must be vested in possession.

Upon an appeal against an order of two justices, whereby W. Stokes, his wife, and children, were removed from the parish of Huttoft, in the parts of Lindsey, in the county of Lincoln, to the parish of Willoughby-with-Sloothby, in the same parts and county, the sessions confirmed the order, subject to the opinion

of this Court on the following case:--

The pauper, W. Stokes, being settled in the parish of Willoughby, J. Neal, by indentures of lease and release, dated the 19th and 20th May, 1825, in consideration of 105*l.*, conveyed a parcel of land and two unfinished dwelling-houses, situate in the parish of Huttoft, to the use of Elizabeth Stokes, for life or during widowhood, remainder to the use of the pauper W. Stokes in fee. The 105*l.* was money which had been bequeathed by the father of the pauper to him absolutely, and the interest of which the pauper had subsequently, by his deed, in consideration of natural love and affection and 10s., settled upon his mother for life or during widowhood; the principal, after her death, to be paid to himself: a further sum of 50*l.* was expended by the pauper after the execution of the conveyance in finishing the dwelling-houses; which sum had been bequeathed by the pauper's father to trustees, in trust to pay the interest to the widow during her life or widowhood, and the principal, after her death or marriage, to the pauper. The pauper paid the interest of *105*l.* to the trustees, and [*63]

the houses and part of the land at the time of the execution of the conveyance. The mother let the other house and remainder of the land for the space of one year after the execution of the conveyance; at the expiration of which year the mother told the pauper she would deliver up all the premises to him, and that he might do as he liked with them. The pauper then entered into possession of the other house and land, and let it, and received the rent, and never accounted for it to his mother; and continued to occupy the same house he had previously occupied until both were sold in May 1828, and conveyed by deed, to which his mother, who remained a widow, was a party. The pauper received the whole of the purchase-money, and did not account for it to his mother. They both joined in the receipt to the purchaser.

Alderson, N. R. Clarke, and Hildyard, in support of the order of sessions. The only question is, Whether the pauper, by the conveyance, took such an estate as conferred a settlement. It is a well established principle, that a party must have a present freehold interest in order to gain a settlement by estate, Rex v. Eatington, 4 T. R. 177, Rex v. Ringstead, 9 B. & C. 218. Here the pauper had no estate of freehold in possession, but an estate in expectancy only;

viz., an estate in remainder.

Funes Clinton and Whitehurst, contrd. Rex v. Eatington is at variance with Rex v. Houghton Le Spring, 1 East, 247, *and Rex v. Staplegrove, 2 B. & A. 527. In the first of those cases, the pauper, who had a freehold estate in the occupation of a tenant to whom he had let it, was held to gain a settlement by residing thereon forty days, with the license of his tenant, for the purpose of making repairs. In the other case, a reversioner in fee of a cottage, subject to a lease for one thousand years, was held to gain a settlement by residence on the cottage. [BAYLEY, J. There the reversioner in fee had the present estate of freehold in him: he had granted a mere chattel interest out of it. Here the pauper has a mere estate in remainder. His mother has the present estate of freehold.

Ever since the case of Rex v. Eatington, it has been an esta-BAYLEY, J. blished principle of settlement law, that a party cannot gain a settlement by residence on an estate in which he has not a freehold vested in possession. Here the pauper had a freehold estate in expectancy only, viz., in remainder, which implies a preceding estate of freehold in some other person. The cases of Rex v. Houghton le Spring and Rex v. Staplegrove only show that where a present estate of freehold is vested, the premises need not be in the owner's occupation. In the first of those cases, the pauper being seised of a freehold house, let it at three pounds per annum; and he was held to gain a settlement by residing as a lodger with his tenant, to conduct alterations in the premises; but the present freehold interest was then vested in him. In Rex v. Staplegrove, the father of the pauper's wife, having let to the parish officers and their successors his freehold *65] cottage for *1000 years, was placed in it and died there; and his daughter and her husband continued to reside there five years; and it was held that they gained a settlement. In that case, the estate of freehold in possession was in the pauper's wife (a chattel interest only having been granted by her father to the parish officers). In this case, the pauper never had any other estate of freehold in the premises than one in remainder. His mother had the estate of freehold in possession.

LITTLEDALE, J., concurred.

PARKE, J. The question raised in this case was expressly decided in Rex v. Estington, 4 T. R. 177, and was considered by the Court as settled law in Rex

Lord TENTERDEN, C. J. I entirely concur in the judgment given by my learned brothers. Order of sessions confirmed

*The KING v. MAINWARING. Nov. 14.

F*66

By the statute 50 G. 3, c. 41, s. 23, it is enacted, that nothing in that act shall extend to hinder the real worker or maker of any goods. &c., or his, her, or their children, apprentices, or known agents, or servants usually residing with such real worker or maker, from carrying abroad or exposing to sale, and selling by retail, or otherwise, any of the said goods. &c., of his, her, or their own making in any mart, market, or tair, and in every city; borough, town corporate, and market-town: Held, that this exemption applied to such agents or servants only as resided in the same house with the maker of the goods, as part of his family.

Upon appeal against six several convictions of the defendant under the hawkers' and pedlars' act 50 G. 3, c. 41, the sessions confirmed the convictions, sub-

ject to the opinion of this Court on the following case:—

Zacharia Boyle, on and before the 21st of October, 1828, was and still is a large china and earthenware manufacturer at Hanley in Staffordshire. the 21st of October he consigned to Gainsborough, a market town, to his own order, a quantity of china and earthenware, of which the several articles mentioned in the conviction formed a part. The china and earthenware were conveyed by a carrier's boat from Hanley to Gainsborough, and Boyle was the real worker and maker of all of it, and it was manufactured by him at Hanley. The defendant Mainwaring was, on and before the 21st of October, and still is, a servant in the sole employ of Boyle. He resided with his wife and family at Hanley, in a separate dwelling-house, being his own, a freehold, within 300 yards of the house and manufactory of Boyle, and never left that place except when employed elsewhere by his master. When at Hanley he superintended and assisted at the manufactory, and was employed by Boyle to sell the before-mentioned china and earthenware at Gainsborough. His salary was a fixed yearly salary, and did not depend on the amount of any sale that he might effect, nor did he receive any commission or benefit, nor was he liable to any charges or loss whatever which might arise or be incurred in the *sale, conveyance, or otherwise, of the said china and earthenware, but rendered a regular account of the same to his master, who bore all losses and expenses and received all the proceeds and profits. The defendant took possession of the china and earthenware so consigned, upon its arrival at Gainsborough, and took a room at an inn there, and on the day mentioned in the conviction sold part thereof by public auction. fendant had no hawker's license, and had previously been selling at Nottingham The question for the opinion of this Court was, whether the and other places. defendant was protected from penalty under the twenty-third section of the act 50 G. 3, c. 41, as the known agent or servant usually residing with the real worker or maker of the goods which he sold at Gainsborough.

N. R. Clarke and Fynes Clinton, in support of the order of sessions. The defendant was not within the exception. The question is, whether the defendant was an agent or servant usually residing with the real worker or maker within the 50 G. 3, c. 41. By s. 23, it is enacted that nothing in the act shall extend to prohibit any persons from selling any printed papers licensed by authority, or any fish, fruit, or victuals, nor to hinder the real worker or workers of any goods, or his or their children, apprentices, or known agents, or servants usually residing with such real workers, from carrying abroad or exposing to sale and selling by retail or otherwise any of the said goods, &c. Assuming that the defendant in this case was the known agent for the real worker or maker, still he was not an agent usually residing with the real worker, for he resided in a dwelling house of his own, distinct from that of his *employer. In furtherance of the general intention of the act (which was to protect tradesmen residing in towns and paying taxes), the exemption ought to be construed

literally.

Denman, Hildyard, and Whitehurst, control. If the legislature had intended to confine the exemption to agents living under the same roof with their employers, they would have used more definite words to express that intention. Assuming that the object of the legislature in the enacting clause, was to encourage

the regular trader, the object in the exempting clause was to afford encouragement to the real manufacturer, and that clause ought to be construed liberally to effect that object. In Rex v. Turner, 4 B. & A. 510, the defendant did not reside with the maker of the goods. In the 22d section, which enables hawkers to exercise any trade in the place where they are resident, the word resident applies to the place or town, and not the dwelling-house. That word, like the word inhabitant, may vary in its import according to the subject-matter to which it applies. The word inhabitant either refers to a place where a man sleeps, 2 Inst. 702, or the place where he is mere occupier of land, Jeffery's case, 5 Coke, 67. In the 52 G. 3, c. 108, which amends the 50 G. 3, c. 41, the words usually residing with are altogether omitted. That is a legislative declaration that they are immaterial.

Lord TENTERDEN, C. J. The twenty-third section exempts from the operation of the act, "the real worker or maker of any goods, or his or their children, apprentices, or known agents or servants usually residing with *such real workers." The word residing may undoubtedly vary in its import, according to the subject to which it is applied. The sense of that word, however, is explained in this section, by the words with which it is accompanied. The words "children or apprentices" apply to persons residing with their parents or masters, as part of their family, in the same house. That being so, I think we ought to understand the other words "agents or servants" to apply to such agents and servants as reside in the same house with their employers as members of their family. Here the defendant was not a member of the maker's or manufacturer's family, he had a separate dwelling of his own. If we were to hold that the words imported only a residence in the same town, the consequence would be that the exemption would apply to a case where a manufacturer and his agent lived on the western side of Temple Bar, but not to a case where one of them lived on the western and the other on the eastern side of Temple Bar.

BAYLEY, J. The 52 G. 3, c. 108, applies to selling by wholesale only, and the words "apprentices, servants, or agents," supply the place of "children, apprentices, or known agents or servants," in the former act. It cannot be expected that the agents for wholesale dealings should be usually residing in the same house with their principals, the words "usually residing with," were therefore omitted for a very sufficient reason. On the construction of the clause in question, I agree with Lord TENTERDEN. I do not go beyond the words of the clause. The words usually residing with, must be taken in their ordinary acceptation to mean persons living in the same house.

*TO] *LITTLEDALE, J. I think the word residing, in this section of the act, imports the place where the party sleeps. According to the authority cited from the second Institute, a man is to be considered commorant where his bed is. In Rex v. Adlard, 4 B. & C. 772, where 2 Inst. 702 and Jeffery's case were cited, a person occupying a house and paying all parish rates in respect of it, and carrying on the trade of a printer there, frequenting the house daily on all working days, and remaining there during the night, at work but not sleeping in the house, was held not to be a resignt, and therefore not liable to serve the office of constable. That case is in point.

PARKE, J. The question is, whether the defendant is, within the words of the exempting clause, a person usually residing with the worker or maker. Those words, taken according to their ordinary sense, import inmates in the same house, and I think that they ought to be construed in their ordinary sense. That construction in this case is fortified by the accompanying words, "children and apprentices."

BROWNE v. CUMMING and Others. Nov. 16.

Quære, Whether a person tried for felony, and acquitted, has a right to have a copy of the record of his acquittel?

A RULE had been obtained by the Attorney-General to restrain the plaintiff from using, in this cause, a copy of an indictment alleged to have been improperly obtained. It appeared by the affidavits, that in December 1825 a commission of bankrupt was issued against the plaintiff, under which he was declared to be a bankrupt, and the defendant Cumming was appointed an assignee. *In 1827, Cumming and the other defendants prosecuted the plaintiff for an alleged concealment and embezzlement of his effects, and at the Somerset Summer assizes 1827, he was tried and acquitted before Burrough, J. Browne's counsel thereupon applied for a copy of the indictment, but the learned Judge refused to order that it should be granted. Some communication was afterwards made by the learned Judge to Browne's counsel, which the latter considered as a promise to grant the order upon a fresh application; and accordingly an application was made, when the learned Judge stated that he had considered the matter, and found that he had not any authority to make such an order, except upon motion in open court at the assizes, and that the Attorney-General alone had power to do it. An application was then made to him; and upon its being stated that Burrough, J., had promised to grant the order, and would have done so had he been authorized to do it, the Attorney-General gave his fiat for the granting a copy; which was done accordingly, and an action commenced against the defendants for a malicious prosecution. The Attorney-General having been afterwards informed by the learned Judge that he had not promised to grant the order, this rule was obtained.

C. F. Williams, and Bompas, Serjt., showed cause. The necessity for obtaining an order for a copy of a record depends on the seventh resolution of the Judges at the Old Bailey, 6 Car. 2, and reported in Kelyng, 3. "That no copy of any indietment for felony be given without special order upon motion made in open court at the general gaol delivery, for the late frequency of actions against prosecutors, which cannot be without copies of the indictments, deterreth people from prosecuting for *the king upon just occasions." Now this resolution is at variance with the law as stated by Lord Coke in the preface to the third part of his Reports, where he says, that "The records of the king's courts, for that they contain great and hidden treasure, are faithfully and well kept, as they well deserve, in the king's treasury, and yet not so kept but that any subject may, for his necessary use and benefit, have access thereunto, which was the ancient law of England, and so is declared by an act of parliament, 46 E. 3,"(a) &c. In Foster's Crown Law, p. 229, it is said, that "this statute plainly relateth to such records in which the subject may be interested as matters of evidence upon questions of private right," and he refers to Lord Preston's case, 12 St. Tr. 662; but the opinion of the Judges there seems to be, that the statute applies to all records where copies or exemplifications are required for the purpose of being used as evidence. In Rex v. Brangan, 1 Leach, 27, the prisoner having been acquitted, applied for a copy of the indictment, but Willes, C. J., who tried the prisoner, refused to grant it, saying, it was not necessary, because by the laws of this realm, every prisoner upon his acquittal has an undoubted right to a copy of the record of such acquittal for any use he may think fit to make of it, and after a demand of it has been made, the proper officer may be punished for refusing to make it out. But supposing *the right of the party to a copy of the record not to be established, the pre-

⁽a) "Item pria les commons que come recorde et quecunque chose en la court le Roy de reason devoient demurr' illonques pur perpetual evidence, et eide de touts parties a icelly, et de touts ceux a queux en nul maner' ils atteignent, quand mestier lour fuit. Et ja de novell refusent en la court nostre dit seig' de serche ou evidence en contr' le Roy ou dissadvantage de luy; que pleise ordeiner per estatute, que serche et exemplification soit faitz as toutz gentz, de queconque recorde que les touche en asc' maner' auxibien de ce que chiet encountre le Roy come autres gentz. Le Roy le voet."

sent application is to the discretion of the Court, and as there is no ground to impute fraud or wilful misrepresentation to the plaintiff, the Court will not interfere. In Lyatt v. Tollervey, 14 East, 302, and Jordan v. Lewis, 14 East, 305, n., it was held that a copy of a record being produced in evidence the Court was bound to receive it, and could not inquire into the manner in which it had been obtained.

The Attorney-General, contrd. It appears by the affidavits that the fiat for a copy of the record was obtained upon a representation that the learned Judge, before whom the plaintiff was tried, flad promised to grant it, and only abstained from doing so because he doubted his authority to do it. Now the learned Judge never made any such promise, and had that been known in time the flat would not have been granted. This Court will therefore interfere to prevent the plaintiff from using the copy obtained in such a manner. It is not necessary to discuss now the right of a party to have a copy of the record of his acquittal, for the decision in this case will not affect that right. If the plaintiff has it, he may demand a fresh copy and use that in evidence.

Lord TENTERDEN, C. J. Taking all the facts of this case into consideration, we do not think that there has been a mistake or misrepresentation of such a nature as to call upon this Court to interfere. The rule to restrain the plaintiff

from using the copy of the record must therefore be discharged.

Rule discharged.(a)

(s) In Groenvelt v. Burrell, 1 Ld. Raym. 253, Holt, C. J., is reported to have said—"If A. be indicted of felony, and acquitted, and he has a *mind to bring an action, the Judge *74] will not permit him to have a copy of the record, if there was probable cause of the indictment; and he cannot have a copy without leave." Holt, C. J., was also present at the trial of Lord Preston; but he there does not deny that a party acquitted a felony has a right to a copy of an indictment for the purpose of using it in evidence, although he refused it to a prisoner about to take his trial for the offence charged in the indictment. In cases of misdemeanor, it has been considered, that a party acquitted is entitled to a copy of the record; Morrison v. Kelly, 1 W. Bl. 385. Evans v. Phillips, Selw. N. P. 952. So also in cases of summary convictions; Rex v. Midlam, 3 Burr. 1720. The distinction between such cases and those of indictments for felony seems to rest entirely on the order of the Judges made at the Old Bailey, as reported by Kelyng. Quære, What power they had to alter the law.

The KING v. WILLIAM HODGKINSON. Nov. 18.

Barm, or yeast, is victuals within the exempting clause of the hawkers' and pedlars' act 50 G. 3, c. 41, s. 23, and, therefore, a person purchasing that article of brewers, and carrying the same from town to town and selling the same, is not liable to the penalty imposed by that statute upon hawkers trading without a license.

Upon an appeal against a conviction under the hawkers' and pedlars' act, the court of quarter sessions for the county of Derby confirmed it, subject to the

opinion of this Court on the following case:-

The defendant had been for some time past in the habit of purchasing barm or yeast of the brewers at Burton-upon-Trent, and afterwards carried the same about to the neighbouring towns and villages, and exposed such barm or yeast to sale, and sold it to such persons as applied to him for it, for the purpose of being used in the making of bread and beer. The defendant took a quantity of barm or yeast to the township of Litchurch in the county of Derby, on the 14th day of November last, and there exposed the same to sale in his usual way, without license as a hawker. The question for the opinion of the Court was, whether the barm or yeast so exposed to sale was to be considered as "victuals" within the twenty-third section of the 50 G. 3, c. 41, by *which it is enacted "that nothing in that act shall extend to prohibit any persons from selling

any printed papers licensed by authority, or any fish, fruit, or victuals," &c.

N. R. Clarke and Fynes Clinton in support of the order of sessions. Yeast
is not victuals within the meaning of that word in the 50 G. 3, c. 41, s. 23. It

is used in the preparing of victuals, and operates chemically. [BAYLEY, J. Is it not a material necessary for the making of good bread?] The same may be said of fire. The effect of the yeast is by producing fermentation to render the bread lighter, and improve its quality. It is manifest from the words fish and fruit in the exempting clause, that the legislature meant to exempt such victuals only as were sold in a state fit to be eaten. [Lord TENTERDEN, C. J. Then flour would not be within the exemption.] It is not victual within the meaning of the act. Rex v. Waddington, I East, 143, will be relied upon by the other side. There, hops were considered to be a victual, but that case turned materially upon the words of the 5 & 6 Ed. 6, c. 14, which contained the words "any corn growing in the fields, or any other corn or grain," butter, cheese, fish, or other dead victuals whatsoever. Tea is an article of very general consumption, yet, in Rex v. M'Gill, 2 B. & C. 142, it was held that a person exposing to sale and selling tea as a hawker without a license, was liable to the penalty imposed by this act.

Brodrick, contrd. Yeast is a victual within the meaning of that word in this act of parliament. It comes *from beer, and is used as an ingredient in bread. Rex v. M'Gill turned upon other statutes; the sale of tea by any hawker or pedlar having been prohibited by the 9 G. 2, c. 35, s. 20, and the 10 G. 1, c. 10, s. 14, having enacted that tea should not be sold except in entered In the 12 Ed. 4, c. 8, ale, beer, and wine are considered as victuals, and the dealers in such articles are called victuallers. In 4 Inst. 262, Lord Coke says, that in the 18 Ed. 2, malt had been adjudged to be no victual of itself; but in Rex v. Waddington, 1 East, 143, hops were held to be a victual. In the 55 G. 3, c. 99, s. 2, yeast is recognised as an ingredient in the making of bread. It is as essential as salt, which is not used as food per se, but for the cooking and preserving of victuals. It was adjudged in the 44 & 45 Eliz. by the Justices and Barons of the Exchequer, that salt is a victual, and that the buying and selling thereof was within the statute 5 Ed. 6, and the reason assigned by Lord Coke is, that it was not only of necessity of itself for the food and health of man, but that it seasoneth and maketh wholesome beef, pork, &c., butter,

cheese, and other viands, 3 Inst. 195.

Lord Tenterden, C. J. I think that the word victuals in the 50 G. 3, c. 41, s. 23, comprises everything which constitutes an ingredient in the food of man, and all articles which mixed with others constitute food. Yeast or barm may not perhaps be necessarily used in the making of bread, but it generally is used, and I am therefore of opinion that it is within the exempting clause.

*BAYLEY, J. I think, construing the word victuals liberally, we must [*77]

understand it to comprise yeast.

LITTLEDALE and PARKE, Js., concurred.

Conviction quashed.

The KING v. The Inhabitants of MARTLESHAM in the County of SUFFOLK. Nov. 18.

An unmarried woman settled in the parish of M., was removed from the parish of P. to the parish S. S. appealed, and the sessions quashed the order of removal, but before the appeal was heard the woman was delivered of a bastard child in S.: Held, that the bastard was not settled in the parish of M.

Upon an appeal against an order of two justices, whereby H. Athrol, alias H. Walford, was removed from Playford to Martlesham, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

Sarah Athrol, single woman, being pregnant, was removed by the order of two justices from Playford to Stutton. Before the sessions, she was delivered at Stutton of the pauper, a bastard. At the sessions Stutton appealed, and the jus-

tices quashed the order. It was admitted on the present appeal, that the mother, at the time of the bastard's birth, belonged to the parish of Martlesham.

The Attorney-General and T. Clarkson in support of the order of sessions. The pauper, though born in Stutton. was settled at Martlesham, the place of the mother's settlement. The general rule undoubtedly is, that a bastard being nullius filius, cannot have a derivative settlement by parentage; but where the mother at the time of the birth is by constraint in some other parish, there, in contemplation of law, she is supposed *to be residing not in that parish but in the parish of her settlement. In this case, therefore, the mother, at the time of the birth of the child, is not to be supposed to have been residing in Stutton, but in Martlesham, the place of her settlement: where, as said by Mr. Justice Bayley in Rex v. St. Nicholas, Leicester, 2 B. & C. 891, she ought At all events, it is more reasonable to consider her, in construction of law, as residing in Martlesham, her own parish, than in Playford. common law, if an illegitimate child be born in a gaol, the child does not gain a settlement in that parish where the gaol is situated, but in the parish where the mother is settled: Suckley v. Whitborn, 2 Bott. 2, 2 Bulst. 358; Elsing v. The County of Hereford, 2 Bott. 4. If the mother of the pauper had been convicted of an offence in the parish of Playford, and sent by an order of two magistrates to a gaol in Stutton, the child would have been settled in Martlesham, the place of the mother's settlement, because, she being in the parish of Stutton by constraint, would, in contemplation of law, be considered to be resident in her own parish. Now here the mother of the pauper was removed from Playford by an order of two magistrates, over which the parish of Playford had no control, for the magistrates who made the order sent the pauper to such place as appeared upon the evidence to be her settlement. The cases of Much Waltham v. Peram, 2 Salk. 474, Westbury v. Coston, 2 Salk. 532, only decide that if a single woman is delivered of a child pending an order of removal, which is quashed on appeal, such child is not settled in the parish where it was born; but they do not establish that the child is settled in the parish from which the mother has been *removed, if that parish is not the place of her settlement. In the first of those cases the mother's settlement was in Much Waltham. In the other case it does not appear whether the mother's settlement was in Westbury or not.

W. E. Taunton, control. If the parish officers of Playford had diligently investigated the case, they would have ascertained the settlement of the mother to have been in Martlesham, and they ought to have removed her thither. They wrongfully removed her to Stutton. She continued in Stutton till the appeal was determined by reason of that wrongful act. In contemplation of law she must be considered to have been residing in Playford during that time, and the pauper, therefore, ought to be considered as having been born in Playford, and as settled there. At all events he is not settled in Martlesham, because, being a bastard, he can derive no settlement from his mother.

BAYLEY, J. It is quite clear that a bastard cannot gain a settlement by parentage. The pauper was not therefore legally settled in Martlesham, and the order of sessions must be quashed.

Order of sessions quashed.

^{*80] *}The KING v. Sir T. M. WILSON and Another. Nov. 18.

Tenant in see of copyhold tenements, surrendered to the use of his will, and devised them as A. for life, remainder to B. for life, remainder to his own right heirs. The devisees disclaimed: Held, that on the death of the testator the estate descended to his heir, and that as the devisees would not come in and be admitted, he was entitled to admittance; and that, whether the disclaimer by the devisees was or was not made in surtherance of a scheme to deseat the lord's right to fines, did not affect the question.

MANDAMUS to Sir T. M. Wilson, lord of the manor of Hampstead, and W.

Lyddon, his steward of the said manor, to admit J. Walmesley to certain copyhold tenements holden of and parcel of that manor. By the recitals of the writ it appeared that in 1769 Henry Flitcroft was admitted tenant to these tenements, to hold the same to him and his heirs, at the will of the lord, according to the custom of the manor. In 1826 Flitcroft died seised of these tenements. leaving J. Walmesley his heir at law according to the custom of the manor. In January 1827 Walmesley applied to be admitted, but was refused on account of an alleged surrender by Flitcroft, to the use of his will; and of certain life and other estates alleged to have been devised in and by his will. 1827 Walmesley attended at a customary court held in and for the manor, and requested the steward to admit him, and produced and tendered to the steward a disclaimer duly made and executed by J. F. and A. M. F., the only surviving devisees under the said will, whereby they disclaimed, renounced, and relinquished all right and title whatsoever to the said tenements; which disclaimer was duly presented by the homage at the same customary court, yet the steward refused to admit him (Walmesley), wherefore, &c. The return stated the admittance of Flitcroft; the surrender by him to the use of his will; and that he died seised, having first made his will, whereby he devised the said copyhold *tenements to his mother for life, with remainder after her decease to the use of his brother-in-law James Fletcher, for life, remainder to trustees to support and preserve the contingent uses and estates thereinafter limited; remainder to the use of Anna Maria Fletcher for life, &c.; and the ultimate remainder to the testator's own right heirs for ever. And that by a certain indenture or deed of release, bearing date the 24th day of August, 1826, made and duly executed by and between the said J. Fletcher of the first part; the said A. M. Fletcher of the second part; and J. Walmsley, in the said writ mentioned, of the third part; the said J. Fletcher and A. M. Fletcher, for the considerations therein expressed, did demise, release, and for ever quit claim unto the said J. Walmsley and his heirs, all the copyhold messuages or tenements, lands, and other hereditaments, situate and being within and held of the said manor of Hampstead, of or to which the said testator Henry Flitcroft was seised or entitled at the time of making his said will, and also at his death, with the appurtenances, and all the estate, right, title, interest, trust, property, benefit, claim, and demand whatsoever of them the said J. Fletcher and A. M. Fletcher, and each of them, into and upon the same hereditaments, to hold the said copyhold messuages or tenements, lands, and other hereditaments thereby released or intended so to be, and every part thereof, to J. Walmsley, his heirs, and assigns, for and during all the rights and interests by or under the said will of the said H. Flitcroft, devised to or otherwise vested in the said J. Fletcher and A. M. Fletcher, or either of them. And that by a certain other indenture, bearing date 25th day of August, 1826, made and duly executed by *and between the said J. Walmsley of the first part, and A. M. Fletcher of the second part, and the said J. Fletcher of the third part, it is among other things witnessed, that in consideration of a covenant entered into by the said J. Fletcher and A. M. Fletcher to surrender all their estate and interest in certain copyhold estates of the said H. Flitcroft, and also in consideration of 2500l. to the said Joseph Walmsley paid by the said J. Fletcher, the said J. Walmsley with the consent and approbation, and at the request of the said A. M. Fletcher, did thereby grant, bargain, sell, alien, and confirm unto the said J. Fletcher and his heirs, all that the remainder or reversion in fee simple, to take effect in possession upon the several deceases of the said J. Fletcher and A M. Fletcher, and failure of the issue of the respective bodies of them the said J. Fletcher and A. M Fletcher of and in the therein described lands, tenements, titles, and hereditaments in Hendon, in the county of Middlesex, and all other the manors, rectories, advowsons, messuages, or tenements, lands, titles, hereditaments, and premises whatsoever of the said H. Flitcroft in Hendon, or in any other place or elsewhere in the said county of Middlesex, to hold the said several messuages or tenements, land, titles, hereditaments, and premises, with their respective appurtenances, expectant upon

the failure of issue of the said J. Fletcher, and upon the decease and failure of issue of the said A. M. Fletcher, unto and to the said J. Walmsley, his heirs and assigns for ever. And that the said copyhold tenements mentioned in the said indenture of the 24th day of August, 1826, and that the said copyhold tenements mentioned in the said indenture of the 25th day of August, 1826, are the same copyhold tenements, and not *other or different, and that they comprise the said copyhold tenements devised by the said will of the said H. Flitcroft, and first mentioned in the said And that the said supposed disclaimer in the said writ mentioned, writ. was made and executed by the said J. Fletcher and A. M. Fletcher long after the making the said two indentures or deeds of the 24th and 25th days of August, 1826, namely, on or about the 4th day of May, 1827, and that the said supposed disclaimer is colourable only and made for the purpose of defeating the lord of the said manor of the fines which would have been payable to him on the admissions of the said J. Fletcher and A. M. Fletcher respectively, to their said respective estates in the said copyhold tenements in the said writ first mentioned, according to the custom of the said manor. And that within the said manor there now is, and from time whereof the memory of man is not to the contrary, hath been a certain custom there used and approved of, that is to say, that when a customary tenant of the said manor has surrendered a customary tenement or customary tenements lying within and holden of the lord of the said manor, to the use of his will, and afterwards appointed the same by way of devise to any person or persons for life or in tail, with remainder over to any other person or persons for life, or in tail, or in fee, such appointee or appointees after the death of the testator and presentment of the will, shall be admitted as tenant or tenants of the lord of the said manor in succession, according to their respective estates, rights, and interests so appointed to them respectively, and that within the same manor there is also an immemorial custom to make proclamations at the general courts baron or customary courts of the lord of the said manor. *for any person or persons having right or title to any customary tenements within and holden of the lord of the said manor, to come into court and be admitted thereto, and that upon the court rolls of the said manor there are entries of the admittance of persons having title to customary tenements by testamentary appointment after such proclamation. And that at the said general courts baron held in and for the said manor, as mentioned in the said writ, one of us, to wit, the said W. Lyddon, as steward of the said courts of the said manor, was then and there ready and willing, and offered the said J. Walmsley to admit him as tenant of the said copyhold premises devised by the said will of the said H. Flitcroft, and first mentioned in the said writ, in remainder or reversion, expectant on the respective deaths of the said J. Fletcher and A. M. Fletcher, and on failure of their issue, according to the tenor and effect of the devise contained in the said will of the said H. Flitcroft, but that the said J. Walmsley refused to accept such admission, requiring to be admitted as tenant in possession, and not otherwise. And these are the causes, &c.

Long now contended that the return was insufficient, and that Walmsley was entitled to a peremptory mandamus. It is clear, that on the death of the testator the estate descended on his heir at law, Roe dem. Jeffereys v. Hicks, 2 Wils. 13. The surrender to the use of the will makes no difference, for until the admittance of a surrenderee the estate remains in the surrenderor. The devisee might, indeed, have a right to come in and be *admitted, but on his neglecting to do so, the heir at law had a right to be admitted. Besides, a devisee may refuse to accept an estate, Townson v. Tickell, 3 B. & A. 31, and here there was a distinct disclaimer. This case, too, is stronger for the heir, that being the case of a freehold estate which vests in the devisee by the will; but a copyhold estate does not, Smith v. Triggs, 1 Str. 484, it can only vest by surrender and admittance. A devisee, until admittance cannot devise, and therefore he has not any estate in the tenement either legal or equitable, for an equitable interest may be devised before admittance, Wainwright v. Elwell, 1

The real question between the parties is, whether the lord can demand a fine from each of the devisees in respect of the estates relinquished by them, or whether he can compel the heir to pay a fine in respect of each of those estates. It is clear that he cannot, for no fine is due until after admittance, Hobart v. Hammond, 4 Co. 28; and he cannot compel a surrenderee to come in and be admitted, 1 Watk. 203, Payne v. Barker, Bridg. 23. Whether he can claim it of the heir is immaterial to the question before the Court, inasmuch as he only desires to be admitted, the amount of fine to be paid must be determined afterwards, Rex v. The Lord of the Manor of Hendon, 2 T. R. 484. The custom set out in the return does not in any way affect the question. It may be very true, that devisees have frequently come in and been admitted, they have a right so to do if they wish to be admitted; but the lord has no power to compel them to come in, and the lord has no right to take into consideration the reasons which induce them not to come *in. If they refuse, the heir has a right to come in, and as the rights of the copyholder and duties of the lord are reciprocal, the former is entitled to a peremptory mandamus to compel the lord to admit him.

The lord of the manor is bound to see that the right person Comun. contrd. is admitted tenant of the copyhold tenements in question. He has offered to admit the claimant as tenant in remainder or reversion, expectant on the determination of the preceding estates created by the will of Flitcroft the surrenderor; and he was not entitled to be admitted tenant in possession, for the estate did not descend to him as heir at law. His title as heir was intercepted by the devises to J. F. and A. M. F. The present application is made in furtherance of an attempt to defraud the lord of his fines. The devisees have not rejected the estate devised to them, but have accepted it, and have dealt with it as their own, and conveyed it to the heir for a valuable consideration. [BAYLEY, J. The copyhold estate remains in the surrenderor and his heirs, until the surrenderee comes in and is admitted. The devisees, therefore, never had the estate.] The mandamus does not aver that the estate descended to the applicant Walmsley. [BAYLEY, J. It states that Flitcroft died seised, and that Walmsley is his heir at law according to the custom of the manor, upon that the law says that the estate descended to him.]

Lord TENTERDEN, C. J. By the common law a copyhold estate in fee, after surrender, remains in the surrenderor and his heirs until the surrenderee comes in *and is admitted. Here the devisees were the surrenderees, and on the death of the testator the estate descended to his heir, subject to the right of the devisees to be admitted. When they declared that they would not come in, the obstruction that stood in the way of the present right of the heir was removed. If the effect of the deeds set out in the return is to give the lord a right to fines of which the parties are seeking to deprive him, his remedy must be sought in another manner. In this proceeding we can only look at the legal right of the heir. He has the legal estate, and a right to be admitted to it. A

BAYLEY, J. In a court of law we can only consider the legal rights of the parties. Now the person having the legal estate in a copyhold tenement has a right to be admitted. The estate in this case remained in the testator, notwithstanding the surrender to the use of his will, and on his death descended to the heir who claims admittance, not on the ground of a distant reversion, but of the immediate legal estate which has descended to him. It was formerly doubted, whether a person claiming as heir could have a mandamus to be admitted because he had a complete title without; but in Rex v. The Brewers' Company, B. & C. 172, it was decided that he might. There can be no doubt in this case, that the legal estate is in the heir of the testator, and that he therefore has a right to be admitted. The return, consequently, is insufficient.

*LITTLEDALE, J. The question before the Court is not affected by the ord's right to a fine. We have only to consider in whom the legal estate is. It is suggested by the return, that the course pursued is in furtherance of a

scheme to defeat the lord's right. If that be so, no doubt the law will provide a remedy. At present we have nothing to do with that, and it is clear that the heir of the testator has the legal estate, and, therefore, a right to be admitted. A surrender was made by Flitcroft to the use of his will, if he had not made a will nobody could doubt that the estate would have descended to the heir. Here, however, a will was made, and certain life estates were given, but the devisees did not accept them; the case is, therefore, the same as if no will had been made. According to the custom of some manors, wills are of no avail, unless presented within a certain time. This will was, I think, equally inoperative, as the devisees refused to take the estate, and the heir is entitled just as if no will had been made.

PARKE, J. I am of the same opinion. The question lies in the smallest possible compass. It depends on principles long settled, and never hitherto disputed. It is clear that a copyhold estate remains in the surrenderor, until the admittance of the surrenderee. It is clear, also, that in this case the estate descended to the heir at law of the surrenderor. Even if there had been no disclaimer, he would have been entitled to admittance, but there is a distinct disclaimer. The custom set out in the return does not affect the question, it does not amount to a custom that devisees must come in, and be admitted. If,

**as suggested, the lord is cheated of his fines, he may have a femedy elsewhere. A peremptory mandamus must, therefore, be awarded.

Peremptory mandamus.

DAVIES and Others v. The KING. Nov. 18.

(In Error.)

Where an indictment alleged that A., B., C., D., &c., on, &c., at, &c., to the number of three and more, together, did by night unlawfully enter divers closes, &c., there situate and being in the occupation of E. F., and where then and there in the said closes, &c., armed with guns, for the purpose of destroying game: Held, that it did not contain a sufficient afterment that the defendants were by night in the closes armed, for the purpose of destroying game; and the judgment given for the crown at the Chester great sessions was reversed.

INDICTMENT for poaching. The first three counts were founded on the statute 57 G. 3, c. 90, which had been repealed before the offence charged was committed. The fourth count, which alone was now relied on, stated that "J. Davies, &c., with force and arms, on the 17th day of December, in the year aforesaid, at the parish of Whitegate, in the county of Chester, being to the number of three or more persons together, did by night unlawfully enter divers closes and enclosed lands there situate, and being in the occupation of the said E. C., and were then and there in the said closes and lands armed with guns and other offensive weapons for the purpose of then and there taking and destroying game against the form of the statute." At the trial before Jervis, J., at the Chester Spring assizes 1829, the defendants were found guilty, and sentenced to transportation for fourteen years. Whereupon a writ of error was brought, and now argued by

J. Jervis for the plaintiffs in error. The first three counts of this indictment may be entirely laid out of consideration, for the statute on which they are founded *was repealed before the alleged offence appeared to have been committed. The fourth count, which alone remains, is defective in several particulars. The 9 G. 4, c. 69, s. 9, upon which it depends, makes it an offence if any persons to the number of three or more together unlawfully by night enter or be in any land, whether open or enclosed, for the purpose of taking or destroying game, any of such persons being armed. The twelfth section provides that, for the purposes of that act, the night shall be considered to commence at the expiration of the first hour after sunset, and to conclude at the

beginning of the last hour before sunrise. The indictment, therefore, should have stated at what hour the defendants were in the place in question, within those limits, so as to make it apparent that they were there by night within the meaning of the statute, Rex v. Waddington, 2 East, P. C. 513. Secondly, the indictment charges that the defendants unlawfully entered the closes, but does not allege that they were there unlawfully for the purpose of destroying game. Thirdly, it states that the defendants, to the number of three or more together, entered the closes, but not that they were there together for the purpose of destroying game. Fourthly, it is stated that they entered "divers closes and enclosed lands," without specifying any in particular. The averment should have been more specific; the names of the closes should have been given, Rex v. Ridley, Russ. & Ry. C. C. 515. [Lord Tenterden, C. J. If the words "then and there" in the allegation that the defendants were "then and there in the said closes and lands, armed with guns, &c.," does not mean that they were there by night, but only on *the day and place aforesaid, the indictment is clearly bad.]

Cottingham for the crown. The words "then and there" must be taken to refer to the last antecedent, viz. the entry by night, and therefore it is in effect an allegation that the defendants were in the closes by night, armed, &c. other objections are not sufficient to reverse the judgment. The indictment contains a sufficient description of the offence to satisfy that which is pointed out as necessary by De Gray, C. J., in Rex v. Horne, Cowp. 682. He there says, "The charge must contain such a description of the crime that the defendant may know what crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them, and that the Court may see such a definite crime that they may apply the punishment which the law prescribes." Here the whole count is to be read as one sentence, and then it plainly charges that the defendants committed an offence by entering and being in divers closes and enclosed lands armed, with intent to destroy game, and that the offence was committed by The names of the closes need not be stated, for the words of the statute are general,-"any land, whether open or enclosed." Neither was it necessary to mention the hour of the night. If the evidence did not prove that the defendants were there by night within the meaning of the statute, they would be entitled to an acquittal. But that comes by way of defence, the proviso as to what *shall be deemed night being in a different section from that which creates the offence.

Lord TENTERDEN, C. J. Assuming the indictment to be sufficient in that respect, it still appears to us that the judgment must be reversed. The phrase used is, that the defendants "did by night unlawfully enter divers closes, and were then and there in the said closes," &c., not that they "by night did unlawfully enter, and," &c. If the words "by night" had occurred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence, they might have referred to the whole, but here they are in the middle of the sentence, and are applied to a particular branch of it, and cannot be extended to that which follows. The two members of the sentence are distinct; the first states the entry into the closes by night, but does not state that the defendants were armed, or the intent with which they entered; the second branch states that they were in the closes armed for the purpose of destroying game, but hot that they were there by night. Neither of those branches of the sentence contains all that is requisite to constitute an offence within the statute, and the two being distinct, the indictment is bad, and the judgment must be reversed.

Judgment reversed.

*93] *R. BROWN, J. LAMOND, A. FARQUHAR, J. BURNESS, and LESLIE CLARKE, v. DUNCAN. Nov. 21.

A., B., C., D., and E. carried on trade in partnership, as distillers, and C. alone carried on the business of a retail dealer in spirits, within two miles of the distillery, contrary to the 4 G. 4, c. 94, ss. 132, 133, and his name was not inserted as one of the partners in the distillery in the excise-book, or license, as required by the 6 G. 4, c. 81, s. 7: Held, these being mere revenue regulations, the breach of them by one of the partners, with the knowledge of the others, did not render the trade carried on by the five so illegal as to deprive them of the right to recover the price of spirits sold by them, or for the breach of a guarantee for the due accounting of an agent, to whom they had consigned the spirits for sale.

Assumpsit on a guarantee. Plea, non assumpsit. At the trial before Lord Tenterden, C. J., at the London sittings after Trinity term 1829, the following appeared to be the facts of the case:—The five plaintiffs carried on trade in partnership as distillers at Aberdeen, and in the year 1825, A. Glennie having applied to them to appoint him their agent for the sale of their whiskey in London, they agreed so to do, provided he obtained a guarantee. At his request the defendant, on the 7th of January, 1826, entered into the following guarantee with Messrs. Brown and Co., Aberdeen :- "I hereby undertake to guaranty the due payment of all sums of money which Mr. A. Glennie may or shall become indebted to you as your agent for the sale of malt whiskey, and for which the said A. Glennie shall not duly account or pay and discharge." Glennie from that time till March 1828, acted as the agent of the plaintiffs, when he became bankrupt, being then indebted to the plaintiffs in the sum of 2307l. in respect of whiskey sold by him for their account. It appeared that the name of Leslie Clarke, one of the plaintiffs, was not inserted in any of the entries made in the books at the excise office, as to licenses taken out by the plaintiffs as distillers, and that he carried on business as a retailer of spirits within two miles of the The 4 G. 4, c. 94, s. 131, subjected every distiller licensed under the act to a penalty of 2001. if he should *at any time during the continuance of such license be directly or indirectly concerned or interested in the sale of spirituous liquors by retail or in carrying on the business of a retailer of any spirituous liquors; and section 132 subjected any such licensed distiller to the like penalty if he carried on or was concerned in the business of a wholesale dealer in spirits, at any place within the distance of two miles from the distillery of such distifler;" and subjected him to a like penalty if he should be directly or indirectly concerned in the trade or business of a dealer in spirits, at any place within such distance. The 6 G. 4, c. 81, s. 7, enacted, that in every license to be taken out under the authority of that act, should be contained and set forth the purpose, trade, or business for which such license was granted, and the true name and place of abode of the person or persons taking out the license, provided that persons in partnership and carrying on their trade and business in one place and set of premises only, should not be obliged to take out more than one license in any one year." It was contended that the license was not legal, as it purposely omitted the name of Clarke, one of the plaintiffs, and, therefore, the trade was unlicensed and illegal; it was also contended, that Clarke having carried on business as a retail dealer of spirits within two miles of the distillery, had done an act prohibited by law; and that his name for that reason having been omitted in the license, was a fraud upon the act of parliament; that the trading was thereby illegal, and that the plaintiffs could not recover the price of spirits distilled by them, or upon the guarantee given to secure the due accounting of their agent for money arising out of such sale. Lord Tenterden directed *95] the jury to find *a verdict for the plaintiff for the amount of their demand, but reserved liberty to the defendant to move to enter a nonsuit; and the jury having found for the plaintiffs,

F. Pollock now moved accordingly. Clarke, one of the plaintiffs, was not a person entitled to sue for the debt which accrued by reason of their agent not having duly accounted to the plaintiffs for the proceeds of spirits made at the

distillery during the time Clarke carried on the business of a retailer in spirits within the limited distance. That was an act prohibited to be done, for the distiller is subjected to a penalty. It is, therefore, unlawful. His name was omitted in the license for the very purpose of enabling him to commit a fraud on the revenue. The whole trading at the distillery thereby became unlawful, and the plaintiffs cannot recover upon a contract arising out of such unlawful [Lord TENTERDEN, C. J. Johnson v. Hudson, 5 Taunt. 181, is against That case is at variance with later decisions. In Cannan v. Bryce, 3 B. & A. 179, it was held, after argument and time taken by the Court to consider of the judgment, that money lent to be applied for the purpose of settling losses on illegal stock-jobbing transactions to which the lender was no party, could not be recovered back by him. In Bensley v. Bignold, 5 B. & A. 335, it was held that a printer who had omitted to affix his name to a work printed by him, could not recover for his labour or materials used in printing it. [Lord TENTERDEN, C. J. The act of printing, in respect of which the plaintiff sought to recover, was illegal.] Here the act of distilling by the five plaintiffs was illegal. *TENTERDEN, C. J. Was the sale illegal?] If the act of distilling were illegal, the act of selling the spirits so distilled is also illegal. In Law v. Hodgson, 11 East, 300, the act of parliament prohibited the making of bricks under a certain size. It was held that the sale of such bricks was illegal. [PARKE, J. That decision proceeded on the ground that it was the intention of the legislature by requiring bricks to be of a given size, not merely to benefit the revenue, but also to protect the buyer against the fraud of the seller, and that the selling of them under that size was a fraud on the latter. The late decision of the Court in Little v. Poole, 9 B. & C. 192, proceeded on the same ground. The provisions of the act of parliament relied upon in this case were not intended to protect the purchasers of spirits.] The omission of Clarke's name in the license was a fraud. It was omitted because he carried on the trade of a retailer in spirits within two miles of the distillery. [BAYLEY, J. Your argument is, that because one of the five plaintiffs was doing an illegal act, the trade carried on at the distillery was altogether illegal, and the sale of those spirits was illegal, therefore that the plaintiffs cannot recover. If Clarke had been a mere secret partner, according to your argument, the other plaintiffs could not recover.] If Clarke was a secret partner only at the time when the guarantee was given, he need not have joined in the action, Lloyd v. Archbowle, 2 Taunt 834. But if he was an ostensible partner, it was necessary to join him as one of the parties to the contract. Here he is incapable of suing. The other partners were parties to the concealment from the excise, of the fact of Clarke being concerned *in the distillery, for the very purpose of enabling him to violate the provisions of the act of parliament. Suppose Clarke had filed a bill in equity against the four in whose names the license was taken out, would a courtsof equity have compelled them to account with him as a partner when his name was not in the license, and was left out for fraudulent purposes, and if not, this Court ought not to assist him as a plaintiff in the present action.

Cur. adv. vull.

Lord Tenterden, C. J., now delivered the judgment of the Court. This action was brought by five plaintiffs against the defendant, on a guarantee which he had given to them for the payment (by a person named in that guarantee) of the price of whiskey which should be consigned by the plaintiffs to that person for sale by him, as their agent. By the act of the 6 G. 4, c. 81, s. 7, which regulates the business of distillers, every person who is a distiller ought to be named in the license; and by another act of the 4 G. 4, c. 94, ss. 131, 132, no person who is a retailer or vendor of spirits within the distance of two miles from the place of the distillery can or ought to be licensed as a distiller. One of the five plaintiffs was not named in the license, and that one carried on the business of a retailer of spirits within the limited distance. It was, therefore, contended, that the trade having been carried on by him in violation of the excise regulations (with the knowledge of his co-partners), the plaintiffs could not recover for

the spirits which they had sold, and consequently could not recover against the present defendant, who was the guarantee for their agent. But we think that *981 the plaintiffs are entitled to *recover. There has been no fraud on the part of the plaintiffs on the revenue, although they have not complied with the regulations which it has been thought wise to adopt, in order to secure (as far as may be) the conducting of the trade in such a way as is deemed most expedient for the benefit of the revenue. The cases of Hodgson v. Temple, 5 Taunt. 181, and Johnson v. Hudson, 11 East, 180, are in favour of the plaintiffs' right to recover. In the first of those cases a distiller had sold spirits to a rectifier, who was also a retailer, with the knowledge that his vendee filled both characters; and had delivered the spirits, not at the place in which the retail trade was carried on, but at the place in which he carried on the business of a rectifier, and to which they were delivered, not in the defendant's name, but in the name of another person. That was certainly a very strong case, because there, as it was contended, that was clearly and knowingly to a certain degree violating the law. The Court of Common Pleas, however, thought the plaintiffs were entitled to In Johnson v. Hudson the action was brought to recover the price of tobacco segars; they had been imported into this country from Guernsey; they were sold by the plaintiffs to Hudson, and the plaintiffs had no license as dealers in tobacco, wherefore it was contended, that they could not recover. The Court doubting indeed whether the plaintiffs from this single instance could be considered as dealers, held it not to be such an illegality as to deprive the owner of the goods, who had sold them to another, of his right to recover the price. These *99] cases are very different from those where the provisions of acts *of parliament have had for their object the protection of the public, such as the acts against stock-jobbing, and the acts against usury. It is different also from the case where a sale of bricks, required by act of parliament to be of a certain size, was held to be void because they were under that size. There the act of parliament operated as a protection to the public as well as to the revenue, securing to them bricks of the particular dimensions. Here the clauses of the act of parliament had not for their object to protect the public, but the revenue only. Neither is this one of that class of cases where an attempt is made to recover the price of prohibited goods. On the authority of the two cases which I have mentioned, we think the plaintiffs are entitled to retain their verdict.

Rule refused.

CLAY, Assignee, &c., of S. MALLEYS, a Bankrupt, v. HARRISON.

A., in England, contracted with B. at Petersburgh to send him a cargo of deals, to be paid for by a bill at three months, which he duly accepted. The deals were shipped, and A. effected an insurance. The ship was stranded on the voyage, near Elsinore, and the deals were saved, but so much injured as not to be worth sending for. A., on hearing of the accident gave the underwriters notice of abandonment the day before the bill became due, which they refused to accept. B.'s agent stopped the goods in transitu at Elsinore. A. having become insolvent: Held, that his assignee, under a commission of bankrupt afterwards issued against him, could not recover on the policy, inasmuch as A., after the stoppage in transitu, had not any insurable interest.

ASSUMPSIT on two policies of insurance at and from Saint Petersburgh to Hull, on a cargo of deals by the ship Providence; the interest was laid in the bankrupt S. Malleys. At the trial before Bayley, J., at the Spring assizes for York 1828, a verdict was found for the plaintiff for 2002, subject to the opinion of this Court on the following case:—

Mr. Simeon Malleys, a merchant at Hull, on the 20th of January, 1825, *100] entered into the following contract *with one George Goodwin on the part of Hubbard and Co.:—"Sold Mr. Simeon Malleys, Hull, on behalf and for account of Messrs. John Hubbard and Co., London, two cargoes of deals, deliverable in June and July; say two cargoes to consist of 10,000 and 12,000 each, Petersburgh standard, or thereabouts, best 3-inch deals, averaging about twenty feet in length, of which 1000 each cargo to be white wood, and the remainder red wood, at the price of 5l. 15s. per Petersburgh standard hundred for the red, and 4l. 10s. per Petersburgh standard hundred for the white wood, free on board, with deal ends for broken stowage in the usual proportion. Payment by the buyer's acceptance at three months from date of shipment on receipt of invoice and bill of lading. The ships to be addressed to Mr. Stephen Morgan, St. Petersburgh. Signed George Goodwin, Hull, January 26th, 1825." Stephen Morgan and Hubbard and Co. are the same per-On the 17th of August, 1825, Malleys chartered and sent out, addressed to Hubbard and Co. at St. Petersburgh, the ship Providence, whereof was master John Younger, for the purpose of bringing the said deals to Hull. On the 8th of October, 1825, Hubbard and Co. shipped the deals on board the Providence for Hull, and signed an invoice and bills of lading thereof endorsed in blank, which invoice, and one of which bills of lading, Malleys received in November 1825, and immediately on the receipt thereof accepted a bill for 923k. 2s. 6d., the amount of the invoice, which bill became due on the 24th of January, 1826. On the 7th day of September, 1825, the defendant subscribed a policy of insurance on the deals by the Providence to Malleys for 100l., and on the 15th of October he signed another policy on the deals for 100l., upon which two policies the action was brought. The Providence proceeded on her *voyage, and on the 5th day of January, 1826, was stranded and wrecked off Felskage, near Elsinore. The insured cargo (with the exception of forty or fifty deals) was saved, but so much damaged that the Captain (Younger) did not think it worth sending out a ship for. The average time of passage from Elsinore to Hull is ten days. Malley's agent first heard of the loss on the 23d day of January, 1826, and on that day gave the following notice to the defendant:-"Sir, observing by Lloyd's list a copy of a letter dated Elsinore, 10th of January, saying the Providence, Captain Younger, was stranded at or near Pratoe, I am, therefore, directed by the assured to abandon to you all his right and interest in the said vessel, so far as concerns your subscription of 2001. on policies of insurance effected by me upon her dated the 7th of September and 15th of October, 1825, from Saint Petersburgh to Hull; and I hereby call upon you for the payment of the same as a total loss. I am, Sir, your most obedient servant, S. Malleys, jun." This notice was returned by the defendant, as not being warranted. Malleys was insolvent on the 23d of January, 1826, and on the 24th of January, 1826, the bill accepted by Malleys in November 1825 was duly presented for payment and dishonoured. On the same day Hubbard and Co. wrote their agents at Elsinore with instructions to take possession of the cargo for them as being their property. On the 2d day of February, 1826, Malleys's agent sent the following notice to the defendant :- "Sir, I beg leave to inform you that a letter has been received from Captain Younger, stating the loss of the Providence at Felskage on the 5th of January last; I am, therefore, directed by the assured to abandon to you all his right and interest in the said vessel, so far as *concerns your subscription of 2001. on policies of insurance effected by me upon her, dated the 7th of September and 15th of October, 1825, from Saint Petersburgh to Hull, and I hereby call upon you for the payment of the same as a total loss." On receipt of both notices the defendant said, he would only accept them if Malleys could put him in possession of the goods saved. On the 4th day of February, 1826, the defendant received the following notice from the agent of Hubbard and Co.:- "Sir, I am directed by Mr. Stephen Morgan of Saint Petersburgh, and Messrs. John Hubbard and Co., London, to give you notice not to pay the loss on deals per Providence, Captain Younger, from Petersburgh, otherwise than to their order, to whom the interest on board the vessel solely belongs." On the 3d of March, 1826, the agent of Hubbard and Co. at Elsinore received from them one of the bills of lading, which was to order, and endorsed in blank, and which had been sent out by them on the 21st of February, 1826, and thereupon applied to the agent of

the ship, who agreed to deliver the cargo; but no further possession was taken until a public sale was fixed upou, which took place on the 22d of May, 1826, the net proceeds of which, 271l. 7s. 10d., have been received by Hubbard and An action was commenced by Hubbard and Co. against Malleys in Easter term, 7th of Geo. 4, on the bill of exchange accepted by him, and notice of trial was given for the first sittings in Trinity term, but the record was afterwards Malleys became bankrupt on the 23d of May, 1826. There was a valid trading, petitioning creditor's debt, and act of bankruptcy, and the plaintiff was duly appointed the sole assignee of the bankrupt's estate. The bill of exchange accepted by Malleys still remains in the possession of Hubbard and Co., but has *not been proved on Malleys's estate. The question for the *1037 opinion of this Court was, whether the plaintiff, as assignee of the estate and effects of S. Malleys, was entitled upon these facts to recover the sum of 2001. on the two policies? If the Court should be of opinion that the plaintiff, as such assignee, was entitled to recover the said sum of 2001., the verdict was If the Court should be of a contrary opinion, then a nonsuit was to to stand. be entered.

Patteson for the plaintiff. There are three grounds on which the plaintiff is entitled to judgment: first, without regard to the question of stoppage in transitu, there was a complete total loss as between the underwriters and the assured, before any proceeding to stop in transitu took place, and at a time when the bankrupt and no one else was interested in the goods: secondly, there could not be any stoppage in transitu at the time when it was attempted, for two reasons, viz., that before that time a complete change of property had taken place, and the goods had become vested in the underwriters; or if not, still, under the circumstances, the voyage had terminated before the stoppage was made, and so the right of stoppage was gone: thirdly, stoppage in transitu does not destroy the contract, but only revests a lien; the property in the goods remains in the buyer, and he has an insurable interest. The dates are material to the first point. By the contract, the bankrupt was to pay for the goods by bill. was duly accepted, and became due on the 24th of January, 1826. The loss was on the 5th of January, and the news of it arrived on the 23d, and notice of abandonment was given the same day, before the bill became due, and before any attempt *was made to stop in transitu. [Lord Tenterden, C. J. *104] The effect of the stoppage is the only question. BAYLEY, J. Does an abandonment vest the property?] If the underwriters had accepted the abandonment, the property would have vested so as to oust the right of stoppage. Now, they ought to have accepted it, and therefore, as to the plaintiffs, they must be considered in the same situation as if they had actually done so. Again, the voyage in fact ended where the ship was stranded, and the transitus of the goods ended at the place where they were landed and accepted by the bankrupt. The law, as laid down by Lord Kenyon, in Holst v. Pownal, 1 Esp. 240, on this point, was much qualified by the decision of this court, in Foster v. Frampton, 6 B. & C. 107, where it was held that if goods are sent to be delivered at a particular place, and the consignee takes possession before they arrive, the transitus is thereby ended. [Lord TENTERDEN, C. J. What act of acceptance did the bankrupt do in this case?] None, certainly, except the abandonment; and if that was not sufficient, the plaintiffs must rely on the third point, viz., that the stoppage in transitu does not rescind the contract ab initio, but only revests a lien. In Hodgson v. Loy, 7 T. R. 445, Lord Kenyon said, that "the right of the vendor to stop in transitu was a kind of equitable lien, adopted by the law for the purposes of substantial justice, and that it did not proceed on the ground of rescinding the contract." And in Lickbarrow v. Mason, 6 East, 24 n., Buller, J., says, that the right to stop in transitu is not founded in property, but necessarily supposes the property to be in some other person. By the common law the property in goods passes by the sale; if payment *is to be made immediately, the vendor has a right to hold them until the payment is made; but if credit is given he cannot do so, Bloxam v. Sanders, 4 B.

& C. 941. [BAYLEY, J. Does not the vendor by stopping in transitu abandon all rights that he had against the purchaser?] No; for he may afterwards sue him for goods bargained and sold, Kymer v. Suwercropp, 1 Campb. 109; the assured, therefore, had an insurable interest which he might abandon. After the bankruptcy, the assignees had a right to pay the money and claim the goods, notwithstanding the stoppage in transitu: the effect of that proceeding was merely to place the vendor in the same situation as if the goods had always remained in his possession. [LITTLEDALE, J. According to Langfort v. Tiler, Salk. 113, the vendor may resell goods if they are not duly paid for.]

Pollock, contrd. In this case there was no actual total loss, otherwise no question as to stoppage in transitu could have arisen. That right continues until the arrival of the goods at the intended place of delivery; the mere accident of the voyage being interrupted or put an end to by the stranding of the vessel could not alter the vendor's rights. As to the main question, it was expressly held in Lett v. Cowley, 7 Taunt. 169, that by a stoppage in transitu the contract was rescinded, and that the goods having been delivered by the carrier to the consignee after notice to stop them, the vendor might maintain trover against the assignees of the consignee to whose possession the goods had come. So, also, the case of the Constantia, 6 Rob. A. R. 321,(a) appears to have proceeded on the *right of the consignor to rescind the contract by stopping goods in transitu, in the event of the insolvency of the consignee.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J. The question in this case was, whether the bankrupt had an interest in the goods insured at the time of the loss? and that depended on the effect which is to be given to the stoppage in transitu. It was argued on the part of the defendant that its effect was to rescind the contract, and to revest the property in the original owners; on the part of the plaintiffs that it only restored to the owners a right of possession, and placed them in the same situation as if they had not parted with the goods. There does not appear to be any case in which this point has been expressly decided. But we are of opinion that, under the peculiar circumstances of the present case, the bankrupt, after the stoppage in transitu, had no property in the goods insured; and, therefore, this action cannot be supported.

(a) Cited in Abbott on Shipping, 371.

(b) It appears from the special case, that by the contract between the bankrupt and the vendors the latter were to supply a cargo of timber. There was no bargain for any specific ascertained chattel, but the vendors were at liberty to supply any timber answering the description of that ordered; and, consequently, no property passed till the cargo of timber was appropriated by the vendors to the vendee, by the delivery on board the ship. The subsequent stoppage in transitu, supposing it had only the effect of revesting the possession in the vendors, and placing them in the same situation as if they had not parted with the goods, destroyed the effect of that delivery, which was the only circumstance which vested the property in the vendee; and, consequently, the property revested in the vendors. They then were exactly in the same condition as if the goods had always remained in their warehouses; and in that case the bankrupt would have had no interest in the goods: his rights, if any, would have rested is contract merely.

*MASON v. WALLIS. Nov. 28.

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By a judge's order a cause was referred to an arbitrator, so as he should make his award in writing on or before the lst day of July then next, or on or before such further or ulterior day as he should appoint in writing, under his hand, to be endorsed on that order, and the Court of King's Bench or a Judge thereof should order. The arbitrator, by endorsement on the order, enlarged the time; but at the time when he made his award no Judge's order had been obtained ratifying that enlargement: Held, that the arbitrator had no authority, and that the award was bad.

ALL matters in difference in this cause were, by a Judge's order, dated the 19th June, 1822, referred to S. B., so as he should make his award in writing on or before the first day of July then next, or on or before such further or ulte-

rior day as he should appoint in writing under his hand, to be endorsed on that order, and the Court of King's Bench, or a Judge thereof, should order. All the costs were to abide the event of the award. The arbitrator, by endorsement on the order, dated the 29th of June, 1822, enlarged the time until the 6th of November then next. By a second endorsement, dated the 6th November, 1822, he further enlarged the time until the 23d of January then next. By a third endorsement, dated the 23d of January, 1823, he further enlarged the time until the 16th of April then next. The last meeting before the arbitrator was on the 7th of April, 1823. By a fourth endorsement, dated 16th April, 1823, he further enlarged the time until the first of June, 1823. No Judge's order was obtained in respect of any of these enlargements. The award was dated the 31st of May, 1823, and ordered the defendant to pay the sum of 11l. 6s. 7d. in full satisfaction of all demands. The award recited the order of reference, but did not recite any of the enlargements. The plaintiff proceeded to make the Judge's order a rule of Court, and the several endorsements were made a part of the rule. The plaintiff then taxed his costs, and demanded the sum awarded and the taxed costs; and, upon a refusal to pay, he moved for an attachment.

*Barstow now showed cause. The award was not duly made, the en-*108] largement of the time not being authorized by the terms of the order of The arbitrator was to make his award within a limited time, or such further time as he the arbitrator should appoint and a Judge should order. Judge's order, therefore, was essential to authorize the arbitrator to make an award after the day mentioned in the first order had passed. In Reid v. Fryatt, 1 M. & S. 1, the terms of the order of reference were the same. There a Judge's order was obtained after the time limited for making the award, but before the award was made, and that was held to be sufficient; but it was assumed that such an order was necessary at some time before the award was made. order whatever was obtained. It will be said that the defendant has waived this objection, by attending before the arbitrator, and Lawrence v. Hodgson, 1 Younge & J. 16, will be relied on; but it does not appear here that the defendant knew there was no proper enlargement. Besides, there was no meeting after the last enlargement. On the 31st of May, therefore, when the arbitrator made his

award, he had no authority, Dickins v. Jarvis, 5 B. & C. 528, George v. Lousley, 8 East, 13, Davis v. Vass, 15 East, 97, Wohlenberg v. Lageman, 6 Taunt. 251,

and Halden v Glasscock, 5 B. & C. 390. Power to enlarge was not given to the arbitrator alone.

Hutchinson, control. It is not competent to the defendant to make the objection. He has admitted, by attending before the arbitrator, that the latter might act *by an enlargement made by himself alone, Lawrence v. Hodgson. But, independently of this, as the rule of Court embodied all the enlargements, the Court will presume that sufficient evidence was then laid before them of the enlargements having been duly made, as the defendant does not swear that no Judge's order was made. The Court will presume anything against such an objection, and according to Bayley, J., in Dickins v. Jarvis, will presume it was not made a rule of Court without sufficient evidence of proper enlargement.

BAYLEY, J. The objection must prevail. Assuming the defendant waived the objection by attending before the arbitrator, still there is no waiver so far as the last enlargement was concerned. The arbitrator had no authority, therefore, when the award was made. We cannot presume that Judge's orders were obtained merely because the rule was drawn up. If there were orders then produced, that would appear on the face of the rule, which in that case would be

drawn up "on reading" those orders as well as enlargement.

LITTLEDALE and PARKE, Js., concurred.(a) Rule discharged.

⁽a) Lord TENTERDEN, C. J., was absent from indisposition.

*THRUSTOUT, dem. JONES the Elder, and JONES the Younger, v. SHENTON. Nov. 23.

Where three ejectments were brought against a landlord and his two tenants, and the landlord obtained a rule for the consolidation of the three actions, and that the ejectment against one of the tenants (who was a pauper) should abide the event of the ejectment against the other, and that action was tried, and the lessor of the plaintiff obtained judgment and took possession of all the tenements, the Court compelled the landlord to pay the coats of that ejectment.

A RULE nisi had been obtained by W. J. Alexander early in the term, calling upon Henry Wright to show cause why he should not pay the taxed costs of the above action tried at the last Lent assizes for Stafford, and the costs of this appli-Three actions of ejectment had been brought by the lessor of the plaintiff, one against Henry Wright, another against Francis Hawford, and a third Wright was the landlord of the whole preagainst the above-named Shenton. Shenton and Hawford were paupers. mises, and the other two his tenants. Wright, instead of entering into the landlord's rule, obtained a rule for the consolidation of the three actions, and that the ejectment against Hawford should abide the event of the action against Shenton, if the verdict was to the satisfaction of the judge who should try the cause. The action against Shenton was tried, and a verdict found for the lessor of the plaintiff; and judgment thereon having been entered up, the lessor of the plaintiff had entered into possession of all three tenements; no process had issued against Shenton for levying the costs of the said action.

Gurney and Whateley showed cause. Three actions ought not to have been brought. The lessor of the plaintiff should have attended to the terms of the consolidation rule, and if he feared for his costs, ought to have tried the action

against Wright.

*Campbell and W. J. Alexander, contrd. Wright is the person beneficially interested, for he is landlord. Without him there would probably have been no defence. The consolidation rule was a trick to evade the costs. Wright does not venture to swear that he had Shenton's authority to make defence; and it appears that he (Wright) gave directions to his own attorneys to defend the action. Those attorneys do not swear that they look to Shenton for the costs; and there is no doubt that they consider Wright answerable for them.

BAYLEY, J.(a) Wright was tenant as to part and landlord as to whole. gave directions to his attorneys to defend, and he was the person interested in that He, therefore, should pay the costs. The proper way of proceeding would have been that one action only should have been brought, and an order should have been obtained to include all three defendants in the declaration, in which case the costs would have fallen on Wright. In the present case, it is but just that he should pay them. The court will exercise an equitable jurisdiction over the proceedings in actions of ejectment, which, for the purposes of justice and convenience, may be said to be peculiarly its own creature. I think that the rule should be made absolute, and that Wright should pay the costs of the action, but not of this application; for as Wright was the tenant in possession of part of the premises, and landlord of the whole, and substantially the defendant in all the three ejectments, an application should have been made by the lessor of the plaintiff, either to this Court or to a Judge at chambers, *to set aside, with costs, the appearances and pleas of the defendants, and for such lessors to be at liberty to sign judgment against the casual ejectors, unless the landlord would come in and defend as landlord for these premises in the possession of his two tenants (Shenton and Hawford). Or (as the landlord was one of the parties served with an ejectment) the lessors of the plaintiff might have obtained a consolidation rule, that the ejectments brought against the tenants should have abided the event of the verdict in the action against the landlord, taking care to have incorporated into such rule that he (the landlord) should pay the costs of those ejectments brought against the tenants, in the event of such verdict being in favour of the lessors of the plaintiff; but as the lessors of the plaintiff did not think proper to do so, but chose rather to proceed against the tenants (Shenton and Hawford), without making such application to set aside the proceedings, or obtaining such order, I think they are not entitled to the costs of this application.

LITTLEDALE and PARKE, Js., concurred.

Rule absolute, without costs.

THRUSTOUT dem. JONES v. NIXON.

This was another ejectment (which had not been tried), brought by the same lessors of the plaintiff against the defendant, a tenant of another part of the premises; and the lessors of the plaintiff obtained a rule for setting aside the *113] appearance, plea, and other *proceedings, if any, entered in this cause, with costs, and that Henry Wright should have leave to appear and defend as landlord for this and all the other ejectments brought in respect of the premises in question; and on the 8th December, 1829, Mr. Justice BAYLEY made an order that Wright should appear within a fortnight, and defend as landlord in this and all other ejectments brought in respect to the premises, and that in default thereof, judgment in this and all the other ejectments should be signed against the casual ejector.

BERKELEY v. DIMERY and Another.

Trespass for breaking and entering the plaintiff's close, and cutting heath, &c. Plea, not guilty. Verdict for the plaintiff. The defendant committed the trespasses by direction of Joseph Brune Hill. The furze and heath when cut were taken to his premises and there consumed. Taunton, in Hilary term, moved for a rule nisi calling upon J. B. Hill to show cause why he should not pay to the plaintiff 4111. 13s. 6d., the damages and taxed costs; and he relied upon the above case of Thrustout v. Shenton, and urged that the plaintiff at the time when he commenced the action might not have known that J. B. Hill was the responsible trespasser.

Lord TENTERDEN, C. J. In ejectment the tenant in possession must be sued; and the Court will not permit a person to put a mere pauper into possession merely to evade the costs. Here thill might have been sued as a trespasser either jointly or singly, and if he had been sued singly, the now defendants might have been called as witnesses. It is said that the plaintiff did not know that Hill was the substantial defendant. Parties should take care before and when they sue, to ascertain who is the substantial defendant. If the Court were to grant this rule, the application to subject to costs persons who were not parties to the record would be very frequent.

Rule refused.

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*TINMOUTH v. TAYLOR. Nov. 24.

A plaintiff in execution upon a judgment obtained against him for 341., and who had been in prison more than twelve months, held not entitled to be discharged under 48 G. 3, c. 123. Semble, that that act does not apply to plaintiffs in execution upon a judgment.

ARCHBOLD had obtained a rule nisi to discharge the plaintiff out of custody under the 48 G. 3, c. 123, he having been in execution more than a twelvementh for 34L, the costs in this action, in which a verdict had passed against him.

Coltman showed cause. An attachment for non-payment of a sum of money under 20l., awarded to be paid, was held not to be within the statute, on the ground that the party was not in execution on a judgment, Rex v. Hubbard, 10 East, 408. So, where a defendant, found guilty upon an indictment for an assault, was brought up for judgment, and it was referred to the master, who awarded 13l. 15s. damages, and 60l. 17s. 7d. costs, for non-payment whereof he was attached, it was held that the defendant was not entitled to his discharge, Rex v. Dunne, 2 M. & S. 201. In Rovlance v. Hewling, 3 M. & S. 282, a Vol. XXI.—8

plaintiff in custody for the costs of a nonsuit amounting to 181. was held to be entitled to his discharge, on the ground that the costs became a debt by the judg-Independently of that authority, it might be contended that the act applied only to defendants. The title is an act for the discharge of debtors in execution for small debts. The preamble recites that it would tend to the relief of debtors in execution for small debts, and occasion no material prejudice to trade and public credit, if such debtors should be discharged: and it then enacts, *that all persons in execution upon any judgment for any debt or damages, exclusive of costs, shall be discharged, &c.; and in the latter part it authorizes the party "to bring any such action, or use any such remedy, for the recovery and satisfaction of his, her, or their demand against any other person liable to satisfy the same, as might have been done if the debtor had never been taken in execution;" and afterwards, "that no proceedings shall be taken against the bail." All these provisions point to the case of a defendant, not of a plaintiff. If, however, the case is to be governed by Roylance v. Hewling, it must be adopted throughout. If the costs are a debt, they are in this

case a debt exceeding 201.

Archbold, contrd. The words of the statute are, "that all persons in execution upon any judgment for any debt or damages, not exceeding 201., exclusive of the costs recovered by such judgment, may be discharged." The intention of the legislature was, that a party should not be detained in custody for costs at all. It is wholly immaterial whether the costs be more or less than 201.

The debt or damages, exclusive of the costs, are not to exceed 201.

BAYLEY, J. We must decide upon the words of the act of parliament; and if we can collect from them that a party circumstanced as this plaintiff is, is entitled to his discharge, we must make the rule absolute. The words of the statute are, "that all persons in execution upon any judgment obtained in any court, &c., for any debt or damages not exceeding 201., exclusive of the *costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, may, upon application for that purpose, in the manner therein mentioned, be forthwith discharged out of custody, as to such execution, by the rule or order of such court." That language, prima facie, applies to defendants only; and looking to all the provisions of the act, I do not see any of them that have the least reference to the case of a plaintiff in execution. In Roylance v. Hewling, it appears that I doubted whether it extended to plaintiffs as well as defendants; and upon the case being mentioned when the court was full, Lord Ellenborough said that the costs became a debt by the judgment, and therefore the plaintiff ought to be discharged. Assuming that decision to be correct, the costs in this case became a debt by the judgment: the plaintiff is in custody in execution upon a judgment for a debt exceeding 201; this, therefore, is not a case within the statute.

LITTLEDALE, J. It seems to me that the words of the act of parliament manifestly apply to defendants. But assuming that they may apply to plaintiffs, the costs became, by reason of the judgment, a debt which exceeds 201; the plaintiff, therefore, is not entitled to his discharge. The only ground upon which it has been contended that this case falls within the act, is, that it totally disregards any debt arising from costs. It seems to me, however, that the act disregards a debt arising from costs only where it does not exceed 201.

Here the debt exceeds that sum.

*PARKE, J. This is not a case within the act of parliament; for, assuming that it applies to the case of a plaintiff in execution, still, according to Roylance v. Hewling, if the costs by the judgment become a debt, it is a debt exceeding 20l., and, therefore, not within the act of parliament.

Rule discharged.

DONLAN v. BRETT. Nov. 24.

In order to entitle a defendant to his costs under the statute 43 G. 3, c. 46, s. 3, on the ground that the plaintiff had arrested him for a larger sum than he afterwards recovered, it is sufficient to show that the plaintiff had no reasonable or probable cause for procuring the defendant to be arrested for that sum; it is not necessary to show malice.

In this case the plaintiff had arrested the defendant for 575l., and recovered at the trial 89l. 7s. 6d. only. A rule nisi had been obtained by Hutchinson for allowing the defendant his costs, pursuant to the statute 43 G. 3, c. 46, s. 3. It appeared by the plaintiff's affidavit in answer to the rule, that the defendant was indebted to him, exclusive of the sums recovered at the trial, in 400l., being the balance remaining unpaid of the purchase-money for the next presentation of a living bargained and sold by the plaintiff to the defendant on the 17th of July, 1828, which the defendant had repeatedly promised to pay, and in other sums amounting to near 90l., for which the plaintiff held receipts signed by the defendant, but which being unstamped, could not be produced in evidence.

Platt now showed cause. Assuming that the 400l., the balance due for the next presentation of a living bargained and sold (that bargain and sale not being shown to be by deed), did not constitute a debt for which an action might be maintained, and that the plaintiff had no probable cause for arresting the defendant for that sum; *still it is quite clear that the facts disclosed in the affidavit would be amply sufficient to negative malice in any action brought against the plaintiff for maliciously arresting the defendant for a larger sum than he ought. In Silversides v. Bowley, 1 B. Moore, 92, the plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to an order of reference for ascertaining the amount of the damages, and the arbitrator awarded a less sum than 151. The Court of Common Pleas, upon application, refused to allow the defendant his costs pursuant to the statute; and Dallas, C. J., laid it down, that, in order to entitle a defendant to his costs under the statute, he must show that the arrest was vexatious and malicious, and Lord Ellenborough, C. J., at chambers, always put the same construction upon the . statute.

BAYLEY, J. The question in this case is not whether an action for a malicious arrest is maintainable, but whether the plaintiff had any reasonable or probable cause for procuring the defendant to be arrested and held to special bail for 5751. The 43 G. 3, c. 46, s. 3, enacts, "that in all actions wherein the defendant shall be arrested and held to special bail, and wherein the plaintiff shall not recover the amount of the sum for which the defendant in such action shall have been so arrested and held to special bail, such defendant shall be entitled to costs of suit, provided that it shall be made appear to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the *plaintiff in such action had not any reasonable or probable cause for causing the defendant to be arrested and held to special bail in such amount as aforesaid." Then the only question is whether it appears here satisfactorily to the Court that the plaintiff had not any reasonable or probable cause for causing the defendant to be arrested for 575l. Now it is quite clear that he could have no right to arrest the defendant for the sum of 400l., alleged to be due for the next presentation of a living bargained and sold. That is an incorporeal hereditament, and can only pass by deed; unless, therefore, the right of the next presentation were granted by deed, there was no consideration for the promise alleged to have been made by the defendant, consequently there was no debt. The plaintiff had no reasonable or probable cause for arresting him for that sum.

LITTLEDALE, J. The defendant is entitled to his costs if the plaintiff had no reasonable or probable cause for arresting the defendant for the larger sum. It is not necessary that the arrest should have been malicious.

PARKE, J. The decisions on the point may have been different, but we are

bound to decide according to the words of the act of parliament, and they only require that the plaintiff should have no reasonable or probable cause for arresting for the larger sum.

Rule absolute.(a)

(a) The same point was decided this term in Hix v. Yeo.

*DAY v. PICTON. Nov. 24.

Г*120

A plaintiff had sold goods to defendant, to be paid for half in ready money and half by bill at three months. The defendant having refused to pay the half in ready money, the plaintiff arrested him for the full price of the goods: Held, that he had no reasonable or probable cause for so doing, and that defendant was entitled to his costs pursuant to 43 G. 3, c. 46.

THE defendant bought two lots of wine of the plaintiff.

The bargain was that it was to be paid for half in ready money, and half by bill at three months. The defendant paid for the half of the first lot in cash. The other lot was delivered, and the half of its price was demanded, with a bill for the remaining half of both lots. On non-payment of the half of this last lot down, the plaintiff arrested the defendant, and held him to bail for the whole balance due, including the halves of the two lots for which three months' credit was bargained for. The defendant, immediately after purchasing the wines, sold them for ready money, at prices lower than he engaged to pay for them. At the trial the plaintiff recovered only the first half of the second lot; and a rule having been obtained for allowing the defendant his costs, pursuant to statute 43 G. 3, c. 46,

Gurney and White now showed-cause. Here there was reasonable and probable cause for the arrest. The plaintiff after the delivery of the second lot of wines applied for the half of its price, which was agreed to be paid in cash, and for a bill at three months for the remaining half of the prices of both lots. Both were refused. The refusal induced a suspicion in the plaintiff's mind that he had been swindled out of his property. And this suspicion is fully borne out by the fact that the defendant sold the wines for ready money at prices considerably lower than those agreed to be given by him. These circumstances would have been sufficient to induce a *judge to grant a special order for the defendant's arrest; and although a person skilled in law would have known that such an order was necessary to justify an arrest for the second half of the prices, it would be too much to expect in a wine merchant the knowledge of a lawyer. In the present case there is not merely a negation of malice in the plaintiff, but there is also what must be considered a reasonable and probable cause for the arrest in the full amount.

BAYLEY, J.(a) Any lawyer, to whom the plaintiff might have mentioned the circumstance, must have known that the sum for which he arrested the plaintiff did not constitute a debt till the credit had expired. There cannot, therefore, be said to have existed any reasonable or probable cause for procuring the defendant to be arrested and held to special bail in the amount to which the plaintiff has sworn.

LITTLEDALE, J. The plaintiff might perhaps consider the defendant equitably indebted to him in the full amount, but at law he was clearly not so, until three months had elapsed. There was no reasonable or probable cause for making the arrest for the full price of the wine, for there was no debt to that amount then due.

PARKE, J., concurred.

Rule absolute.

*R. C. PEASE, J. K. WATSON, H. PEASE, and T. B. LOCKE, who have survived R HARRISON, their late Partner, deceased, v. JONATHAN HIRST, EDWIN HIRST, FRANCIS HIRST, and WIL-LIAM WELBANK. Nov. 24.

A. wishing to obtain credit with his bankers, in 1817, prevailed upon three persons to join him in a promissory note, whereby they jointly and severally promised to pay the bankers or order 300%. The bankers gave A. credit in his pass-book for 300% on account of the note, and charged him with interest for the same yearly. Upon two of the partners retiring from the banking-house a balance was struck between the old and new firm, and the promissory note was delivered to the new firm, but not endorsed to them. A. at one time had in the hands of his bankers a balance exceeding the amount of the note. He paid interest to the bankinghouse annually.

Held, first, that the note being payable to the five members of the banking-house or order, and being evidently intended to be a continuing security, the makers were liable upon it, not-withstanding a change in the members of the banking-house.

Secondly, that an action on the note (the same not having been endorsed) was properly brought in the name of the payees of the note.

Thirdly, that the note was not discharged by reason of A. at one time having in the hands of the banker a balance exceeding in amount the sum secured by the note.

Fourthly, that the payment of interest within six years by A. on the note was evidence of an acknowledgment by all the joint makers of the note, so as to take the case out of the statute of limitations.

This was an action on a promissory note, bearing date the 6th of January, 1817, whereby the defendants jointly and severally promised to pay on demand Messrs. Pease, Harrison, and Co., or order, 300l., with lawful interest for the same, value received. Plea, general issue and statute of limitations. At the trial before Bayley, J., at the summer assizes for the county of York 1828, the following appeared to be the facts of the case: - The plaintiffs and Robert Harrison, in January 1817, carried on business at Kingston-upon-Hull under the firm of Pease, Harrison, and Co. The defendant, Jonathan Hirst, had for some years before kept an account with them, as his bankers; and at that time, in order to obtain credit with them, he prevailed with the other defendants to join him in the promissory note in question. The note was deposited with the *123] bankers, and they gave him credit for 300l. on account *of it in his pass-book, and charged him interest for the same yearly. In November 1820 R. C. Pease and H. Pease retired from the banking-house. A balance was then struck between the old and new firm, and the account of Jonathan Hirst was transferred in the books from the old to the new firm. The promissory note was handed over to the new firm, but was not endorsed to them. In December 1821 Harrison died. The account was transferred to the new firm as on the former occasion. The other two members of the old firm, Locke and Watson, continued the business together, with two new partners, up to the time when this action was brought; and as the new partners entered, the account of Jonathan Hirst was transferred to the new firm, and the promissory note handed over to them. Hirst had at one time in his bankers' hands a balance in his favour of near 700l.; but it did not appear that that was a money balance. was charged by the successive firms with interest upon the promissory note down to the year 1824, and allowed the same in account with the bankers. It was contended, on the part of those defendants who were mere sureties for Jonathan Hirst, that as on every change of the firm a balance was struck, and a new account opened, the note became one of the securities of the new firm; that the defendants, therefore, were liable upon the note to the new firm, and could not be sued by the partners who had retired from it. Secondly, that as against the sureties there was no acknowledgment of a debt within six years, the payment of interest having been made by Jonathan Hirst, not to the original payees, but to those persons who were members of the firm at the time of such payment The jury, under the direction of the *learned Judge, found a verdict for the plaintiffs, but liberty was reserved to the defendants to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

The Attorney-General now showed cause. The payees of the note, if alive, or the survivors of them, who have the legal interest in the note, are the persons entitled to sue upon it. The note cannot be considered as having been discharged by reason of Jonathan Hirst's having in the hands of the bankers a balance equal in amount to the sum for which the note was given. It does not appear that that was a cash balance in his favour; but assuming that it was, the bankers were not bound to apply that balance in discharge of the debt due to them on the promissory note. That note was intended by all parties to be a continuing security for all advances made from time to time by the bankers. The debtor, if he had intended that the note should be discharged by such balance, should have made a specific appropriation, Brook v. Enderby, 2 B. & B. 70. The payment of interest by one of several joint promisors is to be considered in law a payment by all: it operates as an acknowledgment of the debt by all,

Burleigh v. Stott, 8 B. & C. 36.

F. Pollock, and Alderson, contrd. The note was given to the persons who constituted the banking-house in January 1817. By the change in the firm the responsibility of the maker ceased. The note became the property of the successive members of the new firm. It was treated as such by the bankers as well as *by Jonathan Hirst. The members of the banking-house (in whom the property now is) are the persons entitled to sue. Three of the defendants are mere sureties; they, in effect, agreed in January 1817 to guaranty to certain individuals (then constituting the firm of Pease and Co.) the payment of any sum (not exceeding 300l) advanced to Jonathan Hirst. [BAYLEY, J. They do not appear on the face of the instrument to be sureties.] The form of the instrument cannot vary the nature of the contract. Then this being a note payable instanter, they were bound (in favour of the sureties) to apply the first available balance in their hands belonging to Jonathan Hirst in discharge of the note, Clayton's case, 1 Mer. 592, Bodenham v. Purchas, 2 B. & A. 39, Simson v. Ingham, 2 B. & C. 65. Then as to the statute of limitations, the payment of interest by Jonathan Hirst is not any acknowledgment of a debt due to the present plaintiffs by the three defendants, who are mere sureties. It was paid by Jonathan Hirst on account of the several debts due from him to the bankinghouse, and it was paid not to the present plaintiffs but to the persons who, from time to time, were members of the banking-house.

BAYLEY, J.(a) It seems to me that the plaintiffs are entitled to retain their verdict. One objection is, that this being a note in which three of the four defendants joined as sureties to a banking-house (in which the plaintiffs and Harrison were partners), the liability of the defendants has ceased by the subsequent change in the firm. But a surety bond or instrument may be so framed as to comprehend future as well as present *partners. Here by the form of the instrument none of the parties have placed themselves in the condi-They appear on the face of the instrument to be principals, tion of sureties. and not to have confined their liability to the then existing partners in the banking-house, for the note is made payable to them or order. It was evidently intended that it should continue from time to time to be an available security to such persons as afterwards constituted the members of the house. Another objection is, that this note was discharged by a balance belonging to Jonathan Hirst, which afterwards came into the hands of the banker. It was contended that the plaintiffs are bound to consider the debt due on the note as paid and wiped off by that balance. It does not appear that that was a cash balance; but if it had been, the bankers would not have been bound to apply it in payment of the note. It would be directly contrary to the intention for which the note was given that it should be paid off by the first money of Jonathan Hirst which came to the hands of the bankers. If the persons who were in substance, though not in form, sureties, had desired the bankers so to apply the balance, they, perhaps, would have been bound so to apply it. Then it is said that the

action is not properly brought in the names of the plaintiffs. It appears that when a change in the firm of the banking-house took place, the note was transferred in account from the old to the new firm, and interest was paid by Jonathan Hirst from time to time to the different firms as if it was a debt due to the persons successively constituting that firm. It is said that the note was considered by all parties to be for the benefit of the new house; and, therefore, that the persons who are now partners in the banking-house must suc. It seems to *me that the action has been rightly brought in the names of the members of the firm to whom the note was given. If the note had been endorsed to the new firms, then the action must have been brought in the names of the endorsees; but not having been so endorsed, the action is properly brought in the name of the original payees for the benefit of the parties interested. Then it is said, that as to the three defendants who are mere sureties, there was no acknowledgment of the debt within the six years. Here interest on the debt has been paid within that time by one of the four persons jointly liable. That takes the case out of the statute as to all.

LITTLEDALE, J. I am of the same opinion. The payment of interest by Jonatham Hirst, one of the joint promisors, takes the case out of the statute of limitations as to all. Then as to the change of the members of the banking-house, although all the securities belonging to the old firm were handed over to the new firm, still the persons entitled to the legal interest in those securities must sue upon them. Suppose that a bond instead of a note had been given as a security for advances to the members of the firm as they then existed, as well as to any new member of which it might afterwards be composed, the proper

persons to sue would be the surviving obligees.

The next question is, has the note been paid of

The next question is, has the note been paid off by the bankers having struck a balance which was in favour of J. Hirst. It was evidently not intended by the parties to consider it as satisfied as soon as there should be a balance of 300% in the hands of the bankers. It was intended to be a continuing security for advances to be made from time to time. It is made payable to order on *128] ers to appropriate that balance to the discharge of the note; and there having been no appropriation by the debtor, I think the debt cannot be considered as discharged.

(a) PARKE, J., having been counsel in the cause, gave no opinion.

DICKINSON v. VALPY. Nov. 25.

In an action on a bill of exchange, purporting to be drawn and accepted by a mining company, wherein the plaintiff, an endorsee for value, sought to charge the defendant as a member of that company, it was proved that the bill had been drawn and accepted by order of the directors of the company. It was proved further, that the company had entered into a contract for the purchase of mines, taken a counting-house in London, engaged clerks, and also an agent to reside in the country, and had worked some of the mines; that the defendant having applied to the secretary of the company for shares, some were appropriated to him; that he paid an instalment of 151. per share; that he attended at the counting-house of the company, and there signed some deed, and afterwards attended a general meeting of the shareholders: Held, that assuming this to be sufficient evidence of the defendant's being a partner in the company, it was incumbent on the plaintiff to prove that the directors of that company had authority to bind the other members, by drawing and accepting bills of exchange; and that the plaintiff not having produced the deed of co-partnership, nor given any evidence to show that it was necessary, for the purpose of carrying on the business of that mining company, or usual for other mining companies to draw or accept bills of exchange, there was no evidence to go to the jury of such an authority to draw or accept any bills, and still less to draw or accept bills in this form, which in effect were promissory notes.

Semble, also, that there was not sufficient evidence to show that the defendant had ever become a complete partner in the company, or that he had held himself out to the world as such partner.

THIS was an action by the plaintiff as endorsee of the following instrument: £300 0s. 0d. "Redruth, March 30th, 1826.

"Two months after date, pay to the order of Mr. Thomas Teague, three hundred pounds, value received as advised.

"For the Cornwall and Devonshire
"Mining Company.

"ROWLAND WILKS."

"To the Cornwall and Devonshire "Mining Company,

"Lombard-street, London."

The first four counts of the declaration described the instrument as a bill of exchange, charging the *defendant as drawer and acceptor; and the fifth described it as a promissory note. Plea, general issue. At the trial before Burrough, J., at the summer assizes for the county of Somerset 1827, the following appeared to be the facts of the case. The bill was endorsed for value by one Teague to the plaintiff; and having been dishonoured when due, the plaintiff now claimed to recover the amount from the defendant as a member of the Cornwall and Devonshire Mining Company. In order to show that he was a partner in that company, the plaintiff proved that in the early part of the year 1825 certain persons associated themselves together for the forming of a company, for the purpose of working mines in Devonshire and Cornwall. the 7th of April in that year a meeting of those persons was held, at which resolutions were passed that there should be a company formed, with a capital of one million, in shares of 50l. each; that mines in Cornwall should be purchased, and that there should be directors, a treasurer, a secretary, and other officers, and bankers to the company. These resolutions were advertised in the newspapers. A counting-house was taken in London for transacting the business of the company, clerks were engaged, a contract was entered into for the purchase of mines in Cornwall, an agent was employed to reside there, and some of the mines were actually worked. The defendant, on the 6th day of April, applied to the secretary of the company for thirty shares, and ten were appropriated to him. Upon these shares, he paid to the bankers of the company an instalment of 5t. per share, and received in return certain printed receipts, called scrip receipts. He afterwards took these scrip receipts to the counting-house, where there was a meeting of the directors, and paid a *second instalment of 10t. per share, and signed a deed. In July 1826 he attended a [*130 general meeting of the shareholders. The defendant offered evidence of what he said at that meeting, to show that he went to it for the purpose of declining any interest in the company, and not for the purpose of taking any part in the The learned Judge rejected this evidence. direction of its affairs. ant then tendered evidence to show that the original projectors of the company had, by false representations, induced him and other persons to become members of it. The learned Judge was of opinion that fraud in the concoction of the concern, though practised on the defendant, was no answer to this action by a mere stranger, and refused to receive the evidence. It appeared further that the bill was drawn and accepted in London, though dated at Redruth, in pursuance of a resolution of the directors, which was entered in the book of the comouny, and in discharge of a claim by Teague on the company for an advance made by him, and was afterwards allowed in account to Wilks the drawer. was objected, first, that there was no evidence to show that the defendant ever actually became a partner in interest, or held himself out to the world as a part-The learned Judge was of opinion that there was sufficient proof to make the defendant liable as a partner. Secondly, assuming that the defendant was proved to be a partner, there was no proof that the directors had authority to bind the shareholders by drawing or accepting bills. The learned Judge reserved the latter point, and a verdict was found for the plaintiff for the amount of the bill. In the following term, a rule nisi was obtained for entering a nonsuit *131] upon the point reserved by the learned Judge, or for a *new trial, on the ground that the evidence tendered by the defendant had been improperly rejected, and that there was no evidence to show that the defendant was a

partner.

C. F. Williams and Follett now showed cause. There was ample evidence to show that the defendant either was an actual partner, or that he held himself out to the world as a partner in the company. First, it was proved that a partnership or company was formed for the purpose of working mines, selling the ore, and sharing the profits; that the company had a counting-house, agents, clerks, and all the usual accompaniments of a mercantile speculation. Secondly, there ' was proof that the defendant was a partner in that concern. He applied for shares and they were allotted to him, he paid money towards the funds of the society, he attended at the counting-house, and also at a general meeting of shareholders, as a member of the company, and he signed some deed. plaintiff, a perfect stranger to the company, and the mere holder of a bill of exchange, cannot reasonably be expected to produce the deed of co-partnership between the defendant and the other members of the company. Besides, parol evidence is sufficient to show that a person is an actual partner with another, although there may be a deed of partnership, Alderson v. Clay, 1 Starkie, 405, Holmes v. Higgins, 1 B. & C. 74. But then it will be said that, a mine being real property, an actual conveyance ought to have been proved, in order to show that the defendant took any interest in it; and Vice v. Lady Anson, 7 B. & C. 409, will be relied on. In that case there was no proof that Lady Anson had *132] attended any meeting of *the shareholders, or that she had any interest whatever. But it is not essential in order to constitute mining educa-But it is not essential, in order to constitute mining adventurers partners, that they should have an interest in the mine itself. It is sufficient for that purpose that they have a right inter se to share the profits of the mine. It is not usual in actions against mining companies to give any proof of an actual interest in the mine, for no interest in the mine is ordinarily given to the adventurers; they have a mere license to work the mine. [BAYLEY, J. Will that license pass otherwise than by deed?] The usual evidence is that the defendant attended at the meeting of the proprietors, or had his name inserted in what is called the cost-book of the mine. [BAYLEY, J. That would be evidence to show that he was entitled to share in the profits.] Here the defendant became an actual partner in interest by the assent given to his application for shares by the other members of the company, to whose secretary he applied, and by the payment of his deposits. He also held himself out to the world as a partner by reason of his having paid his deposits, and having attended at the counting-house and the meeting of the shareholders. In Perring v. Hone, 4 Bing. 28, the plaintiff's name was entered in a book with those of several other subscribers to a projected joint stock company. The plaintiff received certain scrip receipts, but sold them before the deed for the formation of the company was executed, and therefore he was not a party to that deed. It was held that he was a partner in the concern. In Ellis v. Schmæck and Thomas, 5 Bingh. 521, the defendants had purchased the scrip of a mining company which originated in fraud, and had attended one meeting of the company; but they never signed the partnership *deed, were innocent of the fraud, and transferred their scrip before *133] the plaintiff commenced an action for goods furnished to the company after the defendants had purchased their scrip. It was held, they were liable. But then, assuming that there was a partnership in this case, it will be said it was not a trading partnership, but a partnership in real property, and that particular members of it have no implied authority to bind the others by drawing and accepting bills of exchange; that, like the joint tenants of a farm, they are not traders subject to the bankrupt laws. But here the persons who composed this company did not join together for the purpose of cultivating a real estate. They did not raise the ore of the mine for the purpose of enjoying the real estate, but, as a mode of carrying on a trade. They manufacture and prepare the ore for the market. Port v. Turton, 2 Wils. 169, may be cited to show that a person

who buys a coal mine, works it, and sells the coals, is not necessarily a trader within the bankrupt laws. But if the business is carried on not as a mode of enjoying the profits of a real estate, -if it is carried on substantially and independently as a trade, then the party carrying it on will be subject to the bankrupt laws, Heane v. Rogers, 9 B. & C. 577. It is not necessary, however, to contend here, that these persons would be traders liable to the bankrupt laws. It is sufficient to show that they constitute a trading partnership. In Craw-shay v. Maule and Others, 1 Swanst. 495, it was held that where several persons are jointly interested in a mine which they are working, the concern is not a joint interest in land, but a partnership in trade; and in Jefferys v. Smith, 1 Jac. & Walk. 298, a *receiver was appointed of mines in which several persons were interested, on the ground that the concern, from the nature of the subject, was a species of trade, and not a mere tenancy in common of And in Story v. Lord Windsor, 2 Atk. 630, Lord Hardwicke said, that a colliery was a kind of trade, and that an account might be taken of the profits; and Jesus College v. Bloom, 3 Atk. 262, Ambler, 54, shows that an adventurer in mines may have an account of profits in equity like other trading partners. The principle on which partners have been held to have power to bind one another, by drawing or accepting bills of exchange, is, that one partner is presumed to be the agent of the others for doing all such acts as are necessary to carry into effect the purposes for which they are associated together. If they sell goods, therefore, to persons living at a distance, they must in the ordinary course draw bills for payment. So also, if they buy upon credit, they must accept bills. Now, the persons trading in this ore must buy materials to enable them to raise it, and must sell it to persons living at a distance. necessity, therefore, exists for them to draw and accept bills as for the members of any other trading partnership. Then, as to the rejection of the evidence, what the defendant said or did at the meeting of shareholders in July, could not be evidence to show that he was not a partner in March, when the bill was [PARKE, J. If you relied on the fact of his having attended that meeting to show that he was a partner, what he said or did at that meeting must be evidence to show the character in which he attended.] Assuming that to be so, evidence was not admissible to show that *the original proprietors of the company induced the defendant and others to become members, by fraudulently misrepresenting their capital, and falsely promulgating that certain persons had become shareholders, unless it was shown that the plaintiff was a party to the fraud. The only question is, Whether the defendant was a partner in that company? If he was, he is liable.

The Attorney-General (and Crowder was with him), in support of the rule, was desired by the Court to confine himself to the question, whether the directors had authority to bind the other members of the company by drawing and accepting bills? It is clear that the directors could not bind the other members of the company by drawing and accepting bills, without an authority from them, either express or implied. Here there was no proof of any express authority. The deed of co-partnership was not produced. The law will not imply such an authority in this case, though it does so in the case of an ordinary trading partnership. Here several persons have associated together for the purpose of working mines, and raising and selling the ore. That is not a trade, but a mode of enjoying the produce of the land. The adventurers resemble the joint occupiers of a farm, whose object is, by cultivation, to raise the produce and sell the same; and though it may be necessary to purchase many things for the purpose of cultivating the land and effecting their object, the law does not imply any authority for one of several persons jointly interested in a farm, to bind the others by bills of exchange, Greenslade v. Dower, 7 B. & C. 635. Ship-owners may *bind each other for repairs, but not by bills of exchange, Williams v. [*136] Thomas, 6 Esp. 18.

Lord TENTERDEN, C. J. Assuming that the defendant was proved to be a partner, and not merely to have done certain acts in contemplation of becoming a partner, it was not shown that he, or the other members of that company, had given any authority to a certain part of that company to bind the rest, by drawing or accepting bills of exchange. In order to show that, the plaintiff should have gone further, and proved some express authority for that purpose, or facts from which the law would imply such authority. The deed executed by the defendant and the other partners may, perhaps, have contained a clause empowering the directors to draw and accept bills; but that was not produced. In the absence of such proof, I am of opinion that the mere circumstance of the defendant's having become a shareholder in a mining company does not, in point of law, make him answerable for bills drawn or accepted by those who took upon themselves to manage the concern.

I am not prepared to say that there was sufficient evidence to BAYLEY, J. charge the defendant either as an actual partner, or as a person who held himself out to the world as a partner. A doubt upon that point, however, would only entitle the defendant to a new trial. But in order to establish his liability, it ought to have been made out affirmatively, on the part of the plaintiff, that *137] this was a company in which the directors were *authorized to bind the other members by drawing and accepting bills. Now, upon that point, the only question which could be submitted to the jury was, whether companies instituted for similar purposes had constantly been in the habit of drawing and accepting bills? or whether it was absolutely necessary, for the purpose of carrying on the concern, that there should have been such a power? There was no evidence to warrant the Judge in leaving those questions to the jury. there was no evidence for them that such a power was usually vested in the directors of other companies, or that it was necessary for the purpose of carrying on such a concern. I think that such a power is not necessary for that purpose. The directors of such a company ought to take care to have ready money to answer all demands upon them. If they have not, I cannot suppose that every person who becomes a shareholder in such a company understands that he is to be personally liable upon a bill of exchange, drawn or accepted by a director; for the effect of that would be to authorize the directors to pledge the credit and responsibility of the individual shareholders to any extent; and if that was not the understanding of the shareholders, the directors could not have any implied authority to pledge the credit of the other members by drawing or accepting bills. The directors may bind themselves personally, and pledge their own responsibility, but not that of the other members. I am therefore of opinion, that there was in this case no evidence of any authority conferred upon the directors by the defendant, or any other members of the company, to charge them individually, by drawing or accepting bills of exchange.

*Littledale, J. I think the rule must be made absolute for a nonsuit. *138] The bill is drawn by Richard Wilkes for the Cornwall and Devonshire Mining Company. It is addressed to the company, and accepted for them by John Wood, their secretary. In its form, therefore, it is very unusual. It is not a bill drawn by individuals upon others, but drawn for and accepted by a mining company. When the plaintiff, therefore, took this bill, he had notice on the face of it that it was not an ordinary bill of exchange. It was then incumbent on him to inquire whether the persons who drew and accepted this bill had authority, by such acts, to bind the defendant, the latter not appearing on the face of the bill to be a partner with those persons; and it was incumbent on the plaintiff to prove at the trial that they had such authority. In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to show that, in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others by drawing and accepting bills of exchange. In

the absence of any such evidence, I am of opinion that it is not competent to individual members of a mining company (which is not a regular trading company), to bind the rest by drawing or accepting bills. One of several persons jointly interested in a farm has no power to bind the others by drawing or accepting bills, because *it is not necessary, for the purposes of carrying [*139] on the farming business, that bills should be drawn or accepted. The object of persons concerned in such an undertaking is to sell the produce of the farm; and though, with a view to such sale, it may be necessary to buy many things in order to raise and put the produce in a saleable state, yet it is not necessary for that purpose that bills of exchange should be drawn. Even if that were necessary for the purpose of carrying on a mining concern, though not for the purpose of managing a farm, it was incumbent on the plaintiff, in this case, to have shown, either from the very nature of this company, that it was necessary, or, from the practice in other similar companies, that it was usual: for if it were necessary or usual, it would be reasonable that the directors should have such a power, and the law would imply it. Besides, this is in form a bill of exchange drawn by the company upon themselves. It is, therefore, in effect, a promissory note. I think it would require more evidence to show that the directors of such a company had power to bind the other members by promissory notes than by bills of exchange. Upon the ground, therefore, that the plaintiff, having had notice of what the nature of the bill was, ought, before he took it, to have ascertained whether the directors had authority to bind the other members of the company by drawing and accepting bills, and to have proved, affirmatively, that they had such authority, and not having given evidence to show that it was necessary for this mining company, or usual for other similar mining companies, to draw or accept bills, and still less to accept bills in this form, I am of opinion that he is not entitled to recover.

*PARKE, J. I am also clearly of opinion that there ought to be a nonsuit or a new trial. This was an action upon a bill of exchange against the defendant as one of the drawers or acceptors. The bill was not drawn or accepted by the defendant himself; and, therefore, the plaintiff was bound to show that the defendant, either expressly or impliedly, authorized the drawing or accepting of the bill of exchange; and it makes no difference in my mind, that the plaintiff was the holder for a valuable consideration, because, though he was such a holder, he was bound to make out his case, and for that purpose to show an authority from the defendant. There is no pretence to say that there was any express authority to draw or accept this bill of exchange; and there is no pretence to say, that the drawing or accepting of this bill was subsequently ratified by the defendant; and, therefore, the plaintiff proposes to show that there was an implied authority, and that implied authority, it is said, arises from the relation

of partner.

Now, undoubtedly, if there is a complete partnership between two or more persons, one partner does communicate to the other standing in the relation of complete partner, all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged. The plaintiff, therefore, must begin by showing that the defendant stood in the situation of complete partner. He says, I can show that; in the first place, because the defendant has represented himself to be so. if it could have been proved that the defendant had held himself out to be a partner, not "to the world," for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to *satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement. There is, however, no reason in this case to say that the defendant ever held himself out to the world, still less that he held himself out, either directly or indirectly, to the plaintiff as a partner. Therefore, upon the ground of representation, he is not liable.

It is next said that he was bound, because he was, in point of fact, a partner. It is to be observed, that amongst the circumstances relied upon to show that, was the fact of the defendant's attendance at some meeting of the shareholders; but, as the learned Judge shut out the evidence of what passed at the meeting at which the defendant attended, that attendance ought not to have been used against him; and therefore, on that ground, it seems to me there ought to be a new trial.

But I think that, in this case, it is very difficult to say that there was sufficient evidence to go to the jury that the defendant actually was a partner; because all the acts proved and relied upon at the trial were equally consistent with the supposition of an intention on his part to become a partner in a trade or business to be afterwards carried on, provided certain things were done, as with that of There is a great difference between the two cases. If an existing partnership. there is a *contract to carry on any business by way of present partnership, between a certain definite number of persons, and the terms of that contract are unconditional or complete, I have already said that the partners give to each other an implied authority to bind the rest to a certain extent. But if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those conditions are performed. If any of the other intended partners in the mean time enter into contracts, it seems to me to be clear that he is not bound by them, on the simple ground that he has never authorized them (always supposing that he has not held himself out, directly or indirectly, to the party with whom the contracts are made, as having, in substance, given that authority). In those cases in which a plaintiff has not been induced by the defendant's representation to give credit to him, but seeks to fix him because he has really authorized the contract to be made, the plaintiff must show that authority, and an authority upon condition not performed, is no authority at all.

For these reasons I should say a new trial ought to be granted, upon the ground that no sufficient evidence was given to show that the defendant was a complete partner. Supposing, however, that the defendant was a complete partner, there is another question upon which this case may be decided; that is, that, at all events, there was not any evidence to prove an authority in the partners in this concern to draw such a bill of exchange as this. I very much doubt whether there is any authority in mining companies arising by implication from *the nature of their dealings (and it is to be observed that there was no proof of any usage to do this in such companies) to draw bills of exchange. The argument would go to this, that all persons who deal in the produce of the land which they jointly occupy, because they might sell that produce at a distance, would have an implied power given to each other to draw bills of exchange for the purpose of receiving payment for it. If the argument was valid, it would show that farmers acting in partnership, as well as miners, would have, as incidental to the relation of partners, an authority to draw bills of exchange upon the persons to whom the produce of the land was sold. There is, however, no necessity to decide that point, because there is no ground, at all events, to say that mining partners have an implied authority from one another, arising from the nature of their business, to draw such a bill of exchange as this; for, upon the face of it, this is a bill drawn by the company upon themselves, and though it is in form treated as a bill of exchange, it is in substance only a promissory note; and the effect of saying that one member of a company like this can draw such bills or promissory notes would be, that each of the partners in the concern would have the power of pledging the others, not only to the extent of the goods the company might sell in the course of their ordinary dealings, but without any limit at all, inasmuch as one partner might raise money to any amount by drawing bills of exchange, and, if they were passed into the hands of innocent endorsees, the partners would be liable to the full extent of their fortunes.

It appears to me, therefore, that there ought to be a monsuit, on the ground that the alleged partners had no *authority to draw a bill of exchange residual.

of this description.

I offer no opinion upon the question, whether the evidence that was offered of the fraudulent concoction of this company would, if received, be an answer to this action. It has been assumed in argument, with reference to this part of the case, that the plaintiff believed the defendant to be a partner; and undoubtedly, if the defendant, though be had been induced to enter into the partnership by fraud, had represented himself to the plaintiff as a partner, he could not avail himself of the fraud as any answer to a plaintiff whose situation had been altered in consequence of that representation. That, however, is not this case. This is a case of an alleged actual partnership, and the plaintiff must show a partnership in order to fix the defendant, and the question is, whether, if that defendant has been induced by fraud to enter into it, it is any partnership at all, for this purpose. It is not necessary to give any opinion upon that question at present: but I conceive that it is one of considerable nicety.

Rule absolute for a nonsuit.

*YOUNG v. SPENCER and Another.

[*145

Case by the owner of a house against his lessee for years for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises. Ples, not guilty. The jury found that the lessee did open the door without leave, but that the house was not in any respect or injured by it. The learned Judge thereupon directed a verdict to be entered for the plaintiff with nominal damages, subject to a case: Held, on argument, that the plaintiff was not, at all events, entitled to a verdict; but as the reversionary interest of the plaintiff might be injured, although the house itself was not, and that question had not been submitted to the jury, the Court ordered a new trial.

ACTION on the case for an injury alleged to have been done by the defendants to certain houses in Stowell Street, in Newcastle-upon-Tyne. The first count of the declaration alleged that the defendants were possessed of a certain messuage and dwelling-house in Stowell Street, as tenants thereof to the plaintiff, who was entitled to the reversion; and that the defendants, without the license and against the will of the plaintiff, pulled down part of the wall, and made a door out of the said house into Stowell Street, whereby the house was greatly damaged, weakened, and injured, and the plaintiff was greatly prejudiced in his reversionary estate and interest of and in the premises. There were other counts, stating that the plaintiff was owner of other houses in Stowell Street, which were injured by the opening of the door out of the house occupied by the defendants into that street. Plea, general issue, not guilty. At the trial before Bayley, J., at the Spring assizes for the county of Northumberland 1828, under the direction of the learned Judge, a verdict was entered for the plaintiff, with one shilling damages, subject to the opinion of this Court, on the following case:—In the month of March 1825, the defendants became tenants to the plaintiff of a house in Stowell Street, for a term of fourteen years, determinable by either party at the end of seven years. In 1827, *the defendants. without the leave, and contrary to the wish of the plaintiff, opened a door from the said house into Stowell Street, where the plaintiff had several other houses near to that occupied by the defendants, and evidence was given on both sides as to the effect thereby produced on the house in which the door was made, and the plaintiff's other houses situate in the same street. The learned judge directed the jury, at all events, to find a verdict for the plaintiff. with nominal

damages, on the ground that the defendants had no right to open the door; and also desired them to say whether any actual injury was thereby done to the house occupied by the defendants, or to the plaintiff's other houses in Stowell Street, in order that the opinion of the Court might be taken if they should find that no actual injury had been done. The jury found that the defendants did pull down the wall and erect the door without the leave and against the wish of the plaintiff; but that the house occupied by them was not thereby weakened or injured in any respect, and that no injury was thereby occasioned to the plaintiff's other dwelling-houses in Stowell Street. The question for the cpinion of the Court was, Whether the plaintiff was entitled to a verdict with nominal damages?

This case was argued on a former day in the term by

Ingham for the plaintiff. The plaintiff is entitled to retain the verdict; the act of the defendant being a wrong for which he is liable in nominal damages, on the ground of injury to the plaintiff's reversionary estate, whether the building which is the subject of his reversionary estate sustain damage or not. First, the act A tenant has no rights in demised property beyond what he was wrongful. derives from his contract of tenancy; *the extent of these rights is defined by Holroyd, J., in Farrant v. Thompson, 5 B. & A. 829, "By the lease or agreement, the tenant has the use, not the dominion, of the property demised;" he has authority to use the property in the condition in which it is demised; he may enjoy the shade or the fruit of trees, but if he exercise any act of ownership, if he cut any portion of timber, he is no longer protected by his tenancy, but is responsible equally as a stranger. The only exception is, when it is necessary to change the condition of the property, in order to effect the purpose of the demise; as to break the soil to work the mines, when the mines have been expressly let with the land, and no mines are open, Co. Litt. 54 b. But here, so far from the alteration being necessary, it is not found to have been even beneficial to the object of the tenancy, and the presumption would seem to be, that it was not so; for this very act, that of opening a new door, has been held to be a breach of the covenant to repair, so as to work a forfeiture, Doe dem. Vickery v. Jackson, 2 Stark. N. P. C. 293. But, secondly, it was unnecessary in this case to consider whether the act done was, in fact, beneficial or injurious to the building, for, it being beyond the authority of the defendant as tenant, the law would imply damage. Thus, it is stated by Scrit. Williams, in his note on Mellor v. Spateman, 1 Saund. 346, "That if cattle are permitted to depasture the common, whether they belong to a stranger, or are the supernumerary cattle of a commoner, a commoner may maintain an action on the case, in which it does not seem necessary to prove any specific injury which he has sustained;" *148] and he adds, as the inference from the cases, that "wherever an *act injures another's right, and would be evidence, in future, in favour of the wrongdoer, an action may be maintained for the invasion of the right, without proof of any specific injury." So it has been held, in actions of waste, that it is no sufficient answer for the defendant, that he has enhanced the value of the property. In the trial at bar in Cole v. Green, 1 Levinz. 311, the jury, under the direction of Lord Hale, found the pulling down of an old building, and the substitution of tenements of greater value, to be waste, "notwithstanding the melioration, by reason of the alteration, of the nature of the thing, and of the evidence thereof." And so the act of a tenant in removing a partition wall, and so enlarging a chamber, is waste, "because it cannot be intended to be for the benefit of the landlord; nor is it in the tenant's power to transpose the house."(a) In this case the tenant has exceeded his power "in transposing the house," by the change of entrance; and as a repetition of such acts beyond a tenant's power, although each single act might be unattended by actual damage, would, in the event, furnish evidence of an occupation not as tenant, but as owner, and so prejudice the landlord's title, he is allowed to vindicate his

title by this action for injury to his reversionary estate, without regard to its

present effect on the value of the property.

Cresswell, contrd. The defendant is entitled to have a nonsuit entered. action was for an injury done to the reversionary interest of the plaintiff in a The jury negatived the injury, and, therefore, *unless the Court can say that the act done, although not productive of injury, entitled the plaintiff to a verdict as a matter of law, the action was not maintainable. action on the case for injuries to reversionary estates, is of comparatively modern introduction, and appears to have been substituted for the action of waste. In 2 Inst. 146, the commentary on the statute of Marlbridge, 52 H. 3, c. 24, it is said, that "where land is on lease and a stranger commits waste, the landlord shall have waste against the tenant, and the tenant shall have trespass against him that did the waste." And in the Year-book, 19 H. 6, 45 a, "If a man enters upon land let to a tenant at will, and subverts the land, the tenant at will shall have trespass for the injury done to him, and the lessor shall have another action of trespass for the destruction of his land," and this right in the landlord to bring trespass appears to rest on the ground that no action for permissive waste lies against tenant at will, Countess of Shrewsbury's case, 5 Co. 14, Panton v. Isham, 3 Lev. 349. In Bedingfield v. Onslow, 3 Lev. 209, case was brought by the plaintiff seised in fee of a close, against the defendant, possessed of another close next adjoining, between which ran a rivulet, charging that defendant stopped it, whereby it surrounded and drowned plaintiff's close, and the trees there growing perished. Defendant pleaded, that before and at, &c., one S. was possessed of the plaintiff's close by virtue of a lease made to him by plaintiff's father, and that defendant had paid to him 20s., which he had accepted in satisfaction. Demurrer, and after arguments at the bar, and on consideration of the books, 19 H. 6, 12 H. 6, 2 Roll. Abr. *551 (by which the right of the lessor of tenant at will to bring trespass against the wrongdoer was established), this was held to be no plea, and that the plaintiff, in respect of the injury done to the reversion, might maintain an action. It appears, therefore, that waste was first maintainable against the tenant for years for injuries done by strangers, then trespass was held to lie at the suit of the lessor of tenant at will against a stranger, and, lastly, case against a stranger doing a permanent injury to premises let on lease. The next case on this point was Jesser v. Gifford, 4 Burr. 2141, where the principle was stated on which the action is maintainable, viz. that although the evil might be remedied before the end of the term, yet in the mean time, if the reversioner wished to sell his interest it would be less valuable: and Jackson v. Pesked, 1 M. & S. 234, is an express authority, that unless the property is diminished in value the action is not maintainable. That was an action on the case by a reversioner against s stranger for building upon and raising plaintiff's wall, and making an evesdrop into plaintiff's yard, not averring it to be to the injury of plaintiff's reversionary interest. After verdict for the plaintiff, judgment was arrested for want of such averment, the count not necessarily importing that it was injured. mere alteration be in contemplation of law an injury, the reversionary interest of the then plaintiff was injured; and if it be not, the present plaintiff cannot maintain his action, for the jury have negatived any injury in fact. sion in Jackson v. Pesked is supported by Strother v. Barr, 5 Bingh. 153, and Ferguson v. Cristall, 5 Bingh. 305. It cannot be denied that in some cases an *action is maintainable by a party that has not sustained any temporal damage, but that is where a repetition of the act complained of without [*151 interruption would destroy the plaintiff's rights or establish an adverse right against him. By the act in question, no right of the plaintiff could be injured. nor could any adverse right in the defendant be established. This distinction is very clearly pointed out by Littledale, J., in Williams v. Morland, 2 B. & C. [LITTLEDALE, J. In Com. Dig. Action on the Case, (B), it is said, that it does not lie unless there be a temporal damage. It has been contended, that the act done by the defendant would alter the evidence of the property, and was,

therefore, an injury to the plaintiff's reversionary interest; that is, putting the case as an instance of waste; but although many very harsh examples of the doctrine of waste are collected in Com. Dig. Waste, (D2), the present is not included amongst them; and even if it could be treated as an action of waste, the defendant would be entitled to judgment in his favour, the damages being nominal, Governors of Harrow School v. Alderton, 2 B. & P. 87, upon the authority of which case Chambre, J., held, that the plaintiff could not have judgment in an action on the case in the nature of waste, where the damages were merely nominal, Rigg v. Parsons, cited in Pindar v. Wadsworth, 2 East, 154.

Ingham in reply. The decisions in actions of waste do not properly apply to an action in this form; for as the forfeiture of the place wasted is a necessary part of the judgment in an action of waste, the courts do not favour the plaintiff in so penal a proceeding. If the *conveyance of this house describes it by abuttals, and specifies its street entrance, the alteration of the door may affect the evidence of title.

Cur. adv. vult.

Lord Tenterden, C. J.,(a) after stating the facts of the case, now delivered

the judgment of the Court.

We cannot take upon ourselves to say that there was not any injury to the plaintiff's reversionary right. It might have been left to the jury to say whether there was or was not any injury to the right. The old authorities upon this subject are not reconcilable with each other. It seems to be clearly established, however, that if anything be done to destroy the evidence of title, an action is maintainable by the reversioner. We cannot say that the opening of the door in this case affects the evidence of the plaintiff's title. That is a question of fact. All that we can do is to grant a new trial, in order that that question may be submitted to the consideration of the jury.

(a) The judgment in this case was delivered on Saturday, the 21st of November. Lord TENTERDEN was confined to his house by indisposition, during the subsequent part of the term.

*153] *MUSKETT and Others, Assignees of the Estate and Effects of JAMES TAYLOR, v. HENRY DRUMMOND, Esq.

Where, in an action by the assignees of B., a bankrupt, in order to prove the petitioning creditor's debt, they proved that B. was indebted to one R., that a commission afterwards issued against R., and that his assignees were the petitioning creditors against B., and in order to support the commission against R., produced the proceedings under it: Held, that they were not admissible in evidence, and that the plaintiffs were bound to prove by other evidence R.'s trading, act of bankruptcy, &c.

The plaintiffs also produced an order made by the Lord Chancellor under the 6 G. 4, c. 16,

The plaintiffs also produced an order made by the Lord Chancellor under the 6 G. 4, c. 16, a. 18, whereby, after reciting a petition to him by Muskett, he ordered, that if the commissioners should be satisfied that Muskett had proved under the commission against B. a debt sufficient to support the commission, contracted not anterior to the petitioning creditor's debt, the commission should be proceeded in: Held, that this was not a valid order, inasmuch as it did not find, or call upon the commissioners to find, that the original petitioning creditor's debt was insufficient.

TROVER by the plaintiffs, as assignees of Taylor, to recover certain goods and chattels, the stock in trade and household furniture of the bankrupt, taken and converted by the defendant after the bankruptcy of Taylor. Plea, the general issue, and notice of disputing the petitioning creditor's debt, trading, and act of bankruptcy of Taylor. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary term 1828, the jury found a verdict for the plaintiff, damages 4271, subject to the opinion of this Court on the following case:—

The bankrupt Taylor, for several years previous, and down to the time of the issuing of the commission of bankrupt against him, carried on the trade and business of a builder, at Balham Hill, in the county of Surrey. On the 15th of November, 1826, and two or three days previously, he committed two several

acts of bankruptcy. On the 18th of November, 1826, one Samuel Rothwell issued a fieri facias directed to the defendant, then Sheriff of the county of Surrey, commanding him to levy 440l. 4s. on the goods and chattels of the bankrupt, under which writ the defendant on the same 18th of *November seized and afterwards sold the goods and chattels mentioned in the declaration. The commission under which Taylor was adjudged bankrupt issued on the 9th of December, 1826, and the plaintiffs were afterwards duly chosen assignees, and the usual assignment made to them on the 29th of December, 1826. The commission issued on the petition of the assignees of one James Kenworthy, a bankrupt, to whom, prior to, and at the time of his bankruptcy, Taylor was indebted in the sum of 150% and upwards. The commission, adjudication, and assignments, and other proceedings in the bankruptcy of Kenworthy, were given in evidence duly entered of record. That commission was dated the 6th of November, 1826, and the assignment to the provisional assignee was on the same day, and that to the assignees on the 25th day of November, 1826, but no other evidence was given of the petitioning creditor's debt, trading, or act of bankruptcy, than by the production of such proceedings. The present action was commenced on the 24th day of January, 1827. The notice to dispute was given on the 17th of February, 1827. An order of the Lord Chancellor was put in and proved, bearing date the 25th day of February, 1828. The order was made pursuant to the statute 6 G. 4, c. 16, s. 18,(a) on the petition of G. A. Muskett, which it set forth. That petition stated, that the commission had issued *against Taylor on the petition of the assignees of Kenworthy; that Taylor had been declared a bankrupt; and that Muskett (and the other plaintiffs in this cause) were appointed his assignees; that an action of trover having been brought, it had been found, on preparing for trial, that the petitioning creditor's debt was not such a legal debt as would support a commission, and that it would be necessary in order to support the commission, that there should be another petitioning creditor's debt substituted in the place of that of the assignees of Kenworthy; it then stated, that before and at the time of issuing the commission the petitioner was a creditor of the bankrupt to the amount of 5521.; that his debt was incurred subsequently to that of the assignees of Kenworthy, and that he had proved that debt under the com-The prayer was, that the commission might be supported by, and the proceedings carried on, on the debt of the petitioner, instead of that of the assignees of Kenworthy. The order then stated, that upon hearing the petitioner and the affidavits filed in support thereof read, and what was alleged by the counsel for the petitioner and the counsel for the assignees of Kenworthy, the latter appearing and consenting thereto, the Lord Chancellor ordered, that upon the commissioners named in the commission being satisfied that the debt proved by Muskett was incurred not anterior to the debt of the assignees of Kenworthy, and that it was an existing debt, and sufficient to support the commission, the commission be proceeded in, and he referred it to the said commissioners to make the inquiry.

The commissioners did find that Muskett's debt was an existing debt, and sufficient to support the commission; *and that it was incurred subsequently to that of the assignees of Kenworthy. A debt amounting to 492l. was due to the said G. A. Muskett, previous to and at the time of the committing of the acts of bankruptcy by Taylor and the issuing of the commission against him, and is now due. It was objected on the part of the defendant, first, that the title of the assignees of Kenworthy to become petitioning creditors was not sufficiently proved; and, secondly, that the order of the Lord Chancellor,

⁽a) By which it was enacted, that "if, after the adjudication, the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid."

and the proceeding under it, was not sufficient proof of a debt to sustain the present action. The case was argued at the sittings in banc, after Easter term

1829, by

Hutchinson, for the plaintiffs. The first objection to the right of the plaintiffs to recover was, that there was no sufficient evidence of the title of Kenworthy's assignees to be petitioning creditors. But the proceedings under the commission against Kenworthy were produced, and the debt was one for which Kenworthy might have sued, and therefore, according to the 6 G. 4, c. 16, s. 92, the proceedings were sufficient evidence. [PARKE, J. Is the taking out a commission a suit in equity or action at law? The assignees of Kenworthy might have sued the bankrupt Taylor, and in such a suit the proceedings would have been sufficient evidence, Skaife v. Howard, 2 B. & C. 560. [BAYLEY, J. That only decided, that the deposition which was made admissible evidence by the 49 G. S, c. 121, was prima facie evidence of the facts contained in it. PARKE, J. depositions under the new bankrupt act *are not admissible in evidence.] *157] Then, secondly, the substitution of a new petitioning creditor's debt under the provisions of the 6 G. 4, c. 16, s. 18, makes the commission good ab initio, and all the proceedings under it are as valid as if it had originally been sued out on the petition of the creditor whose debt is so substituted. If this were not so, that proceeding would be nugatory.

Thesiger, contrd, was desired to confine himself to the second point. assignees had no right to use the Lord Chancellor's order for the purpose of maintaining this action, for if they had no title at the time when the action was commenced, they ought not to be allowed to support it by one afterwards acquired. The notice to dispute the petitioning creditor's debt was given in February 1827, and the order for substituting the new debt was obtained in February 1828. [PARKE, J. In Hull v. Pickersgill, 1 B. & B. 282, the defendant justified as an agent for parties who did not ratify his act until after the action was brought, and that was held sufficient.] It would be very hard in this case to fix the defendant with the costs incurred in defending an action against a party who, at the time when it was commenced, had no legal right to maintain [BAYLEY, J. He might have applied to the Lord Chancellor.] He had not any notice of the proceedings before the Lord Chancellor, and could not know of the order for substituting a new petitioning creditor's debt until it was produced at the trial. [PARKE, J. There does not appear to have been any proof that the Lord Chancellor found that the original petitioning creditor's debt was not sufficient. *BAYLEY, J. There may certainly be a great difference between a petition, on the ground of the insufficiency of the debt and The authority given to the Lord Chancellor appears

a mere difficulty of proof. The to extend to the former only.]

Hutchinson in reply. It must be presumed that the Lord Chancellor was satisfied of the truth of the facts stated in the petition before he made his order. That order was never appealed from, nor was any attempt made to reverse or alter it. As to the effect of it when made, it would be altogether useless if it had not a retrospective effect. The proof of debts, choice of assignees, the assignment to them, and all conveyances by them to purchasers, must all remain invalid. And many questions would arise as to the effect of the prior examinations of the bankrupt.

Cur. adv. vult.

BAYLEY, J., delivered the judgment of the Court.

This was an action by the assignees of James Taytor, a bankrupt, and the defendant having given notice to dispute (among other things) the petitioning creditor's debt, there were two questions: one, whether there was sufficient proof of the petitioning creditor's debt; the other, whether the plaintiffs had entitled themselves to resort to a debt due to Muskett, one of the assignees, to support the commission under the 6 G. 4, c. 16, s. 18.

The commission against Taylor was sued out by the assignees of James Kenworthy a bankrupt, and the debt to Kenworthy and the assignment to his assignees

were duly proved, but there was no evidence to support the *commission against him, except the proceedings under his commission; and whether they were sufficient evidence of the debt from him to his petitioning creditor, or of his trading and act of bankruptcy, was the first question in this case. Court intimated an opinion during the argument that they were not, and that opinion is confirmed by the consideration we have since been able to bestow upon the point. It is clear these proceedings are not evidence except as far as they are made so by act of parliament, and it is only by the ninety-second section of the late bankrupt act, 6 G. 4, c. 16, that they are made evidence in The ninetieth and ninety-first sections having provided, that in actions by or against assignees, or in actions against commissioners, or persons acting under their warrant, or in suits in equity by or against such assignees, no proof should be required of the petitioning creditor's debt, the trading, or act of bankruptcy, unless upon notice, the ninety-second section enacts, that if the bankrupt shall not have given notice, the depositions taken before the commissioners of the petitioning creditor's debt, trading, and act of bankruptcy, shall be conclusive evidence of the matters therein contained in all actions at law or suits in equity brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit. It is only therefore in actions or suits brought by his own assignees for a debt or demand for which he might have sued, that the depositions under a commission against a man arc made evidence; and as this action was brought not by Kenworthy's assignees, but by Taylor's, and for a demand for which Taylor alone, not Kenworthy could have sued, the depositions under Taylor's commission were within the provision, *and would have been evidence, the depositions under Ken-

worthy's commission would not.

The second question depends upon the 6 G. 4, c. 16, s. 18, and the right of the plaintiffs to resort to it in this action. By that clause it is enacted, that if after adjudication, the debt or debts of the petitioning creditor or creditors be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors having proved any debt sufficient to support a commission, and incurred not anterior to the debt or debts of the petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid. Muskett had proved a debt under the commission, that debt was sufficient to support the commission, and was incurred after the debt to Kenworthy, and he petitioned the Lord Chancellor for an order under this clause. The Lord Chancellor made an order, that upon the commissioners being satisfied as to Muskett's debt in the several particulars which the clause specifies, the commission should be proceeded in, and the commissioners were satisfied. That petition was not produced, nor the affidavits upon which it was grounded; but according to the recital of it in the Lord Chancellor's order, which was produced, it stated that the debt was not such a legal debt as could support a commission, and the prayer of it was, that the proceedings thereof might be supported by, and the proceedings thereof carried on, on Muskett's debt instead of Kenworthy's. The Lord Chancellor's order says nothing as to the insufficiency of the debt; but upon reading the affidavits, hearing counsel for Muskett and the other assignees of Taylor, and the petitioning creditor's *consenting thereto, it orders that, upon the commissioners being satisfied as to Muskett's debt, and the time it was contracted (as to which the commissioners were afterwards satisfied), the commission should be proceeded in. It does not appear that the Lord Chancellor was apprised, when he made the order, of the existence of the present suit, so as to call his attention to the propriety of making any provision as to giving it in evidence in this suit. No notice of the application to the Lord Chancellor appears to have been given to the defendant, against whom this suit was pending, so as to give him an opportunity of interposing in the Court of Chancery, to prevent its being improperly used to his prejudice.

It is not necessary in this case to give any opinion whether a valid order of

the Lord Chancellor, under the above-mentioned act, would support a commission by relation in an action already commenced, and especially when the opposite party in the suit had no notice of such a proceeding, because we are satisfied this order is not valid. The statute gives a special power to the Lord Chancellor to make an order of this nature, only where the debt of the petitioning creditor "is found insufficient;" but in this case, that insufficiency of the debt is not found as a fact by the jury, nor does it appear that it was so found by the Lord Chancellor, the order containing no adjudication by him on that subject. It appears to us, therefore, that the order was not valid.

The Lord Chancellor's order does not import that the debt had been found insufficient before the petition was presented to him; he pronounces nothing as to its sufficiency; and there is no fair ground for presuming that he examined into its sufficiency. The petition does not pray that he should. The order is made upon the *consent of Muskett and the assignees on the one hand. and the petitioning creditor on the other: the defendant against whom it is to operate is no party to it, and does not appear to have known of it until it was produced against him on the trial; and the conduct of the plaintiffs, in relying upon the debt to Kenworthy at the trial, is a pretty strong ground for concluding that the Lord Chancellor had not passed any judgment upon its suffi-Without entering, therefore, into the question how far an order by the Lord Chancellor, where he pronounced upon the insufficiency of the original debt, or where such debt had otherwise been judicially found insufficient, would operate upon a depending suit, especially against a party who had no notice of such order, and was not apprised that he would have to meet the substituted debt, we are of opinion that the order in this case is insufficient for that purpose, and that a judgment of nonsuit ought to be entered. Judgment of nonsuit.

*163] *The KING v. The OXFORD Canal Company.

By a canal act, the proprietors of the Oxford Canal were empowered to take a mileage tonnage for coals and other merchandises, excepting that they were not to take a tonnage upon coals for a distance of two miles measured from L to B. As to those two miles it was enacted that the proprietors of the Coventry Canal should take all the rates and duties payable by virtue of that act for all coals carried from any part of the Oxford Canal within those two miles; and the proprietors of the Oxford Canal were to take all the rates, payable by an act for making the Coventry Canal, for all goods, except coals, conveyed upon any part of the Oxford Canal, and afterwards upon the Coventry Canal, within three miles and a half of the junction of the two canals. The point of junction of the Oxford and Coventry Canal was in the parish of F. That parish contains one mile and nine hundred and sixty-three yards of the Oxford Canal, being part of the two miles above mentioned, and also two miles and a quarter of the Coventry Canal, being part of the three miles and a half above mentioned. By an act, 33 G. 3, c. 80, for making the Grand Junction Canal (reciting that it was apprehended the intended canal would be injurious to the company of proprietors of the Oxford Canal), it was agreed that the compensation thereinafter mentioned should be made to them as an indemnification against such injury. It then authorized the proprietors of the Oxford

By an act, 33 G. 3, c. 80, for making the Grand Junction Canal (reciting that it was apprehended the intended canal would be injurious to the company of proprietors of the Oxford Canal), it was agreed that the compensation thereinafter mentioned should be made to them as an indemnification against such injury. It then authorized the proprietors of the Oxford Canal to take, for all coals that should pass from the Oxford Canal into and upon the Grand Junction Canal, the sum of 2s. 9d. per ton, without regard to the distance the same should pass on the Oxford Canal; and for all other goods which should pass from any navigable canal into or upon the Oxford Canal, and from thence into or upon the Grand Junction Canal, or from the Grand Junction Canal into or upon the Oxford Canal, and from thence into or upon any other canal, the sum of 4s. 4d. per ton, without any regard to the distance the same should ness on the Oxford Canal.

pass on the Oxford Canal:
Held, first, that the proprietors of the Oxford Canal were rateable to the poor in the parish
of F. for the mile tonnage for merchandise, not being coals, passing along the Oxford Canal

in that parish.

Secondly, that they were rateable in that parish for the mile tonnage payable to them in respect of tolls collected on the Coventry Canal, in the proportion which one mile nine hundred and sixty-three yards bears to two miles.

Thirdly, that they were rateable in that parish for such a proportion of the compensation tonnage payable to the Oxford Canal Company under the Grand Junction Canal act for merchandise, not being coals, passing from the Coventry Canal along the Oxford Canal to the Grand Junction Canal, and vice versâ, and consequently through the parish of F., as one mile nine hundred and sixty-three yards bears to thirty-four miles and seven eighths,

the distance between the points at which the Oxford Canal joins the Coventry and Grand Junction Canals.

Fourthly, that they were rateable in that parish for the same proportion of the compensation tonnage for coals passing along the same portion of the Oxtord Canal from the Coventry Canal into the Grand Junction Canal.

Held, further, that in fixing the amount of the rate, the sum paid by the proprietors for the poor-rate. the expense of collecting the tolls, of repairing the banks of the canal, and of supplying it with water, ought to be deducted from the gross profits.

Upon appeal by the company of proprietors of the Oxford Canal Navigation, against a rate made for the relief of the poor of the parish of Foleshill, in the county of the city of Coventry, whereby the company were rated for their messuages, buildings, stop-land, towing-path, and that part of the canal lying within the *said parish, and for the tolls, duties, and tonnages arising therefrom, estimated as of the annual value of 2000l., at 100l.; the sessions confirmed the rate, subject to the opinion of this Court on the following case:-By the 9 G. 3, c. 70, the appellants were empowered to make and maintain a navigable canal from the Coventry Canal Navigation to the city of Oxford. The appellants are the owners and occupiers of the canal which has been made by virtue of this act. The length of the canal is as follows :-

From the northern extremity at Longford, where it joins the Coventry Canal, to Bramston, the point of union with the Grand Junction Canal, is thirty-four

miles seven eighths.

From Bramston to Napton, the point of union with the Warwick and Napton Canal, is seven miles.

From Napton to Oxford, the southern extremity, forty-nine miles one eighth;

and the total length of the Oxford Canal is ninety-one miles. By the said Oxford Canal Act the company are empowered to levy a mile tonnage for coals, and other merchandise, carried upon this canal, which they levy accordingly, excepting only that they are not to take a tonnage upon coals for a distance of two miles, measured from Longford towards Bramston, respecting which it is enacted as follows: "Provided nevertheless, and be it further enacted, that it shall be lawful for the company of proprietors of the Coventry Canal Navigation, their successors and assigns, from time to time and at all times hereafter, to take and receive all the rates and duties payable by virtue of this act for all coals that shall be carried or conveyed from any part or parts of the said intended cut or canal, within two miles from *the junction thereof with the Coventry Canal at Longford aforesaid, which said rates and duties to be collected and received shall be and are hereby vested in the said company of proprietors, their successors and assigns, and shall and may be collected and levied by them in such manner and with such and the like remedies and powers for collecting and levying thereof, as any rates or duties granted by this act can or may be collected or levied, and the same, when received, shall be applied and disposed of to and for the same uses, intents, and purposes, as the several rates and duties granted by an act of 8 G. 3, entitled 'An Act for making and maintaining a navigable canal from the city of Coventry, to communicate upon Tradley Heath, in the county of Stafford, with a canal now making between the rivers Trent and Mersey,' are thereby directed to be applied and disposed of, and to no other use or purpose whatsoever; and that it shall be lawful for the said company of proprietors of the navigation intended to be made by virtue of this act, to take all the rates and duties payable by the said recited act for all goods, wares, and merchandises, except coals, which shall be navigated, carried, or conveyed upon any part or parts of the said canal intended to be made by virtue of this act, and afterwards upon the said Coventry Canal, within three miles and a half of the junction of the two canals at Longford, towards Coventry, which said last-mentioned rates and duties so to be collected and received, shall be and are hereby vested in the said company of proprietors of the Oxford Canal Navigation, their successors and assigns, and shall and may be collected and levied by them in such manner, and with the like remedies and powers for collecting and levying thereof, as any of

*166] the rates and duties directed to be paid by the said recited *act can or may be collected and levied, and the same, when received, shall be applied and disposed of to and for the several uses, intents, and purposes, as the several duties granted by this act are directed to be applied and disposed of, and to and for no other use or purpose whatsoever; anything contained in the said recited act or this act to the contrary notwithstanding." The said recited act of the 8 G. 3 imposes a mile tonnage on coals and all other merchandises passing along the Coventry Canal.

The point of junction of the Oxford and Coventry Canals is in the respondent parish, which parish contains one mile nine hundred and sixty-three yards of the Oxford Canal, being part of the two miles above mentioned, and also two miles and a quarter of the Coventry Canal, being part of the three miles and a half above mentioned. The company of proprietors of the Oxford Canal are neither owners

nor occupiers of any part of the Coventry Canal.

The Oxford Canal Company are further entitled to certain compensation tonnages, by virtue of the Grand Junction Canal Act, 33 G. 3, c. 80, which enacts as follows: "And whereas, it being apprehended that the making of the said intended canal will be injurious to the company of proprietors of the Oxford Canal Navigation; it is agreed that the compensation hereinafter mentioned, should be made to them as an indemnification against any such injury: Be it therefore enacted. That instead of the tolls, rates, and duties which would have been payable to the company of proprietors of the said Oxford Canal Navigation, by virtue of certain acts of parliament of the ninth, fifteenth, and twenty-sixth years of his present Majesty, for making and maintaining the said Oxford Canal Navi-*167] gation, or any of *them, for or in respect of the coals, goods, and other things hereinafter mentioned and made chargeable with certain rates to the company of proprietors of the said Oxford Canal Navigation, in case no alteration had by this act been made in the tolls, rates, and duties payable to them, it shall be lawful for the company of proprietors of the said Oxford Canal Navigation to take for their own proper use and behoof the respective rates hereinafter mentioned, that is to say, for all coals that shall pass from the said Oxford Canal into or upon the said intended canal, the sum of 2s. 9d. a ton, and so in proportion for a less quantity than a ton, without any regard to the distance the same shall pass on the said Oxford Canal; and for all other goods, wares, merchandises, and things, which shall pass from any navigable canal into or upon the said Oxford Canal, and from thence into or upon the said intended canal, or from the said intended canal into or upon the said Oxford Canal, and from thence into or upon any other navigable canal, except lime and limestone, and also except all such articles and things as are at present exempt from the payment of any tolls, rates, or duties to the company of proprietors of the said Oxford Canal Navigation, the sum of 4s. 4d. per ton, and so in proportion for a less quantity than a ton, without any regard to the distance the same shall pass upon the said Oxford Canal."

The Oxford Canal Company are further entitled to tolls, by the following clauses of the Warwick and Napton Canal Act, passed 34 G. 3, c. 33: "And whereas the making the said intended canal may be injurious to the company of proprietors of the Oxford Canal Navigation unless provision be made for pre*168] venting any such injury; Be it therefore enacted, That it shall be *lawful for the company of proprietors of the said Oxford Canal Navigation to ask, demand, take, and receive, to and for their own proper use, over and above all the rates of tonnage or duties which they are or shall be entitled to for or in respect of any coals, goods, and merchandises, or other things navigated or passing in or upon any part of the said Oxford Canal, by virtue of any acts of parliament now in force, except as hereinafter is excepted, the rates or duties hereinafter mentioned, that is to say, for all coals which shall be navigated out of the intended canal into the Oxford Canal the sum of 2s. 9d. per ton, and so in proportion for a less quantity than a ton, for all goods, wares, merchandises, and things (except lime and limestone, and manure),

which shall be navigated out of the said intended canal into the said Oxford Canal, or out of the said Oxford Canal into the said intended canal (except such as shall be bona fide navigated from the Coventry Canal), or from any intermediate place, between the said Coventry Canal and the said intended canal, into the said intended canal, the sum of 4s. 4d. per ton, and so in proportion for a less quantity than a ton."

The Oxford Canal Company are rated in the parish of Foleshill in the afore-

said sum of 2000l., in manner following:-

1. For the mile tonnage payable to the Oxford Canal Company for merchandises (not being coals) passing along in the Oxford Canal, in the parish of Foleshill, for as far as such merchandise passes into that parish, £450 0 C

*2. For the mile tonnage payable to the Oxford Canal Company in respect of tolls collected on the Coventry Canal, in the proportion of one mile nine hundred and sixty-three yards to two

3. For such a proportion of the compensation tonnage payable to the Oxford Canal Company under the Grand Junction Canal Act, for merchandise (not being coals) passing from the Coventry Canal along the Oxford Canal to the Grand Junction Canal, and vice versa, and consequently through the parish of Foleshill, as one mile nine hundred and sixty-three yards bears to thirty-four miles and seven eighths, - 900 0 0

4. For the same proportion of the compensation tonnage for coals passing along the same portion of the Oxford Canal from the

Coventry Canal, into the Grand Junction Canal, -1090 O C

£2500 0 0

60 0 C

From this sum of 2500l. a deduction of 20l. per centum has been made, as the reasonable profit of a supposed lessee, 500 0 0

£2000 0 0

Which leaves the sum of 2000l. as the supposed rental of the above-mentioned tolls, and upon which the rate has been made. The mile tonnage payable to the Coventry Canal Company for coals passing along the Oxford Canal, in the parish of Foleshill, is 350l. The *parochial rates on landed property in Foleshill, payable by the occupiers, are six shillings in the pound on the amount of their actual rents. The sum which the Oxford Canal Company receive upon all their compensation tonnages, taken in the proportion of one mile nine hundred and sixty-three yards to ninety-one miles, is 1000l.; the expense of collecting the tolls for which the canal company are assessed is 5l. per centum. The annual repairs of the canal in the parish of Foleshill amount to 201. annual repairs of the whole canal amount to 4000l. The expense of works (such works not being situated at Foleshill), by which that part of the canal which lies in the parish of Foleshill is supplied with water, amounts to 1001. The works by which that part of the canal which lies in the parish of Foleshill is supplied with water supply the canal for a distance of forty miles. The total amount of the tolls collected on the canal is 50,000l. The tolls payable throughout the said distance of forty miles, estimated on the principle of the assessment in the parish of Foleshill, amount to 25,000l. The questions for the consideration of this Court are,

First, For what tolls, and for what proportions of such tolls, are the Oxford

Canal Company rateable in the respondent parish?

Secondly, To what deduction are the company entitled, to place them on an equal footing with the other occupiers of land in the said parish?

The rate is to be amended accordingly.

Amos in support of the rate. The Oxford Canal Company are clearly rateable

for the mile tonnage payable to them for merchandise, not being coals, *passing along the Oxford Canal, in the parish of Foleshill, as far as such merchandise passes in that parish, according to the principle established by Rex v. Milton, 3 B. & A. 112, and other decisions, that each parish shall receive from a canal company, out of the common fund of the tolls, a sum in proportion to what the land used by the company in that parish produces. Secondly, the company are rateable for the mile tonnage payable to the Oxford Canal Company in respect of tolls collected in the Coventry Canal, in the proportion of one mile and nine hundred and sixty-three yards to two miles. The Oxford Canal Company receives, by virtue of the Oxford Canal Act, certain tolls earned on the Coventry Canal on all merchandises (except coals) for the distance of three miles and a half on the Coventry Canal. The Oxford Canal Company pay to the Coventry Canal Company the tolls for coals passing on the Oxford Canal for a distance of two miles measured from Longford, the point of junction, towards Bramston. They give to the Coventry Canal Company two miles of their canal, part of which is in Foleshill, and receive from them the tolls earned in three miles and a half of the Coventry Canal. The profit is produced by the two miles of the Oxford canal, part of which is in the parish of Foleshill, and therefore is rateable in that parish. Then, as to the third item, Rex v. The Oxford Canal Company, 4 B. & C. 74, is an express authority to show that they are rateable for such a proportion of the compensation tonnage payable to the Oxford Canal Company, under the Grand Junction Act, for merchandise (not being coals) passing from the Coventry Canal, along the Oxford Canal, to the Grand Junction *Canal, and vice versa, and consequently through the parish of *172] tion Tuanai, and vice versa, and consequently the same bear to thirtyFoleshill, as one mile nine hundred and sixty-three yards bear to thirtyfour miles and seven eighths. The same principle applies also to the compensation tonnage for coals passing from the Oxford Canal along the Coventry Canal, into the Grand Junction Canal. It lies, at least, upon the other side to distinguish the compensation tonnage for coals from that for other merchandise; for the compensation tonnage is, according to that decision, to be divided among those parishes which the Grand Junction Canal Company use in earning that tonnage. As the Grand Junction Canal Company may have occasion to use the Oxford Canal, they give to the proprietors of the latter a compensation for such use by allowing them a toll of 2s. 9d. for coals, and 4s. 4d. for other merchan-The Grand Junction Canal Company have used the part of the Oxford Canal lying in Foleshill for the coals which pass out of the Coventry Canal at Longford to Bramston. The Oxford Canal Company consequently are liable to be rated for that proportion which their land in the parish of Foleshill bears to the whole distance.

Then the only remaining question is, what deductions from the gross receipts of tolls are to be allowed to the company in fixing the amount. Now, the principle is laid down in The King v. The Trustees of the Duke of Bridgewater, 9 B. & C. 68, that the rent is the criterion of the value of the occupation of the land. There the proprietors of a canal were held to be rateable for the sum at which it would let, and not for their gross receipts, minus their expenses. Here, *173] in fixing the rate, *20l. per cent. has been allowed as the profit of a tenant, the residue of the tolls being considered the amount of the annual rent which a tenant would pay for it. [PARKE, J. The poor rate ought to have been deducted, for if the tenant pays the poor rate he will pay so much less rent to his landlord.] The company undoubtedly must be entitled to the same deduction which a person about to become tenant of land would require from the owner, and consequently the poor rate must be deducted.

Hill, control. It must be conceded that the company are properly assessed in respect of the first three items mentioned in the rate. But they are not rateable in respect of the compensation tonnage for the coals mentioned in the fourth item. The term compensation tonnage imports a tonnage allowed in return for something given up. The Oxford Canal was made after the Coventry Canal The Oxford Canal Company are to take the tonnage in the 'hird item of rate.

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mentioned; and the Coventry Canal are to take a tonnage for coals on a certain proportion of the Oxford Canal, covering the whole of the parish of Foleshill. The Oxford Canal Company, therefore, had no tonnage for coals passing through Foleshill, at the time when the act for making the Grand Junction Canal passed. [PARKE, J. The canal in Foleshill may be used for the purpose of carrying the coals.] It would not be a profitable user to the Oxford Canal Company. The compensation tonnage is given as an indemnification against the injury which the proprietors of the Oxford Canal were likely to sustain by the making of the Grand Junction Canal. [PARKE, J. It is given in consideration of the general *damage likely to be done to the Oxford Canal by the Grand Junction Canal.] The Coventry Canal Company have at present, what they always had, the mileage tonnage for coals passing through Foleshill. Oxford Canal Company are entitled by the 33 G. 3, to have a compensation for what they give up. They could not give up that which they never possessed. The 2s. 9d. per ton for coals, is to be paid in respect of so much only of the Oxford Canal as shall be injured by the making the Grand Junetion Canal. The compensation tonnage for coals, therefore, must be distributed over that part of the Oxford Canal which, before the passing of the act for making the Grand Junction Canal, gained the profit by the mileage tonnage. That part of the canal which could not have gained any profit by the transit of coal, could not be injured. If the 2s. 9d. a ton for coals be a compensation for that part of the canal in Foleshill, the consequence will follow that coals will in that parish pay a double toll, for they now pay the mileage tonnage (as they always did) to the Coventry Canal Company. Now that never could have been the intention of the legislature. Besides, if it be a compensation for the general injury to the canal, the rate on goods and on coals ought not to be in the proportion that the length of the canal in the parish bears to the length of the canal from the point where it joins the Coventry Canal to Bramston, but in proportion that the length in the parish bears to the whole length of the canal, which is ninety miles. The toll taken at the time when the Grand Junction Canal Act passed, was 1d. per ton for coals, and 11d. for other goods. compensation tonnage given by that act was evidently fixed with reference to the mileage *tonnage, then received by the Oxford Canal Company. That for thirty-four miles, and seven-eighths of a mile, would be upon coals 2s. 10 d. But the Coventry Canal had a right to the mileage tonuage over two miles, and, therefore, deducting 2d., there will remain 2s. 8 dd.; and the legislature, disregarding the fraction, fixed the compensation tonnage for coals at 2s. 9d. The Oxford Canal Company do not gain altogether, even that fraction, because they receive by the compensation tonnage on goods a small fraction of 1d. less, than by the same calculation they would strictly be entitled to. It is evident, therefore, that the legislature in fixing that which is called compensation tonnage, but which perhaps may more justly be called gross tonnage, acted on the principle that the Oxford Canal Company had no right of tonnage over these two miles. The legislature, therefore, has not made a carrier pay double tonnage for his goods or coals in the parish of Foleshill, which would have been the case if that parish had been considered as the meritorious cause of earning this part of the compensation or gross tonnage. There must not only be a user of the canal in the parish to make it rateable, but a profitable user. Here there was no profitable user by the Oxford Canal Company, in respect of the carriage of coals in this parish.

The remaining question is, what portion of the gross amount of tolls received must be considered as constituting the sum for which that part of the canal situate in Foleshill would let to a tenant. It may be difficult to ascertain what that amount is, because proprietors of canals always keep them in their own hands and collect the tolls. It is conceded that the supposed lessee ought to have a profit of 201. per cent. *If that be so, he ought to be allowed all such payments as he may be compelled to make in respect of the canal, otherwise such payments would pro tanto diminish the profits which it is conceded he

ought to have. The poor rates, the expenses of collecting the tolls, and of annual repairs, must, therefore, be deducted from the gross amount of the tolls received. [BAYLEY, J. There can be no doubt the poor rate, the annual repairs, and the expense of collecting the tolls must be allowed. The sum which remains after making such deductions constitutes the net profit. PARKE, J. In strictness all the profits ought to be rated, but inasmuch as tenant's profits in respect of other lands in the parish are not rated, the tenant's profit in respect of land occupied by the canal company ought not to be rated.] The annual repairs of that part of the canal situate in the parish amount to 201.; the annual repairs of the whole line of the canal amount to 4000l. It is desirable that the court should state whether in fixing the rate there should be deducted that proportion of the whole sum expended in repairs, which the length of the canal in the pari h of Foleshill bears to the whole line of the canal, or whether only the expense of repairs incurred in that part of the canal situate in Foleshill. The rate is to be in proportion to the value of the land in the parish where the rate is made. Therefore all expenses incurred in repairing that part of the canal in that parish must be allowed. LITTLEDALE, J. The banks in one parish may require more repair than in another, or there may be locks which require frequent repair; so that it may happen that a given part of a canal may yield no profit whatever.] A deduction must also be made for the expense of supplying water for the canal. *It is analogous to the expense of manure used in the cultivation of land. Without the supply of water the canal can produce no profit whatever. The fair rent of land is the value of the land, after deducting the expenses of cultivation. [BAYLEY, J. There must undoubtedly be an allowance made upon that account. The quantum will be a question for the sessions. We can only lay down the principle. We never fix the quantum unless the sessions tell us the principle upon which they have fixed the quantum, and their calculation appears to be erroneous.] It is found as a fact that the works by which that part of the canal which lies in the parish of Foleshill is supplied by water supply the canal for forty miles. The true principle, therefore, will be to make an allowance in the proportion which the length of the canal in the parish of Foleshill bears to forty miles.

BAYLEY, J. The principle which we lay down is this: The sessions must make an allowance for a proportion of the reasonable expense of supplying water. They must also make allowance for the poor rate, the expense of repairs,

and of collecting the tolls.

The only point, therefore, which remains for our consideration is, whether any part of the compensation tonnage can be considered as having been earned in the parish of Foleshill; and, upon that point, we will consider of our judgment.

Cur. adv. vult.

BAYLEY, J., delivered the judgment of the Court.

The several questions which were argued on both sides, in this case, were dis-*178] posed of in the course of the *argument, except that arising upon the fourth item of charge on the company mentioned in the special case.

It was contended that the company were not rateable upon the proportion of the compensation tonnage for coals, passing along the portion of the Oxford Canal, lying in the parish of Foleshill; from the Coventry Canal into the Grand Junction Canal; because it was said that the tonnage on coals was a compensation to the company for the injury done by the construction of the Grand Junction Canal, pursuant to the 32 G. 3, c. 80, to their former coal tonnage; and as the company had, before the passing of that act, no coal tonnage in the parish of Foleshill, no part of the compensation tonnage could be considered as earned in that parish. It was further urged, that the new tonnage dues were gives by that act instead of the old dues, and must be considered as standing in respect of their rateability in the same situation. Upon reference, however, to the Grand Junction Canal Act, it would seem that the new coal tonnage is not given as a compensation for the injury to the company, in respect of the old coal tonnage, specifically; but the recital shows, that because it was apprehended that the

intended canal would be injurious to the Oxford Canal, generally, certain compensations were to be made for that general injury; and the legislature has thought that an indemnification would be given by certain new dues upon coals and other goods carried to or from the intended canal, from or to the Oxford Canal, without regard to the distance which they should be carried on the latter: and these dues are not to be in addition to the old dues, but the public are to pay one class of dues only; and this appears to be the meaning of the introductory words of the clause, making them *payable instead of the former tolls, &c. The Grand Junction Canal would probably benefit the Oxford Canal in that part of it which formed the line of communication between that and the Coventry Canal, (a) and it would probably be in other parts where they, to a certain degree, were parallel, (b) that the injury would occur; and the intention probably was to recompense the injury in one part by compensation upon another.

The question, however is, not, for what injury the right to receive the new tonnage dues is given as a compensation; or in other words, for what reason the legislature have given that right to the Oxford Canal Company; but what is the legal liability of the company in respect of these dues, when received by them, to contribute to the poor rates. The company are rateable in each parish for the net annual profit of the portion of the canal lying in that parish; in other words, for what the canal in each parish earns, and the tonnage dues are paid by the owners of goods for passing along the canal, and are received by the company for the use of it, though the reason of being enabled to receive them by the legislature was, that their canal was likely to be injured by the new navigation. It is on the ground that these dues are received for the use of the canal, and are earned by the canal, that the company were held rateable for them in Rex v. Oxford Canal Company, 4 B. & C. 74. For the passage of coals, therefore, along the part of the canal lying in Foleshill, some part of the new dues is received by the company, and in respect of that part the *rate is proper. It is true that the consequence is, that for coals passing along that part of the canal, being within two miles from the junction with the Coventry Canal, the company would receive more dues, and therefore be rateable for more than those which pass along other parts; for they would receive for such coals the proportion of compensation dues above-mentioned directly, and indirectly a part of the tonnage duties on other goods on the first three miles and a quarter of the Coventry Canal, for which it is admitted by their counsel that they were properly rated in the rate in question. This consequence, however, can make no difference in the construction of the act of parliament, which makes the dues payable by the public to the company for passing along their canal, and which therefore constitute a part of the profits of the portion of the canal through which they pass.

The canal earns no part of the original tonnage upon coals carried through the two miles of Foleshill into the Coventry Canal, because it receives its equivalent by the tonnage upon other goods for the first three miles and a half upon the Coventry Canal; but those two miles contribute to earn the compensation tonnage and for that there is no equivalent.

The rate is therefore to be confirmed in this respect; but the case must be remitted to the sessions to make the several deductions to which the company were held, in the argument to be entitled.

(a) From Longford to Bramston.

⁽b) From Napton to Oxford the Oxford Canal is nearly parallel to the Grand Junction.

*181] *DOE dem. JAMES CHRISTMAS and Others v. OLIVER.

Testator devised lands to his wife for life; remainder to all the children of his brother that should be living at the time of his wife's decease. His brother left one daughter, who married, and afterwards with her husband, during the life of testator's widow, levied a fine come ceo of the lands, and declared the use to A. B. After the death of the widow A. B. brought ejectment against the tenant in possession: Held, that it was maintainable; for that although the brother's daughter had only a contingent remainder during the life of the widow, and the fine could only operate by estoppel until the contingency happened, yet afterwards it operated on the estate.

EJECTMENT for the recovery of seven freehold messuages and tenements, land and gardens, with the appurtenances, situate in Belgrave Gate, in the parish of St. Margaret, in the town and borough of Leicester. At the trial before Mr. Serjeant D'Oyley, at the summer assizes for the county of Leicester, 1828, a verdict was found for the plaintiff by consent, on the demise of James Christmas only, subject to the opinion of this Court on the following facts:—

Theophilus Holmes, being seised in fee of the said tenements and premises, made his last will and testament in writing, bearing date the 29th day of September, 1784, duly executed and attested, for the purpose of passing real estates, and thereby gave and devised as follows; that is to say, "I give and devise the messuage or tenement wherein I now dwell, with the appurtenances thereto belonging, and the use of all my household goods, plate, linen, and other household furniture of every sort and kind which shall be about my said messuage or tenement at the time of my decease (except the plate), and also my messuage or tenements in Belgrave Gate, Leicester, unto my wife Christian Holmes, for and during her natural life; and from and after her decease, I give and devise the said messuage or tenement wherein I now dwell, with the appurtenances, and also my said messuages or tenements" (in the said will described, being those for the recovery of which *these actions are brought,) "with warehouses, belonging, in case I shall die without issue (but not otherwise), unto, between, and among all the children of my brother, the Reverend Mr. William Holmes, that shall be living at the time of my said wife's decease, and to their heirs and assigns for ever."

The testator, Theophilus Holmes, died, seised of the premises in question, in the month of September 1785, without issue, and without altering or revoking his said will. On his death, his widow, Christian Holmes, who afterwards intermarried with one Joseph Chamberlain, entered into possession of the tenements in question, and so continued until the time of her death, which happened in or about the month of September 1826. The said William Holmes, mentioned in the will of the testator, had issue three children only, that is to say, James Harrman, Ann Mary, and Thomas Braegate; James and Thomas died without issue in the lifetime of the testator's widow, Christian Chamberlain. The said Ann Mary, the daughter of the said W. Holmes, intermarried with Joseph Brooks Stephenson, and was the only child of W. Holmes, who was living in the month of March 1814, and at the time of the death of the testator's widow, Christian.

On the 4th of March, 1814, and during the lifetime of the said Christian Chamberlain, by indenture duly made between the said J. B. Stephenson and Ann Mary his wife (therein described as devisee, named in the last will of the said Theophilus Holmes, then deceased), of the first part, J. Connor, gent., of the second part, Charles Waldron of the third part, and Thomas Chandless, gent., a *183] trustee nominated and appointed by and *on the part and behalf of the said Charles Waldron, and also of the said Joseph Brooks Stephenson and Ann Mary his wife of the fourth part; the latter, in consideration of 600l., granted to Charles Waldron, his executors, administrators, and assigns, for and during their natural lives and the life of the survivor, an annuity of 100l. to be charged upon and issuing out of the said messuages or tenements devised by the

will of Theophilus Holmes, and for better securing the payment of the annuity granted, bargained, and sold unto Thomas Chandless, his executors, &c., all the said premises, habendum, from and immediately after the decease of Christian Holmes for the term of ninety-nine years. And then, after reciting that the said J. B. Stephenson and Ann Mary his wife did, as of Hilary term then last, acknowledge and levy before his Majesty's justices of the Court of Common Pleas at Westminster, unto T. Chandless and his heirs, one fine sur conusance de droit come ceo, &c., of the said premises, by the description of seven messuages, seven gardens, and one acre of land, with the appurtenances, in the parish of St. Margaret, in the town and borough of Leicester, of which fine no uses had as yet then been declared, it was by the said indenture agreed and declared between and by the said parties, that the said fine should be and enure to and for the several uses, intents, and purposes in the said indenture expressed of and concerning the same; that is to say, in the first place, for confirming the said yearly rent-charge or annual sum of 100l. thereinbefore granted, and the several powers by the said indenture given, and, in the next place, to the use of T. Chandless, his executors, administrators, and assigns, for and during the said term of ninety-The said last-mentioned indenture was duly executed by the parties, and a receipt for the consideration money endorsed, and a memorial of the same duly enrolled in the Court of Chancery according to the statute in such case made and provided. The fine referred to by the said indenture was duly levied according to the same in Hilary term 54 G. 3, with proclamations. On the 11th day of April, 1823, Thomas Chandless departed this life, having made a will and several codicils, and appointed Sir W. Long, Knight, Henry Gore Chandless, executors. On the 27th of January, 1827, by indenture of that date between the said Charles Waldron of the first part, Sir W. Long, Knight, and Henry Gore Chandless, executors of Thomas Chandless, of the second part, Newbold Kinton, one of the lessors of the plaintiff, of the third part, and James Christmas, one other of the said lessors, of the fourth part, in consideration of the sum of 240l. expressed to be paid by Newbold Kinton to Sir W. Long and H. G. Chandless as such executors as aforesaid, and also in consideration of the further sum of 720l. also expressed to be paid by Newbold Kinton to Charles Waldron, they Sir W. Long, H. G. Chandless, and Charles Waldron, did, and each of them did grant, bargain, sell, assign, transfer, and set over unto N. Kinton all the said annuity or yearly sum of 100% so granted for and during the lives of J. B. Stephenson and John Connor, and the life of the survivor of them, and all arrears and future growing payments thereof. by the said indenture the said Sir W. Long and H. G. Chandless, as such executors, and for the considerations aforesaid, and of 10s. paid to them by the said James Christmas, did bargain, sell, assign, transfer, and set over unto the said James Christmas, his executors, *administrators, and assigns, the said tenements so demised by the said indenture, bearing date the 4th day of March, 1814, to hold the same to the said James Christmas for the residue of the said term of ninety-nine years granted by the said indenture of the 4th day of March, 1814, in trust for securing the payment of the said annuity to the said Newbold Kinton. On the 4th day of June, 1827, the sum of 12751. became due and payable in respect of the said annuity, for fifty-one quarterly payments of the said annuity, and which had respectively remained unpaid for the space of forty days before the commencement of the said actions. The day of the demises laid in the declarations is the 1st day of November, 1827. question for the opinion of the Court was,

Whether the said Ann Mary Stephenson, who was the only child of the said William Holmes living on the 4th of March, 1814, and at the time of the death of the said Christian Holmes (afterwards Chamberlain) took a vested or contingent remainder under and by virtue of the will of the said Theophilus Holmes; and whether the fine levied by the said Mr. and Mrs. Stephenson worked any forfeiture of the estate of the latter, or transferred any interest therein?

The case was argued at the sittings in Banc after Trinity term by

Preston for the plaintiffs, who admitted that the estate given by T. Holmes to the children of W. Holmes was contingent during the lifetime of Christian, widow of the testator; but contended that the fine levied by Mrs. Stephenson, the daughter of W. Holmes, and her husband, although it operated by estoppel only during *the life of the widow, yet after the contingency happened, operated on the estate which became vested in the daughter of W. Holmes.

N. R. Clarke, contrd, contended that the estate of Mrs. Stephenson could not be conveyed by the fine levied in the lifetime of the widow, inasmuch as a contingent remainder cannot be so conveyed; and, consequently, the estate still remained vested in Mr. and Mrs. Stephenson. The fine levied by them operated by way of estoppel only, and of that a stranger may take advantage, Doe v. Martyn, 8 B. & C. 497.

Cur. adv. vult.

BAYLEY, J. This case depended upon the effect of a fine levied by a contingent remainder-man in fee. Ann Mary the wife of Joseph Brooks Stephenson was entitled to an estate in fee upon the contingency of her surviving Christian, the widow of Theophilus Holmes; and she and her husband conveyed the premises to Thomas Chandless for ninety-nine years, and levied a fine to support that conveyance. Christian, the widow, died, leaving Mrs. Stephenson living, so that the contingency upon which the limitation of the fee to Mrs. Stephenson depended, happened, and this ejectment was brought by the assignees of the executors of Thomas Chandless, in whom the term for ninety-nine years was It was conceded upon the argument that the fine was binding upon Mr. and Mrs. Stephenson, and all who claimed under them by estoppel; but it was insisted that such fine operated by way of estoppel only; that it *therefore only bound parties and privies, not strangers; that the defendant, not being proved to come in under Mr. and Mrs. Stephenson, was to be deemed not a privy, but a stranger; and that as to him, the estate was to be considered as still remaining in Mr. and Mrs. Stephenson. To support this position, the defendant relied upon the latter part of the judgment delivered by me in Doe dem. Brune v. Martyn, 8 B. & C. 497; and that part of the judgment certainly countenances the defendant's argument here. The reasoning, however, in that case, is founded upon the supposition that a fine by a contingent remainder-man operates by estoppel, and by estoppel only; its operation by estoppel, which is indisputable, was sufficient for the purpose of that decision, whether it operated by estoppel only, or whether it had a further operation, was quite immaterial in that case; and the point did not there require that investigation, which the discussion in this case has made necessary. We have, therefore, given the point the further consideration it required, and are satisfied upon the authorities, that a fine by a contingent remainder-man, though it operates by estoppel, does not operate by estoppel only, but that it has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel; and that the fine operates upon that estate, as though that estate had been vested in the cognisors at the time the fine was levied.

In Rawlins's case, 4 Co. 52, Cartwright demised land, not his, to Weston for six years; Rawlins, who owned the land, demised it to Cartwright for twenty-one years; and Cartwright re-demised it to Rawlins for ten; and it was *188] *resolved that the lease by Cartwright, when he had nothing in the land, was good against him by conclusion; and when Rawlins re-demised to him, then was his interest bound by the conclusion; and when Cartwright re-demised to Rawlins, now was Rawlins concluded also. Rawlins, indeed, is bound as privy, because he comes in under Cartwright; but the purpose for which I cite this case is, to show that as soon as Cartwright gets the land, his interest in it is bound. In Weale v. Lower, Poll. 54, A. D. 1672, Thomas, a contingent remainder-man in fee, leased to Grills for 500 years, and levied a fine to Grills for 500 years, and died. The contingency happened, and the remainder vested in the heir of Thomas, and whether this lease was good against the heir of Thomas, was the question. It was debated before Hale, C. J., and his opinion was, that

the fine did operate at first by conclusion, and passed not interest, but bound the heir of Thomas; that the estate which came to the heir when the contingency happened fed the estoppel; and then the estate by estoppel became an estate in interest, and of the same effect as if the contingency had happened before the fine was levied; and he cited Rawlin's case, 4 Coke, 53, in which it was held, that if a man leased land in which he had nothing, and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest till he bought the land; but that as soon as he bought the land, it would become a lease in interest. The case was again argued before the Lord Chancellor, Lord C. J. Hale, Wilde, Ellis, and Windham, justices, and they all agreed that the fine at first enured by estoppel; but that when the remainder came to the *conusor's heir, he should claim in nature of a descent, and therefore should be bound by the estoppel; and then the estoppel was turned into an interest, and the cognizee had then an estate in the land. In Trevivan v. Lawrence, 6 Mod. 258, Ld. Raym. 1051, Lord Holt cites 39 Ass. 18, and speaks of an estoppel as running upon the land, and altering the interest of it,—as creating an interest in or working upon the estate of the land, and as running with the land to whoever takes it. In Vick v. Edwards, 3 P. Wms. 372 (1735.) Lord Talbot must have considered a fine by a contingent remainder-man as having the double operation of estopping the conusors till the contingency happened, and then of passing the estate. In that case, lands were devised to A. and B. and the survivor of them, and the heirs of such survivor, in trust to sell: the master reported that they could not make a good title, because the fee would vest in neither till one died. On exceptions to the master's report, Lord Talbot held, that a fine by the trustees would pass a good title to the purchaser by estoppel; for though the fee were in abeyance, it was certain one of the two trustees must be the survivor, and entitled to the future interest; consequently, his heirs claiming under him would be estopped by reason of the fine of the ancestor to say, quod partes finis nihil habuerunt, though he that levied the fine had at the time no right or title to the contingent fee. And the next day he cited Weale Now, whether Lord Talbot were right in treating the fee as in abeyance, and the limitation to the survivor and his heirs as a contingent remainder or not, it is evident he did so consider them; and he must have had the impression that the fine would have *operated not by estoppel only, but by way of passing the estate to the purchaser, because, unless it had the latter operation as well as the former, it could not pass a good title to the purchaser.

In Fearne, c. 6, s. 5 (edit. 1820), p. 365, it is said, "we are to remember, however, that a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency;" and after stating the facts in Weale v. Lower, he says, it was agreed that the contingent remainder descended to the conusor's heir; and though the fine operated at first by conclusion, and passed no interest, yet the estoppel bound the heir; and that upon the contingency, the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied.

Upon these authorities we are of opinion that the fine in this case had a double operation,—that it bound Mr. and Mrs. Stephenson by estoppel or conclusion so long as the contingency continued; but that when the contingency happened, the estate which devolved upon Mrs. Stephenson fed the estoppel, the estate created by the fine, by way of estoppel, ceased to be an estate by estoppel only, and became an interest, and gave Mr. Chandless, and those having right under him, exactly what he would have had had the contingency happened before the fine was levied.

Postea to the plaintiff.

*191] *DOE dem. WILLIAM HARRIS v. ELIZABETH HOWELL and Others.

Testator devised to his daughter E. H., the wife of W. H., for life; remainder to John, his daughter's son, and his heirs and assigns for ever; but in case he should die before the testator's daughter E. H., and she should have no other child living at her death, his will was, that his said daughter should give and devise the premises to such person as she should think proper. The testator died in February 1763, and John, the daughter's son, in April following. In January 1766 the daughter had another son. In November 1770 W. H. died, and in Hilary term 1773 E. H. levied a fine with proclamations: Held, that although at the death of the testator, and until the death of his grandson John, the power given to the daughter to devise to such person as she should think proper, could avail only as an executory devise, yet upon the death of John the character of the limitation changed, and it became a contingent remainder, and that it was therefore barred by the fine.

At the trial of this cause before Vaughan, Baron, at the Spring assizes for the county of Worcester 1828, a verdict was taken for the lessor of the plaintiff,

subject to the opinion of this Court on the following case:-

Shortly before the 19th day of February, 1763, John Ley died seised in his demeane as of fee of the premises hereinafter mentioned, having first duly made and published his last will and testament in writing, executed and attested so as to pass his real estate, bearing date the 20th of September, 1762, whereby (amongst other things) he gave, devised, and bequeathed as follows, "I give, devise, and bequeath unto my daughter Elizabeth Harris all those my two messuages or tenements lying and being in Clifton in the county of Worcester, (being the premises in question in this ejectment,) with the gardens, land, and appurtenances to the same belonging, to hold to her my said daughter for and during the term of her natural life, and from and after her decease, in case her husband William Harris shall survive her, then I give and devise the same unto him the said William Harris for the term of his natural life, and from and after the decease of the said William Harris and Elizabeth his wife, and the survivor of them, then I give and devise the said *messuages or tenements, with the appurtenances, unto my grandson John the son of my said daughter Elizabeth Harris, and his heirs and assigns for ever; but in case my said grandson shall die before my said daughter, and she shall have no other child living at her death, then my will is that my said daughter shall give and devise the said premises to such person or persons as she shall think proper."

The testator died without revoking or altering his said will with respect to the said devise, and was buried on the 19th day of February, 1763. at the time of his death was a widower. William Harris and the testator's daughter Elizabeth who are named in the will were married on the 28th of April, 1762. John, the testator's grandson, who is also named in the will, was the illegitimate son of the said Elizabeth by the said W. Harris and died in the month of April 1763, aged about two or three years. W. Harris the lessor of the plaintiff is the son and heir at law of the said Elizabeth and W. Harris her said husband, and was born in the month of January 1766. W. Harris the said husband of the said Elizabeth died in the month of November 1770, leaving his said wife, and his said son Wm. Harris the lessor of the plaintiff, him surviving. On the 27th of December, 1772, the said Elizabeth, the widow and relict of the first-named W. Harris, intermarried with one Samuel Anthornies. In Hilary term, 13 G. 3, the said Elizabeth and Samuel Anthornies (her second husband) duly levied a fine with proclamations of the premises in question, in which fine one Robert Jones was plaintiff, and the said Elizabeth and S. Anthornies and one James Payne were defendants. Robert Jones afterwards conveyed the premises to a person of the name of Child, from whom, by divers *mesne assignments, they came into the possession of the present Earl of Coventry, whose tenants the defendants in this ejectment are. Elizabeth Anthornies died a widow in May 1819, leaving W. Harris the lessor of the plaintiff, and ber then only child, her surviving. The lessor of the plaintiff made an actual

entry upon the premises within five years next after the death of Elizabeth Vol. XXI.—12 H2

Anthornies, and before the day of the demise laid in the declaration, for the purpose of avoiding the said fine, and also commenced this ejectment within one year after the making of such entry and duly prosecuted the same. The questions for the opinion of the Court were; first, What estate in the premises of the said Elizabeth the daughter of the said testator and mother of the lessor of the plaintiff took under the said demise? And secondly, Whether the title of W. Harris the lessor of the plaintiff was or was not barred by the fine so levied by the said Elizabeth and S. Anthornies as aforesaid?

This case was first argued at the sittings in banc after last Easter term, by Busby for the plaintiff, and Shutt for the defendant. The former contended that W. Harris the grandson of the testator took under his will an estate in fee by implication, by way of executory devise, which was not barred by the fine; that the limitation over to the daughter in case she should have no child living at her death, she being the testator's heir at law, raised an estate by implication in favour of the lessor of the plaintiff, and that as that limitation over was after a previous fee given to the daughter's son John, it operated upon the testator's death by way of executory devise, and that a limitation which operates by way of executory *devise cannot be defeated or destroyed by any act of any [*194] of the preceding takers.

The defendant insisted, first, that Elizabeth Harris took in tail; that an estate could not be raised by implication upon a limitation which operated by way of

executory devise; and that the devisee ought to be named.

It was suggested by the Court that so long as John the son lived, the limitation over operated by way of executory devise; but that as soon as John died, and his estate, which made the limitation over an executory devise, ceased, the limitation over operated by way of remainder, exactly as it would have operated had the will contained no limitation to the son; and if that were the true light in which the case ought to be viewed, the defendant would be entitled to the judgment of the Court. The remainder to such child or children, if any, as Elizabeth should have living at her death, would clearly be contingent, and the destruction of her life estate by the fine would destroy the remainder, which had nothing but that life estate to support it.

They therefore ordered that there should be a second argument on the question, "Whether an executory devise might, by an event happening after the death of the testator, viz. by the death of John his grandson, be converted into a contingent remainder." On a former day in this term the case was argued on

this point by

Busby for the plaintiff. In this case, the grandson, W. Harris took an executory devise in fee by implication. It makes no difference whether the estate in remainder to John was vested or contingent. It is not *a case of contingency with a double aspect, as in Loddington v. Kime, 1 Salk. 228. Here, John survived the testator for three years; and if John, at the time of the death of the testator, took a vested remainder in fee, the limitation to any child then unborn could only be by way of executory devise, Doe v. Selby, 2 B. & C. 926, Gulliver v. Wickett, 1 Wils. 105. Next, suppose John took a contingent remainder. [LITTLEDALE, J. The question to be discussed is, what There can be no doubt that John took a vested remainder estate William took. in fee.] Then it is clear that William took by way of executory devise, and the death of John in the lifetime of the tenant for life, made no difference. LEY, J. That is the whole question, viz. Whether the circumstance which made the limitation to William an executory devise ceasing, it continued an executory devise or not.]

Shutt, contrd. There are many instances in which a testator having given a particular estate, with subsequent limitations, to take effect by way of contingent remainders, and the particular estate has failed in the lifetime of the testator, the other limitations have been held to take effect as executory devises, Hopkins v Hopkins, Cas. temp. Talb. 44, Stephens v. Stephens, Cas. temp. Talb. 228; and where there is a class of executory devises, and one becomes vested, all the

others become contingent remainders, Fearne, 525, 6th edit., Hopkins s. Hopkins, Brownsward v. Edwards, 2 Ves. 243, Fonnereau v. Fonnereau, Dougl. 587, Doe v. Scudamore, 2 Bos. & Pull. 289.

*Busby, in reply. In those cases the alteration was made by an event

*196] happening in the lifetime of the testator.

Cur. adv. vult.

BAYLEY, J., delivered the judgment of the Court. This case was founded upon the will of John Ley. By that will he devised to his daughter Elizabeth, the wife of William Harris, for life, remainder to William Harris for life, remainder to John, his daughter's son, and his heirs and assigns for ever; but in case he should die before the testator's daughter, Elizabeth Harris, and she should have no other child living at her death, his will was, that his said daughter should give and devise the premises to such person or persons as she should think proper. The testator died in February 1763, and John, the daughter's son, in April following. In January 1766, the daughter had another son, William, the lessor of the plaintiff. In November 1770, William Harris died; and in December 1772, his widow married again. In Hilary term 1773, she and her second husband levied a fine with proclamations of the premises in question; and the case depends upon the effect of that fine. If that fine barred the lessor of the plaintiff, the defendant is entitled to the property; if it did not bar him the property is his. In May 1819, the testator's daughter Elizabeth died, and a proper entry was made to avoid the fine. The daughter was John Ley's heir. At the time, therefore, when the fine was levied (John the devisee in fee being dead, and William Harris being dead), the only parts of the will which continued capable of operating, were the devise to the daughter *for life, and the devise over in case she should have no other child living at her death, that she might give and devise the property as she should think

The question whether the plaintiff's title is barred by the fine levied by his mother Elizabeth, depends upon the quality and character of the power given to her by the will to give and devise the premises after her own death, in case she shall have no other child living at her death. If this be considered as an executory devise, the fine did not bar it; and the lessor of the plaintiff is entitled to recover. If it be considered as a contingent remainder, it was defeated by

the fine.

It is a maxim of law, that no limitation shall be considered as an executory devise which may be good as a remainder, the law favouring the alienation of property. In the present case, it is clear that at the death of the testator, and until the death of his grandson John, this limitation could avail only as an executory devise; and this not for want of a freehold interest to support it, but by reason of the previous gift of the whole fee to the testator's grandson John, if he had survived his mother. Upon the death of John, this necessity and the reason of it ceased, and the lands then stood limited to Elizabeth for life, remainder to her husband for life, with a power to her to give and devise the fee if she should have no other child living at her death. In this state of facts, therefore (that is upon the death of John), we think the character and quality of this limitation changed, and it became a contingent remainder. This appears to us to be conformable to the principle upon which executory devises are allowed, viz. the necessity to give effect to the intention of a testator.

*In Stephens v. Stephens, Cas. temp. Talb. 228, Fearne, 519, the testator devised to his grandson William Stephens, his heirs and assigns for ever (after the death of the testator's wife), but if William should die under twenty-one, to his grandson Thomas and his heirs; but if he should die under twenty-one to such other son of the father and mother of William and Thomas as should attain twenty-one, in tail made, remainder to the daughters of their father and mother in tail general, remainder to Sir Richard Stephens in fee. William and Thomas both died under twenty-one; their father and mother had another son and daughter, Sarah and Thomas, and it was held by the Court of

King's Bench, Lord Hardwicke then being Chief Justice, that the limitation to such other son as the father and mother of William and Thomas should have (there being no freehold to support it) was good by way of executory devise; and that if the limitation to their sons and daughters in tail should fail, the estate would go to Sir Richard Stephens, by virtue of the remainden to him in fee. Lord Chancellor Talbot decreed according to this decision, and expressed his satisfaction with it as agreeing with his own sentiments. Mr. Fearne observes upon this case, that until the estate vested in some son (of the father and mother of William and Thomas) who attained twenty-one, the limitations over to the daughter and Sir Richard Stephens must have been executory devises; but as soon as ever the estate should become vested in a son, then those subsequent limitations must, of course, have taken effect as vested remain-In Hopkins v. Hopkins, Cas. temp. Talb. 44, Fearne, 304, 525, there was a devise in *trust for B. for life, remainder to his first and other sons successively in tail male, remainder to the future sons of C. successively for life, remainder over. B. died in the life of the testator, and C. had no other son until some time after the testator died: it was held, that if the fee had not been in the trustees, B.'s death in the testator's lifetime would have made the limitations to the future sons of C. executory devises; but that as soon as C. had another son, and the executory devise having thereby vested, the subsequent limitations would have ceased to be executory devises, and would have been contingent remainders; but C.'s son having died before any other estate vested, and the question being raised, Whether the limitations over, prior to D.'s were not destroyed? it was decreed by Lord Chancellor Talbot that the legal estate was in the trustees, and protected those which would otherwise have been contingent remainders from destruction; and that decision was afterwards acted upon by Lord Hardwicke. That case, therefore, shows that limitations, which had previously been considered as executory devises, by the birth of a son (intended to be the first taker), became contingent remainders. And if an executory devise shall become a contingent remainder by the birth (of a person capable of taking) happening after the death of the testator, the same change must, by parity of reason, take place on the death of the person whose interest alone caused the limitation to be considered as an executory devise.

That a limitation in a will which, at the time of making it, could only have operated by way of executory devise, may, by change of circumstances in the testator's *lifetime, operate at his death so as to give a vested estate in possession, or a vested remainder, or a contingent remainder liable to destruction, is laid down distinctly by Mr. Preston in his book upon Abstracts, vol. ii. p. 154, and it will be found upon examination that a change of circumstances after the testator's death may change the character of a particular limitation, and make it operate at one time as a remainder, at another as an executory devise, and e converso at one time as an executory devise, at another as a remain-

der.(a)

And in Fearne's Essay on Contingent Remainders abundant proof will be found that where a limitation, which causes subsequent limitations to operate by way of executory devises, is removed, the subsequent limitations, if they do not give an estate in possession, will operate either by way of vested or contingent remainder, as they would have done had that limitation which made the others operate by way of executory devise never existed. In p. 506, Mr. Fearne says, "But here an observation is to be attended to, that notwithstanding the rule that if one limitation be executory, every subsequent one must be so likewise, yet a preceding executory limitation may be uncertain and contingent, when a subsequent one may be so limited, as to take effect either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. In either of those cases it must vest at the time appointed for the preceding limitation to vest: should the preceding limitation fail, the

⁽a) Preston on Estates, vol. i. 59-83, 87, 88. Preston on Abstracts, vol. ii. 154, 172.

*201] subsequent one will then vest in *possession; should it take effect the subsequent one will at the same instant vest in interest as a remainder upon the preceding one, and then become liable to the same modes of destruction, as other remainders of the same kind are subject to. And in addition to the cases I have mentioned of Hopkins v. Hopkins, and Stephens v. Stephens, Mr. Fearne adduces in different parts of his work, in illustration of the same doctrine, the cases of Brownsward v. Edwards, 2 Ves. 243, and Gulliver v. Wickett, 1 Wils. 105.

In Gulliver v. Wickett, the testator devised to his wife for life, remainder to the child his wife was then supposed to be pregnant with, and his heirs, but if he should die under twenty-one and without issue, then to B. and his heirs, this was held to be a good devise to the wife for life, with contingent remainder to the child in fee, with a good executory devise to B. in fee; and if the contingency of a child never happened, that the remainder to B. would take effect upon the death of the wife; and it will be seen that it would take effect as an ordinary remainder.

In Brownsward v. Edwards, 2 Ves. 243, Fearne, 506, where an estate was devised to B. and the heirs of his body if he attained twenty-one, but if he died under twenty-one, and (construed 'or') without issue, and he attained twenty-one, but died without issue, Lord Hardwicke held that the remainder over would have enured by way of executory devise had B. died without issue under twenty-one, yet as he did not die till after the estate vested in him, the limitation over

went by way of remainder.

*From these authorities we think it clear that a change of circumstances after the death of the testator may convert into a remainder what at the death of the testator and without such change could only have operated by way of executory devise, and that this will be the case where that limitation which alone would make the others executory devises is become incapable of taking effect, and if this be so this case is clear. For at the time this fine was levied, the only vested estate was in Elizabeth the testator's daughter, and her husband in her right, and the only other interest was a contingent remainder in favour of any child or children she should leave at her death, and that remainder the fine destroyed. For these reasons, we think the verdict must be entered for the defendants, according to the reservation in the case.

Postea to the defendant.

NIGHTINGALE v. WILCOXSON and Others.

(In Error.)

In a declaration against the sheriff for an escape, it is sufficient to allege that the writ directing the arrest was duly endorsed for bail without adding "by virtue of an affidavit made and filed of record."

stated the delivery of the writ to the sheriff, the arrest of Kirk, and that defendant voluntarily suffered and permitted Kirk to escape. Demurrer, assigning, among other causes, that it was no where alleged that any affidavit of the supposed cause of action set forth was ever made; nor, if made, that it was filed in the Court of Common Pleas; nor if so made and filed, to what amount the affidavit specified the said supposed cause of action. Joinder in demurrer. The Court of Common Pleas having given judgment for the plaintiffs below, the cause was removed into this court by writ of error. The case was argued on a

former day in this term (the court being full) by Wyborn for the plaintiff in error. The declaration does not show that it was the duty of the sheriff to arrest the body of Kirk, for the sheriff was not bound to arrest unless there was a previous affidavit of debt. It is essential in an action for an escape, for the plaintiff to allege and prove an affidavit filed of record previous to the arrest, corresponding with the endorsement on the writ as to the amount, and with the body of the process as to the cause of action. statute 12 G. 1, c. 29, for preventing frivolous and vexatious arrests, is divided by the first two sections into two branches. By the first section, all claims made in the *superior courts not amounting to 10l. and upwards, are to be deemed frivolous; and no arrest is for such sum to be permitted. The second section defines what shall be deemed vexatious arrests: and all arrests for sums above 10l. are thereby deemed vexatious, and as such to be prevented, unless such process against the person be accompanied by certain forms previous to the arrest. First, there must be an affidavit of the precise cause of action for an arrest above 10l.: secondly, such affidavit must be filed previous to the arrest: thirdly, the affidavit and process must correspond exactly, and the amount expressed in the affidavit on record is to be endorsed on the pro-The second section provides for the case now before the Court in these words,-"If a writ shall issue against the person for the sum of 101. and upwards, and no affidavit shall be made as aforesaid (i. e. filed of record), the plaintiff shall not proceed to arrest the body of the defendant, but proceed as directed in section one, viz. serve a copy of the process. Here there is no allegation that any affidavit has been made or filed against Kirk. The plaintiffs below could only empower the sheriff to arrest by proceeding as the statute directs. Court cannot, since the statute, know what the sheriff's duty was, but from the declaration. It appears from the declaration, that the plaintiffs below were restrained from causing the body of Kirk to be arrested. They cannot, therefore, maintain any action against the sheriff for suffering Kirk to escape, because he never was in legal custody, and the sheriff ought not to have arrested him. The sheriff was liable to an action at the suit of Kirk, Hill v. Heale, 2 N. R. 202; for, if the *sheriff take upon himself, in violation of any particular statute, to execute process, he does so at his peril if the process be exceptionable or defective in form; and if good in form, and the court or officer executing it has no jurisdiction, the sheriff must abide the consequence, civil as well as criminal, Hill v. Heale, Foster's Crown Law, 312, cited by Lawrence, J., in Cole v. Hindson, 6 T. R. 236. The case of the Marshalsea, 10 Rep. 76. A sheriff has a discretionary power. Thus, though an attachment issuing out of Chancery to compel appearance be in the nature of an execution for a supposed contempt, and therefore a sheriff is not compellable to take a bail-bond, yet he may take one if he think fit, and may assign it; but he is not bound to make such assignment, Morris v. Hayward and another, 6 Taunt. 569. So where he has reasonable doubt of the correctness of the process, he may discharge the prisoner; and where he may but is not bound to detain him, no action for an escape will lie, Morgans v Bridges, 2 Stark. 314; 1 B. & A. 647, Shadget v. Clipson, 8 East, 328. And where a defendant had been arrested by a wrong Christian name, and an attachment had actually issued against the sheriff for not bringing in the body, the Court of Common Pleas set it aside on the ground that by the original arrest the sheriff was a trespasser, The King v. The Sheriff of Surry, 1 Marsh. 75. . [LITTLEDALE, J. An arrest for debt may be legal,

though not warranted by the statute. The statute requires the affidavit to be sworn before a judge or commissioner appointed by the court, and within its *206] jurisdiction; yet *parties are frequently held to bail on affidavits sworn abroad.] Such arrests are rendered lawful by a judge's order after an application founded on an affidavit which must be filed to be regular. The judge's order authenticates the foreign affidavit, and is tantamount to a re-swearing before a judge. Such an affidavit is essential; and it not being shown that any such existed, the plaintiffs cannot sustain the action, for its omission cannot be supplied by evidence, for the plaintiffs are bound to recover secundum allegata et probata, Brazier v. Jones, 8 B. & C. 124. The plaintiff's count ought to contain all the circumstances material for the maintenance of the action; and if there is an intendment, it shall be taken most strongly against the plaintiff, Jackson v. Pesked, 1 M. & S. 234, Thornton v. Adams, 5 M. & S. 38.

The rule is that averments, if material, must be proved; if immaterial, they need not be proved. If the existence of an affidavit on record for a bailable cause of action previous to the arrest be material, it must be not only proved but averred. Buller, J., in Webb v. Herne, 1 Bos. & Pul. 281, speaks of a case in which it was held unnecessary to produce an affidavit in support of such an averment as the present. That was Croke v. Dowling, E. 22 G. 3; Bull. N. P. 14, which was an action for a malicious arrest, and it would have been most unreasonable to have required in such case proof of an affidavit to hold to bail, which if it did not really exist would but have aggravated the wrong. [Lord TENTERDEN, C. J. That case bears no resemblance to the present. It would clearly be no defence to an action for a malicious arrest, that the defendant caused the *plaintiff to be arrested only by an endorsement on the writ without any affidavit to hold to bail.] Most of the printed precedents of declarations in actions against the sheriff for an escape (since the statute) contain the averment of an affidavit on record. It is not to be found in the precedents in Lilly or Rastall; they were printed before the statute. In 2 Chitty on Pleading, 739, in the precedents of declarations in actions for escape, a reference is made to a former precedent of a declaration in an action on a bailbond, and there it is stated, in a note, not to be advisable to insert the averment, and that may account for the practice which has latterly prevailed. DALE, J. I have seen many precedents without any other averment than that the writ was duly endorsed, settled by pleaders of great eminence.]

The second question is, whether the word duly necessarily imports more than is expressed by the subsequent words affixed to that adverb. Now that word has received a legal interpretation in several cases. In Everard v. Paterson, 6 Taunt. 645, which was an action of debt on an award, the submission was to the arbitrators, so that they made their award in writing under their hands on a certain day: and the declaration (after stating that submission) averred that the arbitrators in due manner, and before the day named, duly made their award in writing; and a judgment was obtained by the plaintiff in this Court, but upon a writ of error in the Exchequer chamber, that judgment was reversed upon this ground, that the averment of the arbitrators having "duly" made their award in writing, did not necessarily import that it was under their hands, although it *208] was urged that *an award duly made in writing must mean, made with all the formalities which the previously stated submission required, and that those words were equivalent to an express averment that the award was made under the hands of the arbitrators. That construction of the word duly has been supported in this Court in Williams v. Germaine, 7 B. & C. 468, where, in an action by the endorsee of a bill of exchange, against an acceptor for honour of the drawer, the declaration averred, that the bill was duly presented at the place where it was made payable by the acceptance and payment of the money duly demanded according to the tenour and effect of the bill and of the acceptance and endorsement. It was argued for the plaintiff, as in this case, that it sufficed; for it was averred that the bill was duly presented, and payment duly demanded, according to the tenour of the bill and acceptance; which could not be true unless presented both to the drawee and acceptor for honour, if such presentment were necessary. But such an extension of the sense of an averment by the mere antiposition of the word duly was repudiated by this Court, and the judgment was arrested even after verdict. So in Brazier v. Jones, 8 B. & C. 124, the declaration was against the marshal for an escape, and averred that the prisoner was duly committed to the custody of the warden of the Fleet for non-payment of money under an award which had been duly made a rule of Court. This was relied on by the plaintiff's counsel as a sufficient averment of a commitment to justify the receipt of evidence of an order of the Court of Common Pleas for an attachment for non-performance of the award. But this Court held it to be insufficient, on the ground that *the plaintiff was [*209] bound to aver, not only the escape but that the prisoner was in lawful

custody.

Russell. Serit., contrd. The declaration must undoubtedly show an obligation on the part of the sheriff to arrest and detain Kirk. But it sufficiently appears in this case that the statute has been complied with. A special averment of an affidavit to hold to bail is unnecessary. Here, that fact is included in the averment, that the writ was duly endorsed for bail for 25l. and upwards. Before the statute 12 G. 1, c. 29, a defendant might have been arrested upon process against the person in civil actions for any sum of money however trifling, without any affidavit of its being due. But the statute requires that an affidavit of the cause of action shall be made and filed, and that the sum specified in such affidavit shall be endorsed on the back of the writ, for which sum so endorsed, the sheriff shall take bail. There can be no endorsement, therefore, but of the sum specified in the affidavit. Now, the declaration states, first, that J. W. Kirk was indebted to the plaintiffs in a large sum, to wit, in the sum of 50l., in respect of certain causes of action. It therefore avers a cause of action; and that averment can only be supported by proof of a bailable cause of action. A good cause of action must be proved, Gunter v. Cleyton, 2 Lev. 85, Alexander v. Macauley and another, 4 T. R. 611. It will be a defence for the sheriff, of course, to negative such bailable cause of action; thus where the declaration in an action for an escape stated generally that the party was indebted to the plaintiff for goods sold and delivered, and it appeared that *the goods were sold at three months' credit, and that the arrest took place before the three months had expired, it was held to be a ground of nonsuit, White v. Jones, 5 Esp. 162. The next averment is, that a writ of capias ad respondendum was sued out, and that the said writ was duly marked or endorsed for bail for 25l. and upwards. Now it is said that the word duly is to have no effect, and Williams v. Germaine, 7 B. & C. 468, is cited. There the action was by the endorsee of a bill of exchange against the acceptor for the honour of the drawer, and the question on the motion in arrest of judgment was, whether the declaration sufficiently averred a presentment for payment to the drawee. The averment was "that the bill when it became due was duly shown or presented at the place where it was made payable by the acceptance, and payment of the sum therein mentioned, was duly demanded according to the tenor and effect of the bill and of the acceptance and endorsement." Now this could only be read as an averment of a presentment to the acceptor—it clearly refers to that only; presentment to the drawee was not included in it or implied by it. The averment, therefore, that all this was duly done, could not extend to another different and independent fact, viz. a presentment to another party. In Everard v. Paterson, 2 Marsh. 304; S. C. 6 Taunt. 645, the decision proceeded upon the ground that a submission being a special authority given by the parties to the arbitrator, by which they bound themselves to the performance of the award, such special authority must be strictly pursued; and by using the expression in due manner and duly, the party was drawing his own conclusions as to what would be a compliance with such *submission. The submission required that the [*2]1 award should be under the hands of the arbitrators. The allegation was, that they duly made their award in writing; and as the award might have

been duly made in writing and not under their hands, the court held that it was But though the addition of the word duly will not supply the omission of a material independent fact, which may or may not exist independently of that which is averred, yet it has its effects in relation to the subjectmatter of the averment to which it is applied. It signifies that it is done legally, in due course, according to the provisions of the law whether common law or Here it signifies that the endorsement was such an endorsement as is required by law, and that implies and includes in its terms an endorsement by virtue of an affidavit. This sense has been put on the word duly in several cases. In Dudlow v. Watchorn and another, 16 East, 39, bail sued in scire facias upon their recognisance, pleaded that no ca. sa. was duly sued out, returned and filed against the principal according to the custom and practice of the Court, the plaintiff in reply showed a ca. sa. issued into Middlesex, and the defendants rejoined that it issued into a wrong county. And this was held not to be a departure from the plea, but to sustain the plea from the effect of the word duly. Lord Ellenborough says, "Here the allegation is that no writ of capias ad satisfaciendum was duly issued against the principal, which refers to the purpose for which it is professed to be issued, that of charging the bail, and is equivalent in effect, to saying that no ca. sa. was sued out in the manner re-*212] quired by the practice of the Court, to charge the bail." And *the case was distinguished from Elliot v. Lane, 1 Wils. 334, where the bail had pleaded that there was no ca. sa. against the principal; the plaintiff replied a ca. sa. and a return of non est inventus, and a rejoinder showing an irregularity was held to be a departure. In Rex v. Lyme Regis, Dougl. 79, the effect of the words duly elected was much considered on a return to a mandamus to restore a person to the office of burgess. The writ stating that the party applying was duly elected, admitted, and sworn, and the return being that he was not duly elected, admitted, AND SWORN. Lord Mansfield, after observing on the nicety in the cases as to elected and duly elected, pronounced against the return, because it was in the conjunctive, not duly elected, admitted, and sworn; but he says, "If the truth would have warranted it, and they had returned not duly elected, or admitted, or sworn, it might have been good." So in Patience v. Townley, 2 Smith, 223, Lord Ellenborough, speaking of an averment that a bill was duly presented, said that it imported that it was presented according to the custom of merchants, which necessarily implied an exception in favour of the unavoidable accidents which must prevent the party from doing it within the regular time." This word has its effect also in criminal proceedings. Lord Kenvon considered that in an indictment for perjury an averment that the defendant was duly or in due manner sworn was sufficient, Rex v. M'Carther, Peake's N. P. C. 155.

Besides, it is a general principle in pleading, which applies to this case, that it is not necessary to allege any facts or circumstances necessarily implied.

*213] Sheriffs of *Norwich v. Bradshaw, Cro. Eliz. 53, Cadwallader v. Bryan, Cro. Car. 162, Co. Lit. 303 b, 2 Saund. 305, n. 13, Vynior's case, 8 Co. 81 b. Here the fact, that an affidavit to hold to bail was filed of record, is implied in the words "duly endorsed;" there could not be an endorsement without it: for by the statute the endorsement must be of the sum specified in the affidavit. As to precedents, they are both ways.

It must be conceded that the statute is not merely directory, though that was so held by Lord Mansfield in Whiskard v. Wilder, 1 Burr. 330. In Hill v. Heale, 2 N. R. 202, Sir James Mansfield, who expressed a different opinion upon that point, seemed to consider the endorsement as a sufficient authority to the sheriff; for he is reported to have said, "The sheriff must see by the writ whether it be endorsed or not, and I cannot think he could justify an arrest without it." Croke v. Dowling(a) is certainly not in point, because that was an action for maliciously holding to bail; but Webb v. Herne, 1 Bos. & P. 281, w. an action against the sheriff for an escape, and there Lord C. J. Eyre

expressed an opinion that a special averment that the writ was endorsed for bail by virtue of an affidavit filed of record was unnecessary. [BAYLEY, J. That case only decides, that if there be such a special averment it must be proved. It is true that Lord C. J. Eyre said that if the latter words had been omitted, he should have left the evidence to the jury; but that was after Mr. J. Buller had said that he remembered a case in Lord Mansfield's time, probably alluding to Croke v. Dowling, where the *declaration only stated generally that the writ was endorsed for bail, and it was held unnecessary to prove the affidavit. Croke v. Dowling was an action for a malicious arrest, and it would undoubtedly have been unnecessary to aver that which, if it did not exist at all, would have been an aggravation of the defendant's conduct.] Mr. J. Buller did not mention Croke v. Dowling, though it is referred to by the reporters; and ever since the case of Webb v. Herne it has been considered unnecessary to aver specially that the writ was endorsed, by virtue of an affidavit filed of record, and the authority of that case is recognised in Casburne v. Reid, 2 Moore, 60. editors of the last edition of Saunders, in a note to Green v. Jones, p. 296, state that "those words are now usually omitted, the endorsement on the writ being considered sufficient evidence of compliance with the act of parliament, but that if they be inserted, the affidavit must be proved;" and it is perfectly consistent with principle, and all the authorities, to hold that the averment of the writ being duly endorsed for bail is a sufficient averment of compliance with the sta-Whether, in support of that averment, an affidavit may not be considered necessary evidence, is another question.

Wyborn in reply. The adverb duly imports no more than what is necessary to make it a legal endorsement. It is not immaterial. Here it imports all the essential qualities of an endorsement that it is in writing, intelligible and sufficiently precise. The authorities cited on this point only show that the Courts will intend what is strictly necessary.

Cur. adv. vult.

*BAYLEY, J., now delivered the judgment of the Court. This is a writ of error brought by the late sheriff of Cambridgeshire, on a judgment pronounced against him in the Court of Common Pleas, in an action for the escape of one John Ware Kirk, on mesne process issued against Kirk at the suit of the defendants in error. The sheriff demurred specially to the declaration, and assigned several causes, of which one only is material, namely, the want of an affidavit, or rather, perhaps, the omission to aver that an affidavit of the cause of action against Kirk was made and filed. Declarations in the present form have prevailed extensively, and without objection, for more than twenty years, which shows the opinion of the profession upon the subject. The form is convenient, and ought to be held good, if by law it can be so, and we are of opinion that it may. The declaration alleges that Kirk was indebted to the plaintiffs below in a large sum of money, to wit, 501., and it is a known rule of pleading, that where a sum, a time, or any matter is material, the sum, the time, or matter, though mentioned under a videlicet, shall be taken to be the true sum, the true time, or the true matter; and therefore this must be considered upon demurrer as an allegation that Kirk owed 50%, which is much more than the sum required to warrant an arrest. It would have been more correct to have stated, that the defendant in the former action was indebted to the plaintiff in a sum of money exceeding 10l., to wit, &c. The declaration then proceeds to allege that they, for the recovery of their debt, sued out a writ of capias ad respondendum, with an ac etiam clause, commanding the arrest of the alleged debtor; that this writ was duly marked and endorsed for *bail for 25%, [*216 and so marked and endorsed was delivered to the sheriff to be executed; and it then proceeds to allege the grievance. We think this is sufficient, and that the writ, which is stated to have been prosecuted out of this court, is not to be presumed to have issued improvidently. The presumption is the other way, and that all things have been done rightly, and all steps taken which are necessary by the practice of the Court, or the statute law regulating that pructice, to the due issuing of the writ. It is also to be observed, that the statute

of 12 G. 1, on which the case of the plaintiff in error was rested on the argument, as requiring an affidavit of the cause of action, sworn as therein mentioned, does not apply to all cases: it has been held, in this respect, to restrain plaintiffs only, and not to affect the ancient practice of the Court, on the special application of a suitor. There can be no doubt but that before the statute, this form of declaring was good; and as the statute requires this affidavit in some cases, and not in all, the form is still good; for it is impossible to say on the face of the record, that this is a case to which the statute applies. For these reasons we are of opinion that the declaration alleges all that is necessary to be alleged.

Judgment affirmed.

*217] *HAWKINS and Others, Assignees of ARCHIBALD MORTON, A. RODICK, and CHARLES MORTON, v. WHITTEN.

By the statute 6 G. 4, c. 16, s. 50, mutual debts and credits may be set off, notwithstanding any prior act of bankruptcy, provided that the party claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed: Held, in an action brought by the assignees of certain bankers, that a party has a right to set off notes of such bankers taken by him after he knew that they had stopped payment, but before he knew that they had committed an act of bankruptcy.

Assumpsit for money lent and advanced, money paid, money had and received, &c. Plea, general issue, and notice of set-off. At the trial, before Holroyd, J., at the Spring assizes for the county of Northampton, 1827, it appeared that the bankrupts had carried on business as bankers at Wellingborough, in the county of Northampton; and this action was brought by the plaintiffs as their assignees, to recover 751. (the balance of an account), admitted to be due from the defendant to the bankrupts before their bankruptcy. It was also admitted that the defendant had a right to set off 10l. for goods sold and delivered by him to the bankrupts before their bankruptcy. The only question was, whether the defendant was entitled to set off a further sum of 65l. As to that, it was proved by the defendant that he had received notes of the Wellingborough bank to that amount on the 16th of December, 1825, and it appeared upon the cross-examination of the defendant's witnesses, that he had taken some trouble to procure the notes. It was proved also, that on the 14th of December the bankers had stopped payment, and on that day had issued the following notice, addressed to the debtors and creditors of Messrs. Morton and Co.:- "Messrs. Morton, Rodick, and Co. hereby give notice, that owing to the alarming state of money matters in London, their agents cannot *possibly remit them the funds which are in their hands; they are therefore under the painful necessity of suspending their payments for a short time." Whitten, the defendant, was a printer and stationer in Wellingborough, and was employed to print the notice. The plaintiffs, then, in order to show that an act of bankruptcy had been committed by the three bankrupts on Wednesday the 14th day of December, proved that the three partners on that day ordered the bank to be shut up about halfpast ten in the morning. That the shutters were then put up, and the doors bolted and barred. Archibald Morton, the senior partner, who was eighty years of age, was so affected by the circumstance, that he became very ill, and was confined to his bed in his dwelling-house, between which and the banking-house there was no internal communication, though there was a garden common to both houses. Charles Morton, on that morning, desired one of the clerks to go to the house of the elder partner, and remain in the parlour to tell all persons who called, why the banking-house was shut; and he then went to his dwellingbouse, which was in Wellingborough. Rodick the third partner went also to his dwelling-house in Wellingborough, but desired the clerk to say to any persons who should inquire for him, that he would be glad to see them at his dwellinghouse; and he came to the banking-house on Thursday the 15th of December.

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The banking-house was not again opened. After it had been shut up, many persons came there to demand money. They knocked at the door; none were admitted; no answers were returned to some, others were told that they could not be paid. When creditors called at old Morton's house on the 14th, the clerk told them that Morton was very ill, and could *not be seen (which was the fact), and that Rodick and Charles Morton were at their respect-Upon these facts it was contended by the plaintiffs' counsel, that the three partners had committed an act of bankruptcy on the 14th, by absenting themselves from the banking-house, and that, as the defendant knew when he took the notes that they had suspended their payments, he must be taken to have had knowledge of the act of bankruptcy committed by them on that day. On the other hand it was contended, that in order to deprive the defendant of the right of set-off, it was necessary to show that he had notice, not only of the insolvency of the bankers, but of their having committed an act of bankruptcy; and first there was no evidence of any act of bankruptcy committed by the three. partners, for old Morton the senior partner was compelled by illness to go to his dwelling-house: but assuming that the three had committed an act of bankruptcy on the 14th, still that was immaterial, unless the defendant at the time when he took the notes, had knowledge of those circumstances which constituted an act of bankruptcy. The learned Judge directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit or a verdict for him, if the Court should be of opinion that he was entitled to set off the notes. A rule nisi having been obtained for that purpose,

**Mi-balmes term 1827. showed cause. The bank-

Clarke and Goulbourn, in Michaelmas term 1827, showed cause. The bankers, on the 14th of December, shut up their banking-house and absented themselves from it. That was an act of bankruptcy by the three, Judine v. Da Cossen, 1 New Rep. 234, *though an absenting by one might not be evidence of a joint act of bankruptcy by the three, Mills v. Bennett, 2 M. & S. 556. [*220] Here the defendant, at the time when he took the notes which he seeks to set off, had notice that the bankers had stopped payment. Hodson v. Young, East, 1814,(a) Dickson v. Evans, 6 T. R. 57, and Ex parte Stone, 1 Glyn & J. 191, are authorities to show that under the old bankrupt acts he could not set them off. But assuming that under the late bankrupt act to prevent the right of set-off it was necessary that the defendant should have had notice of an act of bankruptcy committed by the three bankrupts before he took the notes, he knew that the banking-house was shut up, and must have known that creditors holding notes had, before the 16th of December, by the shutting up of the bank, been prevented gaining admittance there. He must have known, therefore, that all the partners had before that day committed an act of bankruptcy, either by ab-

senting themselves, or beginning to keep house.

Adams, Serjt., contrd. The defendant undoubtedly knew at the time when he took the notes in question, that the banking-house had been shut up, but that fact was equivocal; it was consistent with it that no act of bankruptcy may have been committed. There was no proof that the three bankrupts had on the 14th, 15th, or 16th, committed an act of bankruptcy. Under the old bankrupt acts it would have been sufficient, to deprive the defendant of his right of set-off, to prove that he knew at the time when he took the notes that the *bankers had stopped payment; but the 6 G. 4, c. 16, s. 50, gives the right of setoff in all cases where the party claiming it has no notice, at the time when such credit was given, of an act of bankruptcy by the bankrupt committed. It was necessary for the plaintiff in this case to prove actual notice of an act of bankruptcy; constructive notice is not sufficient. [Ld. TENTERDEN, C. J. If the defendant took the notes, knowing that the bankers had suspended their payments, intending thereby to get 20s. in the pound on his own debt, and so defeat the object of the bankrupt law, is not that a fraud on the bankrupt statute?] That cannot be a fraud on the bankrupt statute which it has permitted to be done. Cur. adv. vult.

BAYLEY, J. This was a case from the Midland Circuit. The plaintiffs were assignees of the Wellingborough bank, and the question depended upon the right of the defendant to set off notes of the Wellingborough bank, which he had industriously obtained after the Wellingborough bank had stopped payment. This turned upon the 6 G. 4; c. 16, s. 50. By that section, where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankropt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another (notwithstanding any prior act of bankruptcy committed by the bankrupt), before the credit given to or the debt contracted by him, provided the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed. Before this statute there were *three provisions for setting off mutual debts and credits in cases of bankruptcy. One by the 5 G. 2, c. 30, s. 28, another by the 46 G. 3, c. 135, s. 3, and the third by the 5 G. 4, c. 98, s. 48. The first gave the right of set-off, if the credits were given or the debts incurred at any time before the person became bankrupt. And upon this there was no qualifi-The second gave the right, notwithstanding the existence of a prior act of bankruptcy, in like manner as if there had been no prior act-of bankruptcy, provided the credit was given to the bankrupt two calendar months before the date and suing forth of the commission, or provided the person claiming the benefit of such set-off had not, at the time of giving such credit, notice of any prior act of bankruptcy committed by such bankrupt, or that he was insolvent or had stopped payment. The 5 G. 4 (which repeals the 5 G. 2 and 46 G. 3) consolidates the two provisions which I have mentioned in those statutes, but, instead of the concluding provision in the 46 G. 3, excludes from the benefit of the set-off such persons only as had, when they gave credit to the bankrupt, notice, either actual or constructive, of an act of bankruptcy by such bankrupt committed, or that he had stopped payment; and the two provisions contained in the 46 G. 3, were in terms confined (as they probably would before have been confined in construction) to those cases in which there had been a prior act of bankruptcy. At the time, therefore, when the 6 G. 4 was passed, every man was entitled to the benefit of a set-off if the credit between him and the bankrupt were given, or the debt existed, between them before any act of bankruptcy was committed; and he was also entitled, notwithstanding such act of bankruptcy, if the person claiming *the set-off had not, when he gave his credit or trusted the bankrupt, notice of an act of bankruptcy by such bankrupt committed, or that he had stopped payment. The 6 G. 4 takes away the latter part of this condition, viz. the notice that the bankrupt had stopped payment, and gives the right of set-off in all cases where it existed before any act of bankruptcy was committed, and gives it also where there was a previous act of bankruptcy, if the party claiming such set-off had no notice of such act.

Notice of an insolvency, therefore, or notice of stoppage, are no longer ingredients upon this point. Notice of an act of bankruptcy is alone the criterion or dividing point, and before this period Whitten takes the notes he claims to set off, and thereby becomes a creditor of the bankrupts, and they become his debtors. It may be true, and is, that he took these notes for the very purpose of making them the subject of his set-off, and of getting, in substance, 20s. in the pound upon these notes; but as this has not been prohibited, we cannot say it is illegal. The consequence is, that the rule for a nonsuit must be made absolute.

Rule absolute.

- OBOILLIE.

MAYFIELD v. DAVISON.

A variance between the writ and the count (the ac etian being in case on promises, but the declaration in debt), is a ground for discharging the desendant out of custody on filing common bail, where the sum for which the bail-bond mast-be taken exceeds 40l.

A RULE nisi had been obtained to discharge the defendant out of custody on filing common bail; he having been arrested for 32*l*., the ac etiam being in *trespass on the case on promises, and the declaration being in debt.

Dodd showed cause. In Lockwood v. Hill, 1 H. Blacks. 310, this variance

was held immaterial, when the sum sworn to was under 40l.

Humfrey, contrd, was stopped by the Court.

Per Curiam. The bail required here would be 64l., which is clearly within the statute 13 Car. 2, st. 2, c. 2. Rule absolute.

.GAINSFORD v. MARSHALL. Nov. 28.

By the practice of this Court the turnkey of a prison is the agent of a debtor confined in execution, for the purpose of receiving the sixpences under the lords' act, and therefore, by the acceptance of spurious coin, binds the debtor.

A RULE nisi had been obtained for discharging the defendant out of custody in execution, for default of payment by the plaintiff of the allowance of 3s. 6d. per week, pursuant to his undertaking under the lords' act. It was stated in the affidavits in support of the rule, that the turnkey of the prison had received for the prisoner a half crown and a shilling from a person sent by the plaintiff; that he delivered the same to the prisoner; that the latter rung the shilling, discovered it to be a bad one, and returned it to the turnkey. In the affidavit in answer to the rule, it was stated, that the plaintiff's son, who sent the money in question by a servant to the turnkey, tried the shilling before he sent it, and that it was a good one. The servant swore that he delivered the same shilling to the turnkey, who examined it, rung it, and said it would do.

*Thesiyer now showed cause, and contended that the receipt of the money by the turnkey was a receipt by the prisoner according to the practice of the Court, and had been so held in an anonymous case cited in

Fisher v. Bull, 5 T. R. 37.

Chitty, control, relied upon Agutter v. Wilson, 7 Taunt. 6, where the Court of Common Pleas held that the turnkey of a prison was not such an agent for a prisoner confined in execution, that, by his acceptance of spurious coin in part

of the prisoner's allowance, he could bind the prisoner.

BAYLEY, J. It is a settled rule in this Court, that the creditor is to pay the turnkey, and that the latter is to receive the money for the prisoner. It is the duty of the turnkey to take care to receive good money only. Here the affidadits are contradictory; and it lies on the defendant to make out the fact that the shilling was a bad one.

LITTLEDALE, J. By the practice of this Court, the turnkey is the agent of

the debtor, and it is convenient that he should be so considered.

PARKE, J. It is not satisfactorily made out that the shilling was a bad one.

Rule discharged with costs.

*226] *The KING v. The Justices of WESTMORELAND.

It is no ground of appeal against a county-rate, that individuals in one parish are rated in a higher proportion than in another.

It is not necessary, in a notice of appeal against a county-rate, to specify the grounds of appeal: but if the appellant states in his notice, as causes of appeal, things which are not so, the court of quarter sessions ought to adjourn the appeal, if they think the respondents have been misled by the terms of the notice; or otherwise to hear it.

A RULE had been obtained calling upon the defendants to show cause why a writ of mandamus should not issue, commanding them to cause continuances to their next general quarter sessions of the peace to be holden in and for the said county, to be entered upon the appeal of the churchwardens and overseers of the poor of the township of Shap, in the county of Westmoreland, and J. Morton, J. Whitesmith, and J. Robinson, against the churchwardens and overseers of the poor of the parish of Bampton, in the said county, T. Rowlandson, T. Atkinson, W. Holmes, T. Mounsey, and J. Mattinson, touching the county rate for the said appellants. It appeared that the following notice of appeal had been served on the respondents:—"This is to give notice to you, and every and each of you, that the churchwardens and overseers of the poor of the township of Shap, in the county of Westmoreland, and J. M., J. W., and J. R., being severally inhabitants and owners or occupiers of certain messuages, lands, and tenements in the township and parish of Shap, in the county of Westmoreland, and rated to the relief of the poor within the said township in respect thereof, are aggrieved by a certain rate or assessment made by virtue of an order from his majesty's justices of the peace in and for the said county of Westmoreland, at their general quarter sessions assembled, and issued to the constable of the township of Shap, under the hand of *T. H., high constable for the division of West Ward, in the said county of Westmoreland, on the 1st day of May last past, for the purpose of raising the sum of 10l. 19s. 6d. for and towards a general county rate or assessment in and for the said county of Westmoreland, and that they do intend to appeal against the said county rate or assessment at the next general quarter sessions of the peace to be holden at Appleby, in and for the said county of Westmoreland, on Monday, the 13th day of July next; and that the grounds of such appeal are, that T. R., T. A., W. H., T. N., and J. M., and others, are in the general county rate or assessment for the parish or constablewick of Bampton, in the said county of Westmoreland, severally underrated in respect of the yearly value of their respective messuages, lands, tenements, and premises by them occupied in the said parish or constablewick of Bampton. And also that they the said J. M., J. W., and J. R., are in the said general county rate or assessment for the township of Shap, in the said county of Westmoreland, severally overrated in respect of the yearly value of the respective messuages, lands, tenements, and premises by them respectively occupied in the said township and parish of Shap, and for that the said rate is in other respects unequal, unjust, defective, and informal. the 26th of June, 1829." The appellants tendered evidence to prove the general inequality and disproportion of the respective county rates of the township of Shap and of the parish of Bampton; but the court of quarter sessions dismissed the appeal without entering into the merits, on the ground that the statement of the causes of appeal contained in the said notices was defective.

*Aglionby showed cause. The statute 55 G. 3, c. 51, s. 14, gives the right of appeal to the churchwardens or overseers of the poor of any parish aggrieved by any rate, "whether it be on account of the proportions assessed upon the respective parishes, townships, or places being unequal; or on account of some one or more of them being without sufficient cause omitted altogether from the rate; or on account of such parish, township, or place being rated at a higher proportion of the pound sterling, according to the fair annual value of the rateable property therein; or on account of some other parishes, townships, or places being rated at a lower proportion of the pound sterling, according to

the fair annual value of the rateable property therein, than has been fixed and declared by the justices of the peace of the said county, in sessions assembled. as the basis of the rate of the said county; or on account of any other just cause of complaint whatsoever." The appeal, therefore, is given to a parish aggreed by reason of the sum assessed upon it being disproportioned to the sum assessed upon some other parish; but no appeal is given to the particular inhabitants of any parish against the rate made by the overseers for raising the sum assessed by the sessions upon the parish in respect to the county rate. The appellants in their notice state the grounds of appeal to be, that certain persons in the township of Shap are overrated with respect to certain persons in the parish of Bampton; but the statute does not make that a ground of appeal. In the early part of the notice it is only stated that the appellants are aggrieved by the rate, but non constat that they are aggrieved on account of the inequality of the rate as between the appellant and *respondent parishes: that ought to have The appellants were not entitled to give evidence 1 229 been distinctly shown. of the general inequality of the rate, because, by the notice, they had tied themselves down to the particular grounds therein stated. The respondents had no reason to suppose that there was any other ground of complaint than that particularly specified.

Courtenay, contrd. The churchwardens and overseers of the contending parishes were parties to the appeal. It is not stated in the notice that the persons named were the persons exclusively aggrieved, but merely, by way of example, that they are persons overrated. It was not necessary that all the parishioners should be named in the notice. The notice alleges, that certain persons named, and others in the parish of Bampton, were overrated. Besides, the act of parliament does not require the specific grounds of appeal to be stated in the notice. [Bayley, J. You may have misled the respondents by specifying, as the ground of your appeal, that which in fact was not so.] . It is not stated in the

affidavits that they were misled.

BAYLEY, J. I am of opinion that this rule must be made absolute. I think that the true construction to be put on the clause giving the right of appeal, is that stated by Mr. Aglionby, viz. that the parish, township, or place must be aggrieved. Here the fact stated in the notice is, that particular individuals are rated higher in the township of Shap than other individuals are in the parish of Bampton. I think that it is incumbent on a party appealing against a county rate to show that the appellant parish, township, or place is rated in a higher proportion, with reference to some other parish, than it ought to be. But no act of parliament having required the grounds of appeal to be specified in the notice, the sessions ought either to have heard or adjourned the appeal to the next sessions. If the justices thought that the respondents were misled by the terms of the notice of appeal, they ought to have adjourned it. But they refused to hear the appeal altogether, which was improper.

LITTLEDALE and PARKE, Js., concurred.

Rule absolute.

The KING v. OGDEN and Four Others.

An information in the nature of quo warranto, against persons for claiming to act as a corporation, must be filed by and in the name of the Attorney-General.

Such an information cannot be filed at the instance of an individual against persons for usurping a franchise of a private nature, not connected with public government.

A RULE nisi had been obtained calling upon the defendants to show cause why an information, in the nature of a quo warranto, should not be exhibited against them for acting as a corporation, by the name and style of the freemen and stallingers of the borough of Sunderland, without being authorized so to do. This rule had been obtained on affidavits of certain inhabitants of the town of

Sunderland, stating, that certain persons styling themselves freemen of the town of Sunderland near the sea, and certain other persons, styling themselves stallingers of the said town, had constituted and formed themselves into a certain supposed body or corporation within the town of Sunderland, called the freemen and stallingers of the borough of Sunderland, and that they claimed to exercise and enjoy and did exercise and enjoy certain corporate powers, authorities, and *2311 privileges within the said town over the rest of the *inhabitants of the said town; that the said pretended corporation consisted of twelve persons called freemen, and eighteen other persons called stallingers, and that they the freemen and stallingers denominated and represented themselves to the world as a corporate body, and to have good right and title to be and act as such by law; that they claimed to have and exercise and did exercise the power of electing their own members, in perpetual succession for ever; that they claimed to have and use a common seal for their pretended corporation; and that they claimed the right of making and did make by-laws for the government of their pretended corporation; that they claimed to hold for the benefit of themselves and their successors, the town moor of and belonging to the town of Sunderland near the sea aforesaid, and claimed to exclude and prevent the inhabitants of the town from the privilege and enjoyment of the herbage of the said moor, and that the defendants claimed to be members of the corporation. The affidavits against the rule stated, that the freemen and stallingers had never interfered, nor was it their duty to interfere, with the rule or government of the town or borough of Sunderland, nor had they ever exercised or enjoyed or claimed to exercise or enjoy, nor did they exercise or enjoy, any corporate or other powers, authorities, privileges, or jurisdictions whatever within the same town over the rest of the inhabitants of the said town, or any of them, except such control as they possess over such of them as are members of the corporation; but that their acts have been confined to the management of their own private property.(a)

*Sir James Scarlett and Patteson showed cause. An information in *232] the nature of a quo warranto cannot be filed against an entire corporation by the master of the crown office, but by the Attorney-General only. Rex v. The Corporation of Carmarthen, 3 Burr. 869, is an authority to show that the statute of 9 Ann. c. 20, extends only to individuals usurping offices or franchises in a corporation, when the right of the whole body to act as a corporation is Another objection to this rule is, that the five persons against whom it has been obtained do not claim to be members of a corporation of a The franchise alleged to be usurped is not connected with the public government, but is of a mere private nature; and the practice of filing informations by leave of the Court is confined to cases which concern public government.

F. Pollock and Alderson, contrd. This is a proceeding, not against an entire corporation, but against five individuals. Undoubtedly, if it be an offence by the whole body to act as a corporation, it must be equally so by any of the members. This corporation claim to exercise over the moor an exclusive privilege by charter or grant. That is sufficient to call upon those who are members of it to show by what authority they claim this exclusive right. In Rex v. Reynell, 2 Str. 1161, the Court held, that an information in the nature of a quo warranto would lie for claiming an exclusive ferry over the river Thames from Laleham; and in Rex v. Nicholson, 1 Str. 299, such an information was granted *233] against trustees appointed by authority of an act of parliament for the purpose of enlarging and regulating the port of Whitehaven.

Lord TENTERDEN, C. J. If any number of individuals claim to be a corporation without any right so to be, that is an usurpation of a franchise; and an information against the whole corporation, as a body, to show by what authority they claim to be a corporation, can be brought only by and in the name of the

⁽a) This case, which was decided in Easter term 1829, was inadvertently omitted in its proper Vol. XXI.—14

Attorney-General, Rex v. The Corporation of Carmarthen, 3 Burr. 869.

rule must, therefore, be discharged.

BAYLEY, J. There is no instance of a quo warranto information having been granted by leave of the Court against persons for usurping a franchise of a mere private nature, not connected with public government.(a)

LITTLEDALE, J., concurred.

Rule discharged.

(a) See Tancred on Information in the nature of Quo Warranto, 14; and Ibbotson's case, Ca. temp. Hardw. 261. Sir W. Lowther's case, 2 Lord Raym. 1409. S. C. 1 Str. 639, there cited.

*NEWSOME v. GRAHAM and Another.(a)

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A tenant having paid rent to A., was ejected at the suit of a third person, who afterwards recovered from him the mesne profits for the period in respect of which he had paid rent to A.: Held, that the tenant, in an action for money had and received, might recover back that rent from A., he not having set up any title to the premises at the trial.

Assumpsit for money had and received, &c. Plea, general issue. trial before Bayley, J., at the Summer assizes for the county of York, 1829, the following appeared to be the facts of the case :- About the year 1819, William Dollman Taylor died without issue, possessed of certain freehold estates. was succeeded by his younger brother, John Taylor, who claimed as his heir at law, to the exclusion of daughters of an elder brother, supposed to be illegiti-John Taylor died in the course of the following year, having previously made his will, by which he duly devised the estates to Graham and another, the defendants, as trustees under his will. Among other bequests, he left a large annuity to Jane Walker, one of the daughters of the elder brother; and during her lifetime the right of John Taylor as heir, and the validity of the will, were not disputed; but on her death some papers were found in the handwriting of W. D. Taylor, which clearly proved the legitimacy of the elder brother, and the right of his children to inherit. The plaintiff was a tenant of some of the property during the life of W. D. Taylor, and on his death held under the trustees for eight or nine years. On the discovery of the evidence in favour of the elder brother's children, an action of ejectment was brought against the plaintiff, and a verdict passed against him establishing their title. Subsequently an action for mesne profits was brought, and a verdict passed against *the plaintiff for the amount of six years' rent; and he brought this action to recover that amount, and the costs, from the defendants as trustees. It was contended that the action for money had and received was not maintainable, inasmuch as the title to land might come in question, which could not be tried in that form of The learned Judge directed the jury to find a verdict for the plaintiff; and reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that the plaintiff was not entitled to recover in this form The jury found that the defendants knew, when they received the rents, that there were doubts about the title.

F. Pollock moved accordingly. This action is not sustainable, as the title to the land might come in question; and title to land or to an incorporeal hereditament cannot be tried in an action for money had and received. Cunningham v. Lawrents, 1 Bac. Ab. 260, Lindon v. Hooper, Cowp. 414.(b) The money is claimed back, as rent paid without consideration; and the ground of the claim is, that the trustees had not a valid title; and having received the rent from time to time without any title, they were bound to refund it as money had and received to the use of the plaintiff, he having been defeated both in the action

⁽a) This case was moved in the early part of the term, and the judgment pronounced on the 12th of November. It was unavoidably postponed.
(b) And see Arris v. Stukely, 2 Mod. 263.

Rule refused.

of ejectment and the action for mesne profits. The action of ejectment is not conclusive of the right, and it was open to the defendant to show that he was entitled to the rent; and, therefore, as this action might turn upon the title, it was not maintainable as an action for money had and received.

Cun adv. vult. *Lord Tenterden, C. J., delivered the judgment of the Court. *236] are all clearly of opinion that the action for money had and received is maintainable. It appears that the plaintiff had from time to time paid rent to the defendants for certain premises which he held of them; that it afterwards turned out that the defendants had no title: the plaintiff was ejected, and compelled to pay the mesne profits for the time during which he had held of the defendants; and this action was brought to recover back the rent which he had paid to them. The objection was, that title to land could not be tried in an action for money had and received. That is true; but here there was no trial of title. It had been previously ascertained that the defendants had no title whatever to this land, in respect of which the plaintiff had paid rent to them; and the defendants did not, at the trial of this cause, claim to have any title. From the short note of the Nisi Prius case of Cunningham v. Lawrents, in Bacon's Abridgment, it may be inferred that the defendant claimed title to the land at the very time when the action of assumpsit for the rents received was brought. In Lindon v. Hooper, the right of common was in dispute at the time when the action for money had and received was brought to recover back the money paid for the release of the cattle; the defendant, who had distrained the plaintiff's cattle, agreed to return the money if the plaintiff should make out his right, and the action was brought to try the right. In this case it did not appear that the defendants, either at the time when this action was brought, or at the trial, claimed to have any title to the land. That being so, we are of opinion

*237] *DAUBNEY, Gent., One, &c., v. COOPER, Clerk, and Others.(a)

that there should be no rule.

The proceeding against a party in a summary manner under the 5 Ann. c. 14, for keeping and using a gun to destroy game is of a judicial nature, at which all persons have a primâ facie right to be present; and, therefore, where a magistrate had, without any specific reason, caused a party, who claimed a right to be present, to be removed from the justice-room, where such a proceeding was going on, it was held, that he was liable to an action of trespass.

THE declaration alleged that the defendants, on, &c., at, &c., made an assault on plaintiff, and beat him and forced and compelled him to go from and out of a certain room, there called the justice-room, in which the defendants, as justices of our lord the king, assigned to keep the peace, &c., were then and there holding a certain court, to wit, a court of petty sessions for the administration of justice, whereby the plaintiff was hindered and prevented from exercising his business as an attorney in the said room. Second count, for a common assault and battery. Third, for an assault only. Plea, not guilty. At the trial before Best, C. J., at the Lincolnshire Lent assizes, 1829, it appeared that on the 14th of February, 1828, one Preston was summoned to appear before the defendants, on the 18th of the same month, to an information charging that he, on the 3d of January preceding, did unlawfully keep and use a gun to kill game. Preston requested the plaintiff to attend for him as his attorney, and did not go in person. The plaintiff attended accordingly in the justice-room, when the defendant Cooper, being informed that he attended on behalf of Preston, said, that the magistrates had resolved not to allow an attorney to appear, *and desired him to leave the room. The plaintiff refused to do so, and Cooper ordered

⁽a) Two or more of the Judges sat in the Bail Court from Monday, the 30th of November, to Wednesday, the 2d of December, inclusive; and from Thursday, the 10th of December, to Wednesday, the 23d of December, inclusive. During that time this and the following cases were argued and determined.

the constable to remove him, which was done. • For the defendants it was contended, that the plaintiff had no right to attend before the magistrates as attorney for a party summoned, and that he must be nonsuited. A verdict was then entered for the plaintiff by consent, with 1s. damages, subject to an application to this Court or a nonsuit. A rule nisi was accordingly obtained in Easter term

1829, against which

Denman and Fynes Clinton showed cause and contended, 1st, That the magistrates, proceeding on the statute 5 Ann. 14, had no power to compel the appearance of the party summoned, and that, consequently, he might appear by attorney; and that the plaintiff, being an attorney of the Court of K. B., had a right to practise in any inferior court: on this point they cited Gilman v. Wright, 2 Keb. 477, 1 Ventr. 11, 1 Sid. 410, Hasting's case, 1 Mod. 23, Rex v. Simpson, 1 Str. 44, Hurst's case, 1 Lev. 75, Anon., March. 141, pl. 214. And 2dly, That as this was a proceeding in the nature of a trial, and not a preliminary inquiry, the party accused had a right to avail himself of professional assistance, Cox v. Cole-

ridge, 1 B. & C. 16.

Adams and Goulburn, Serjts., contrd, contended that at common law no persons had a right to appear by attorney; and they relied upon 2 Inst. 249, Bac. Abr. Attorney (B); where it is said, "On an indictment, information, or action for any crime whatsoever, under the degree of capital, the defendant may (by the favour *of the court) appear by attorney." The information in this case cannot be distinguished from any other case not capital; and the party charged had no right to appear by attorney, the court not having thought fit to allow it. The only ground on which any doubt can exist is, whether or not the plaintiff had a right to appear as an advocate for Preston; but, in the first place, he did not claim that right; and next, the proceeding was not necessarily taken at the petty sessions, but the conviction might have been by any single Lastly, there was nothing to show the magistrate that the plaintiff was duly authorized to appear as attorney or advocate for Preston, even supposing that the latter had power to give such authority. (During the course of the argument, the Court intimated an opinion that as the proceeding in question was of a judicial nature it could only be in a Court, and that all persons, whether attorneys or advocates or not, had a prima facie right to be present.)

Cur. adv. wulf.

The judgment of the Court was delivered by

BAYLEY, J. In this case, the Court, during the argument, intimated an opinion upon one particular point; and after thinking further upon the subject, and having had a conference with Lord TENTERDEN also, we adhere to the opinion we then formed. It was an action by the plaintiff against three justices for having turned him out of a room: and one of the questions which the parties were desirous of having agitated was, whether upon a summary conviction upon the game laws the defendant had a right, as matter of right, to appear by attorney He himself was not present, but he insisted *upon a right to appear by his attorney. We do not think it at all necessary to give any opinion upon that point. Whether it may be matter of right, whether it may be matter of indulgence or not, or whether the magistrates have or have not a right to exercise a discretion upon that subject, are questions upon which we say nothing. When any such question shall arise, we will decide it; but the ground upon which our present opinion is formed is, that the magistrate was proceeding upon a summary conviction, and, therefore, exercising a judicial authority. He was, as it were, a court of justice for that purpose; and we are all of opinion, that it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose,-provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed, -have a right to be present for the purpose of hearing what is going on. And in this instance, one of the three defendants, without any authority, without any ground of offence given by the party who

was the plaintiff in this case, took upon himself to turn him out. It appeared in evidence that he was there as the friend of the then defendant, he might be there as one of the public: but as the friend of the defendant he might be desirous of knowing what evidence there was to support the case, and who were the witnesses; and it might be of great importance to the defendant, with a view to ulterior proceedings, if there should be misconduct on the part of the witnesses, and if the witnesses should state more than the facts warranted and beyond the truth, that he should have the opportunity of knowing what it was that was proved *against him, and of calling the party in question for that mis-The point which we decide is, that the magistrate in the exerconduct. cise of a duty of this description, namely, by summarily convicting a party, is a species of court, and is exercising a judicial function, and that his proceedings ought not to be private, but ought to be public; and therefore he was not warranted in removing the party now complaining of that removal. The action was brought against three defendants; Cooper was the only one who in any respect interfered as to turning the plaintiff out of the room, the other two defendants taking no part in this transaction. The verdict was against all. We are of opinion that it ought to stand against Cooper only, and that a verdict ought to be entered in favour of the other two defendants.

SHAW v. PRITCHARD and Others.

A demise by a parson of his benefice, made subsequent to the 57 G. 3, c. 99, for securing an annuity, is void, it being in substance a charging of the benefice within the meaning of the 13 Eliz. c. 20, which, as far as relates to chargings of benefices, is now in force, having been revived by the 57 G. 3, c. 99.

THE following case was sent by the Lord Chancellor for the opinion of this Court:-

By indenture, bearing date the 8th day of September, 1826, and made between the Rev. William Pritchard, clerk, being then and still rector of the rectory and parish church of Great Yeldham in the county of Essex, and also vicar of the vicarage of Great Wakering in the same county, of the first part, Benjamin Shaw of the second part, and William Stephens of the third part, and duly executed by the said W. Pritchard, and a memorial thereof duly enrolled; after reciting that the said W. *Pritchard was rector of the said rectory and parish church of Great Yeldham, and in right thereof was seised or entitled of or to the glebe lands, together with all and singular the great or predial, and small tithes or tenths, moduses, or customary payments in lieu of such tithes or tenths, rents, offerings, and oblations, and other appurtenances to the same rectory or parsonage belonging or appertaining; and that the said W. Pritchard was also vicar of the vicarage of Great Wakering, and in right thereof was seised or entitled of or to the vicarial tithes to the said vicarage belonging; and also reciting, that the said W. Pritchard, together with John Daniel Haslewood, clerk, had contracted to sell to the said B. Shaw one annuity of 931. 10s., to be paid to the said B. Shaw, his executors, administrators, or assigns, during the natural life of the said W. Pritchard, at or for the price or sum of 750l.; and that, in pursuance and performance of the said agreement on the part of Shaw, he Shaw had paid to Pritchard and J. D. Haslewood the sum of 750l.; and that in pursuance and part performance of the said agreement on the part of Pritchard and J. D. Haslewood, they Pritchard and J. D. Haslewood had, by a certain bond bearing even date with the said indenture, become bound under Shaw, his executors, administrators, and assigns, in the penal sum of 1500l., with a condition thereunder written for making the same void, on payment by Pritchard and J. D. Haslewood, or one of them, their or one of their executors or administrators unto Shaw, his executors, administrators, or assigns, yearly and every year during the natural life of Pritchard, of the said annuity of 931. 10s. by four equal quarterly payments (on the *days therein mentioned): it was by the said indenture witnessed, that in pursuance and performance of the said agreement on the part of Pritchard, and in consideration of the said sum of 750l., then paid by Shaw to Pritchard, and for the nominal consideration therein mentioned to have been paid by Stephens to Pritchard, he Pritchard did. at the request of Shaw, grant, bargain, sell, and demise unto Stephens, all that and those the said rectory and parish church of Great Yeldham, and the said vicarage of Great Wakering, and all the messuages or tenements, and glebe lands, tithes, tenths, oblations, obventions, offerings, portions, profits, emoluments, rights, members, and appurtenances whatsoever, thereunto belonging, to have and to hold the said rectory and vicarage, messuages or tenements, glebe lands, tithes, hereditaments, with their rights, members, and appurtenances, unto Stephens, his executors, &c., thenceforth for and during the full end and term of ninety-nine years from thence next ensuing, if Pritchard should so long live, yielding and paying, therefore, yearly and every year during the said term unto Pritchard, the rent of a pepper corn, if lawfully demanded, upon trust to permit Pritchard or his assigns to hold and enjoy the said rectory and vicarage, and lands and premises, and to receive the rents, issues, and profits thereof respectively, for his proper use and benefit, until the said annuity or some quarterly payment thereof should be in arrear by the space of twenty-one days next after the same should be payable as therein mentioned; and upon further trust, that in case default should at any time thereafter be made in the payment of the annuity, or any part thereof, for twenty-one days after *the same should become payable, Stephens, his executors, &c., should enter into the actual possession of all and singular the rectory and vicarage, hereditaments, and premises therein granted and demised, or expressed and intended so to be, and receive all the tithes or compositions, or payments for or in lieu of tithes, and all other the rents, issues, and profits of or belonging to the same rectory and vicarage, hereditaments and premises respectively, and should from time to time set, let, order or manage the same rectory and vicarage, hereditaments, and premises in such manner as to him should seem reasonable; and upon trust out of the residue of the said moneys to pay the said B. Shaw, his executors, &c., the said annuity, or so much thereof as should not have been otherwise satisfied, and to pay the ultimate residue or surplus of the said moneys unto Pritchard, his executors, &c. And it was also thereby declared, that if the said annuity, or any part thereof, should at any time be in arrear for forty days next after any of the days on which the same ought to have been paid as aforesaid, it should be lawful for Stephens, his executors, &c., and he was thereby directed (if requested so to do by Shaw, his executors, &c.), by demising, leasing, mortgaging, or selling the said rectory and vicarage, hereditaments and premises, or any part thereof, for all or any part of the said term of ninety-nine years, or by such other ways and means as to him or them should seem meet, to levy and raise such sums of money as would be sufficient, or, as he or they should think fit or expedient, to raise for paying and satisfying to Shaw, his executors, &c., the said annuity, or such part thereof as should be in arrear, and all costs, charges, and expenses which Shaw, his *executors, &c., or Stephens, his executors, &c., should sustain by reason of the nonpayment of the said annuity or otherwise in the execution of the trusts of the said indenture. And Pritchard did thereby for himself, his heirs, executors, and administrators, covenant with Shaw, his executors, &c., that in case the said annuity, or any quarterly payment thereof, should happen to be behind or unpaid by the space of forty-five days next over or after any of the said days and times on which the same were appointed to be paid as aforesaid, and Shaw, his executors, &c., should deem it expedient to sequester the said rectory and vicarage, or either of them, it should be lawful for Shaw, his executors, &c., and Pritchard did thereby authorize and empower him and them to sequester the said rectory and vicarage, or either of them, for rayment of the arrears of the said annuity, or any part thereof, and particularly to instruct ccunsel or civilians to act for Shaw, his executors, &c., and for Pritchard, and in his name, either in courts of common law, civil law, or equity, or elsewhere, as occasion should require, to assent to and concur in all such proceedings as might be necessary to obtain an immediate sequestration of the said rectory and vicarage, or either of them, and that without giving notice to, or advising or consulting with Pritchard thereupon. The question for the opinion of this Court was, Whether the above demise for securing an annuity being subsequent to the 57 G. 3, c. 99, was valid or not?

The case was now argued by

Manning for the plaintiff, and by Chitty, Patteson, and Follett for other *246] parties in support of the demise. *This grant or demise was no doubt good at common law; and the first question that arises is, Whether it was affected by the statute 13 Eliz. c. 20, or 14 Eliz. c. 11? The 13 Eliz. c. 20 enacted, "That all chargings of benefices with cure, thereafter, with any pension or with any profit out of the same to be yielded or taken, other than rents to be reserved upon leases thereafter to be made, according to the meaning of that act, should be utterly void." The instrument in question is, in common parlance, a lease, and not a charge, which means something issuing out of land; and the practice which has prevailed explains this, for such leases were constantly granted before the enabling statute 43 G. 3, c. 84 (which by section 10 repealed the 13 Eliz. c. 20), was passed, and no objection was taken to them as being in contravention of that act, Bromley v. Holland, 5 Ves. 610, 7 Ves. 14, Erington v. Howard, Ambler, 485, White v. The Bishop of Peterborough, 3 Swanst. 109. And the objectors to the deed are in this dilemma, if it is within the statute 13 Eliz. c. 20, as a charge, it is also within it as a lease, and is therefore valid, Bowyer v. Pritchard, 11 Price, 103. [BAYLEY, J. It may be in form a lease, but in substance a charge.] Supposing, however, this deed to be within the 13 Eliz. c. 20, or the 14 Eliz. c. 11, by which it was enacted, "That all bonds, contracts, promises, or covenants thereafter to be made for suffering or permitting any person to enjoy any benefice or ecclesiastical promotion with cure, or to take the profits thereof, other than such bonds and covenants as should be made for *247] assurance of any lease theretofore made, should be to *all intents and purposes adjudged of such force and validity, and not otherwise, as leases by the same persons made of such benefices and ecclesiastical promotions with cure," those statutes were wholly repealed by the 43 G. 3, c. 84, s. 10, and were not revived by the 57 G. 3, c. 99. This latter statute begins by reciting two statutes of the reign of Henry VIII., the statutes 13 Eliz. c. 20, 14 Eliz. c. 11, and several others, and then proceeds, "Be it enacted, that so much of the said several acts passed in the reign of Henry VIII., and so much of the said acts of the reign of Queen Elizabeth, &c., as relates to spiritual persons holding of farms, and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices, shall be repealed;" and it is supposed that so much only of the statute of Elizabeth as relates to leases of benefices, commonly so called, is thereby repealed; but that is a very narrow construction. was evidently the intention of the legislature to make an entirely new code on the subject of the encumbrance of ecclesiastical property. The words "so much of" were necessary as to the statutes of Hen. 8 and the 14 Eliz. c. 11, which relate to many other things besides those which were then in the contemplation of the legislature, but 13 Eliz. c. 20, did not; and therefore it must have been their intention to repeal the whole of that act. And that the legislature did not mean to confine the operation of the 57 G. 3, c. 99, to the repeal of the former acts only as to leases properly so called, is clear, for they meant to repeal some part of the 14 Eliz. c. 11, and no part of that relates to leases, but to certain securities or covenants which were to have the force of leases. The *deed in question is precisely within that description; if then it falls within the statute 14 Eliz. c. 11, that statute is clearly repealed; if it does not, it is within the 13 Eliz. c. 20, as being a lease; and that statute, as to leases, is admitted to

be repealed; and therefore, quacunque viâ, the deed is valid. At all events, it

is binding during the life of the incumbent.

Brodrick, contrd. It is quite clear that the demise in question is within the 13 Eliz. c. 20, and that the provisions of that statute are now in force as to every thing but leases, properly so called. The object of that statute is clearly explained by the preamble, it was passed in order that "the livings appointed for ecclesiastical ministers might not, by corrupt and indirect dealings, be transferred to other uses;" and after providing that leases should only continue valid during the residence of the incumbent, enacted, that all chargings of any benefice, with any profit out of the same, to be yielded and taken, &c., should be void. demise does charge the benefice with a profit to be yielded and taken out of it, not upon a lease for the benefit of the minister, but so that the living may, by this indirect dealing, go to other uses, Mouys v. Leake, 8 T. R. 415. statute then distinguishes between leases and other charges, it is repealed as to the former, but not as to the latter, and therefore continues in operation as to the charge in question. This was taken for granted in Doe v. Somerville, 6 B. & C. 126, and expressly decided in Doe v. Gully, 9 B. & C. 344. As to the deed being valid during the life of the incumbent, *that only applies to [*249] cases under the 13 Eliz. c. 10, which was passed for the protection of the successors of incumbents, and not under the 13 Eliz. c. 20, which was to protect the incumbents themselves.

The following certificate was afterwards sent.

This case has been argued before us by counsel, and we are of opinion that the demise for securing the annuity in question is invalid, being in substance a charging of the benefice within the meaning of the 13 Eliz. c. 20, which, as far as relates to chargings of benefices, is now in force.

J. BAYLEY.

J. LITTLEDALE.
JAS. PARKE.

SPRATT v. JEFFERY.

By contract A. agreed to sell to B. the two leases and good-will in trade of a public-house, and shop adjoining, for the sum of 4250l., "as he holds the same," for terms of twenty-eight years from Midsummer next ensuing, at the annual rent therein mentioned, and B. agreed to accept a proper assignment of the said leases and premises as above described, without requiring the lessor's title; and upon payment of the said sum of 250l., A. agreed to execute an effectual assignment of the said leases, and deliver up possession of all the said premises: Held, that the true meaning of this agreement was, that the vendee was to purchase the two leases without inquiring into the title of the lessor, and could not refuse to complete his purchase on account of an objection to that title.

This was an action of assumpsit tried before Lord Tenterden, C. J., at the Middlesex sittings after Michaelmas term 1828, when a verdict was found for the plaintiff, for 230l. damages and costs of suit, subject to the opinion of this

Court on the following case :--

On the 23d April, 1828, the plaintiff and defendant entered into the following agreement:—"William Jeffery of Newington Butts, Surrey, victualler, doth agree to sell unto William Spratt of Shadwell, the two leases and *good-will in trade, of the house and premises now occupied by him, known by the sign of the Rockingham Arms, and shop adjoining, situated at Newington Butts, in the parish of Saint Mary, in the county of Surrey aforesaid, for the sum of 4250l., as he holds the same, for the term of twenty-eight years from Midsummer next ensuing, at the annual rent of 126l., and under fair and usual covenants only, except that the lessee is to insure and to keep the house as a tavern or coffee-house, and to be called the Rockingham Arms. And the said William Spratt doth hereby agree to accept a proper assignment of the said leases and premises as above described without requiring the lessor's title; and that he will pay unto the said William Jeffery, the said sum of 4250l. for the same, also the

amount at which the goods, fixtures, effects, and stock in trade shall be valued as aforesaid, together with the proportionate value of the unexpired term in the licenses, after deducting the sum of 2001. which has now been paid as a deposit, (the receipt whereof is hereby acknowledged,) and take possession of the said house and premises on or before the 5th day of May next ensuing, at which time, upon payment of the several sums as aforesaid, he, the said William Jeffery, doth agree to execute an effectual assignment of the said leases, and deliver up possession of all the said premises except the shop which is underlet at will, and also the effects and stock in trade, and to assign over good and sufficient licenses to the said William Spratt, also to repair or allow for the external damaged window, and pay or allow for all rent, taxes, gas, and outgoings up to the day

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of quitting possession."

****Shortly after the above agreement was executed, the *plaintiff's attorney received from the defendant's attorney, an abstract of the vendor's title to the premises in question, entitled, "Abstract of the title of Mr. William Jeffery, to leasehold premises called the Rockingham Arms, in the parish of St. Mary, Newington, in the county of Surry." The abstract set forth an indenture of lease, dated the 2d of March, 1813, made between John Carter and Samuel Brandon therein described, as the then trustees of the will of Thomas Brandon deceased of the first part; Stephen Hall, on behalf of himself and his infant children, William Smith and Mary Ann his wife, Thomas Fleming and Harriet his wife (which said Mary Ann Smith and Harriet Fleming were stated in such lease to be the only then surviving children of the said Thomas Brandon, deceased, and to be, with the infant children of the said Stephen Hall, by his late wife Elizabeth Hall deceased, one other of the daughters of the said Thomas Brandon deceased, the only devisees and legatees named in his last will and testament), of the second part; and Joseph Denyers of the third part. By this lease John Carter and Samuel Brandon, with the consent and approbation of the parties thereto of the second part, demised the premises in question to Denyers for twenty-five years, from the 24th of June, 1812, at the yearly rent of After stating several mesne assignments, the abstract showed that, by an assignment dated the 2d of June, 1824, the lease and premises became vested in Alexander Magnus for the residue of the term. The abstract then set forth an indenture of lease, dated the 17th of June, 1825, between John Webster of Upper Grosvenor Street, Grosvenor Square, in the county of Middlesex, Doetor of Medicine, therein described as the then only continuing *trustee of the estates of the said Thomas Brandon, deceased, of the first part; Stephen Hall, Thomas Fleming, George Webster, and Elizabeth his wife, late Elizabeth, spinster, Mary Ann Hall and Jane Hall of the same place, spinster, Stephen Hall, Thomas Brandon Fleming, and Harriet Fleming, therein described as parties beneficially entitled to the estates of the said Thomas Brandon of the second part; and the said Alexander Magnus of the third part. By this indenture it was witnessed, that in consideration of 1000% paid by Magnus to the parties thereto of the second part, the said Thomas Webster, by the consent and direction of the parties of the second part, demised the premises in question to Magnus, to hold to Magnus, his executors, administrators, and assigns, for nineteen years, to commence and be computed from the 24th of June, 1837, at the yearly rent of 1261. The abstract then stated a bond, also dated the 17th June, 1825, from the parties of the second part to the last mentioned indenture of lease, to Magnus, his executors, administrators, and assigns, in the penal sum of 2000% for quiet enjoyment of the premises against John Webster, his executors, administrators, and assigns, themselves and any claimants under them, or the said Thomas Brandon, deceased. The abstract, after divers mesne assignments, then showed an assignment by indenture, dated 10th June, 1826, of both the above leases to the defendant, the consideration for which assignment was 40001. After perusing the abstract, the plaintiff's attorney returned it to the defendant's attorney, with several queries on the title within in the margin; and amongst them were inquiries, whether the trustees under the will of Thomas Brandon, named as the granting parties in the two indentures of *lease of the 2d March, 1813, and the 17th June, 1825, had power to grant leases upon a premium, and whether the respective directing parties to those leases were all the parties beneficially interested in the demised premises?

On the 5th May the vendor's attorney returned the abstract, and in answer to those inquiries, referred generally to the will of Thomas Brandon, and at the same time required the plaintiff's attorney to forward the draft assignment as

soon as possible.

Upon examining the will it appeared that Thomas Brandon devised the premises in question, with other property, to trustees, their executors, &c. (amongst whom was John Carter, one of the granting parties in the lease of 2d of March, 1813, in trust for his, the testator's, three daughters, Mary Ann Brandon, Elizabeth Brandon, and Harriett Brandon, in equal shares, as tenants in common, and not as joint tenants, and for their respective executors, &c., &c., subject to a proviso that it should be lawful for the said trustees, or the survivors or survivor of them, to demise the estates devised to them in trust, on building or repairing leases, or common tenants' leases, for any term of years, so as all such leases, made in pursuance of that his will, should be made to take effect in possession and not in reversion, or by way of future interest, and so as upon every such lease or demise there should be reserved, during the continuance thereof, the best and most approved rent that could be reasonably had or gotten for the same.

without taking any sum or sums of money by way of fine or foregift.

At the time when the indenture of lease dated the 17th of June, 1825, was granted, several children of Elizabeth Brandon and Harriett Brandon mentioned in the will of Thomas Brandon, beneficially interested in the premises *under the will, were living and infants, and did not join in the lease; and some of such children were living and infants at the time when the above agreement was made between the plaintiff and the defendant, and also at the time when the cause was tried. On the 5th of May, the day appointed by the contract for the completion of the purchase, the defendant was prepared to give possession of the premises, and to assign the leases, and the plaintiff attended on the premises with his broker, but his attorney did not attend; and on the following day, by letter to the defendant's attorney, the plaintiff's attorney stated, that before he proceeded any further in the business, or gave any answer to the question put to him by the defendant's solicitor that evening, requiring to be informed whether they meant to complete the purchase or not, he wished to be informed whether the answers returned to the plaintiff's solicitor's queries on the abstract, contained all the information intended to be furnished; and whether the deeds which he the plaintiff's attorney required would be produced to them: to which letter the defendant's attorney returned for answer, that he did not feel himself bound to give any further answers to the queries in the abstract; that the deeds required to be produced were not in his possession; and that the same related to the lessor's title, which the purchaser was not at liberty to On the 12th of May, seven days after the day appointed for cominquire into. pleting the contract, the plaintiff's attorney, by letter, informed the vendor's attorney that he had inspected the will of the late Thomas Brandon at Doctors' Commons; that it appeared that the will gave a power to the trustees to grant leases, so that no premium be taken for the granting thereof; and that *the term be made to commence in possession and not in reversion. further stated, that the title to the second lease appeared on the face of the abstract connected with the information acquired by the inspection of the power under which it was granted to be decidedly defective, a premium having been taken for the granting thereof, and the term being made to commence in reversion and not in possession. Under these circumstances, he informed the vendor's attorney that it was the intention of his client to rescind the contract, and to require the payment of the deposit-money with interest, and the plaintiff's expenses, together with the 500l. agreed to be paid as liquidated damages. This requisition the defendant refused to comply with. All the parties interested who were of age when the second lease was granted, joined therein, and received the consideration-money, and laid out the whole of it in beneficially improving other parts of the property devised by the will, whereof the premises in question are parcel, for which purpose money was wanted. The defendant, at the time of making the contract, declared to the plaintiff and his broker, that he defendant would sell no other title than what he held, and that he would not sign the agreement unless the stipulation respecting the non-production of the lessor's title was introduced. The rent of 126l. par annum was not, at the time of the trial of the cause, the best and most improved rent that could be reasonably had or gotten for the premises.

Jardine, for the plaintiff. The second lease which the defendant contracted to sell is void in equity. It was granted by trustees under a power, but not according to the power. This is not like an informal execution *of a power; and therefore it is void, and cannot be confirmed. The plaintiff must consequently be entitled to recover, unless there be anything in the agreement binding him to accept such title as the defendant had, whatever that might be. The plaintiff had not any notice that the title was defective or even doubtful, and therefore his agreement to take it, although bad, should be clearly established. The argument for the defendant must rest entirely on the words of the agreement, "as he holds the same;" and it will be said, that by those words the plaintiff was bound to take the title, good or bad. But they were not intended to bear that construction, they merely apply to the circumstances of occupation without reference to the title. The agreement is divided into two parts. The first contains the undertaking of the defendant to sell, and must therefore be construed against him; the words in question occur in that part of the agreement. The second part contains the stipulation by the plaintiff, to accept an assignment without requiring the lessor's title. Now it has been decided that these words, although they exonerate a vendor from the necessity of making out that the lessor had a good title, do not preclude the purchaser from showing it to be bad and insisting on the objection, White v. Foljambe, 11 Ves. 337. These words, then having this limited operation, would have been perfectly unnecessary if the expression, "as he holds the same," had the effect to be contended for on the other side. The case of the plaintiff, however, does not depend entirely on that point, for the lease being granted under a power, the testator, who created the power, must be considered as *the lessor; to his title no objection is made, the objection made is to the title of the lessee, in consequence of a defect in the lease. Again, if the words "as he holds the same," are considered as referring to the title and not to the occupation of the defendant, it was a misdescription, for he did not hold the premises under the two leases. The whole was held under the first lease, the second was a lease in reversion, the defendant therefore misdescribed in the contract the interest which he had, and cannot insist upon making the plaintiff take it, White v. Foljambe, 11 Ves. 337 Deverall v. Lord Bolton, 18 Ves. 505.

Campbell, contra. The defendant in this case guarded himself, both by writ-

Campbell, contra. The defendant in this case guarded himself, both by writing and parol, against the necessity of warranting the lessor's title to the premises, and he did not misdescribe that which he contracted to sell. In the cases cited, there was a contract to sell the residue of a term, whereas there appeared to be two, one of them in reversion. Here the defendant contracted to sell and assign two leases; and he is ready to assign them. The only important question is, whether the agreement is to be considered as containing a warranty of the lessor's title, or whether the defendant merely undertook to sell that which he had. The latter clearly is the meaning of the agreement, which is to sell two leases of certain premises, "as he holds the same," for terms of twenty-eight years. The two leases are clearly the antecedent to which the latter part refers, and it therefore applies to the holding of the leases, and not to the occuration of the premises. As to the subsequent *stipulation, as to not requiring the lessor's title, that is like many other things in conveyances, introduced from abundant caution, and strengthens rather than weakens what

has gone before. The case of Freme v. Wright, 4 Mad. 364, cannot be distinguished from this. There the assignees of a bankrupt contracted to assign his interest in certain premises, under such title as he lately held the same, and although the title was defective, a specific performance was decreed against the purchaser, and the Vice-Chancellor there said, that "although a party proposing to sell an estate without a qualification, asserts, in fact, that it is his to sell, and that he has a good title, yet he may, if he thinks fit, contract to sell such title as he has, and the question is, whether he did make such a contract." [Little-DALE, J. I doubt whether that was the case here.]

Jardine in reply. The meaning of the words, "without requiring the lessor's title," is easily discovered, by considering the state of the law as to that which may be required of the vendors of leasehold estates. It was formerly doubted whether the vendor, who made no stipulation on the subject, could be called upon to show that the lessor had a good title; but at that time no doubt was ever entertained that the purchaser might, if he could, show it to be bad and reject the bargain. In Purvis v. Rayer, 9 Price, 488, it was finally decided that the vendor was bound to show the lessor's title, and the words in question were introduced in order to obviate that difficulty. The effect of them is, that the lessor's title must *be assumed to be good until the contrary is proved; [*259] but they do not affect the right of the purchaser to insist on any objection

that he can establish to that title.

BAYLEY, J. I entertain no doubt on this question. The plaintiff might have had all that he bargained for, and therefore is not entitled to recover back his deposit. At the time when the contract of sale was made, the defendant, in fact, held two leases, and under those, if valid, he might occupy for the whole of the terms granted; or, if evicted, he might maintain an action of covenant on the word "demise," which occurs in both the leases. This being the state of things at the time of the bargain being made, let us see what were the terms of it. The defendant agrees to sell, not the premises for a given term, but the two leases and good will in trade of the premises, at a certain sum, as he holds the same, for terms of twenty-eight years. One objection made on behalf of the plaintiff is, that this being a bargain to sell two leases for terms of twenty-eight years the leases must be taken to be concurrent, and not consecutive leases, and that consequently the defendant contracted to sell that which he had not. Two cases were cited on this point, but in each of them the language of the contract was very different; in each the bargain was to sell the residue of a term. Here it is to sell two leases, and the rent being one, any lawyer would at once conclude that the leases were consecutive; that objection therefore fails. The defendant then having bargained to sell the two leases and good will, the plaintiff agrees to accept an assignment, without requiring the lessor's title, and to pay for the same 4200l. The fair and reasonable construction of those words is, *that he shall not be at liberty to raise any objection to the lessor's title. By the purchase of a bad lease, the party may derive the same benefit as if it were good; and if he cannot, the lessee or his assignee has a remedy over against the grantor of the lease. The plaintiff, therefore, under the circumstances of this case, may either have the premises for the two terms, or an equivalent compensation. Upon the whole, it appears to me that the defendant was bound by this contract to assign the leases, such as they were, and that the plaintiff is precluded from calling in question the title of the lessor.

LITTLEDALE, J. Upon the whole, I am inclined to give judgment for the defendant, but am not without considerable doubts as to the propriety of it. The objection on the ground of misdescription does not appear to me entitled to any weight. The next question is as to the meaning of the words, "as he now holds the same." Do they describe the premises or the defendant's interest! I think they were meant to describe the interest, vis. twenty-eight years, without reference to and without affecting the question of title. It could not be intended to exclude all inquiry as to the title, for the defendant was not the original lessee. Some of the mesne assignments might be defective, and the

plaintiff might clearly inquire into any defects except those in the title of the original lessor. The main difficulty arises from the words, "without requiring the lessor's title." Taking the agreement altogether, I am disposed to say that the defendant contracted to sell a qualified title only. But then it is contended, that the devisor was in law the lessor, for he created the *power under which the leases were granted. In some instances of leases under powers, the creator of the power is deemed the lessor, Isherwood v. Oldknow, 3 M. & S. 382. But as nothing was said in this contract about the leases being granted under a power, the meaning of the words probably was, that the title of the party who actually granted them should not be inquired into; and on that ground I concur in giving judgment for the defendant.

PARKE, J. I am of opinion that the defendant is entitled to the judgment of the Court. If the defendant has been ready to perform his engagement, no action can be maintained against him, although the plaintiff may have discovered that his bargain is of no value. The real question is, whether the defendant has performed or offered to perform his engagement. The first objection is, that the contract was to sell concurrent leases. I think there was no such engagement, but that the contract was to sell consecutive leases. In the next place, it is said that the defendant has not been ready to give the plaintiff all that he contracted to sell. There can be no doubt that the vendor of a lease unconditionally, undertakes to give a good title, but every person may enter into a qualified contract. This certainly was so to some extent. The question is, to what extent the qualification goes, and I think that depends upon the words as to not requiring the lessor's title. They could not mean that the vendor should merely assign such interest as he had, for an objection arising after the original grant might have been made. The words "as he now holds the same," are ambiguous, *262] been made. The words "as he now noids the same, are ambiguous, that the plaintiff contracted to pay for an assignment without requiring the lessor's title. For the plaintiff, it is contended, that he is nevertheless at liberty to object to the lessor's title, although the contract does not bind the defendant to produce it; but this is an unreasonable construction, and cannot be sustained. Then it was said, that this is not an inquiry into the lessor's title, but into the derivative title; but the meaning of the words must be, that the plaintiff should not require the title of the lessor to grant the leases; and it seems to me, that the person who made the lease was the grantor, the legal estate was in him, and the term given was to be derived out of that estate. think then that the defendant having offered to assign the leases, was ready to perform all that he engaged to do, and that the plaintiff was not at liberty to object to the title of the lessor to grant those leases.

Postea to the defendant.

*263] *M'PHERSON v. DANIELS.

In an action for slander, for words spoken of the plaintiff in his trade, importing a direct assertion made by defendant, that the plaintiff was insolvent, the defendant pleaded, that one T. W. spoke and published to the defendant the same words, and that the defendant, at the time of speaking and publishing them, declared that he had heard and been told the same from and by the said T. W.: Held, upon demurrer, that this plea was bad, first, because it did not confess and avoid the charge mentioned in the declaration, the words in the declaration importing an unqualified assertion made by the defendant in the words stated in the declaration, and the words used in the plea, importing that the defendant mentioned the fact on the authority of T. W.

Secondly, because it did not give the plaintiff any cause of action against T. W., inasmuch as it did not allege that T. W. spoke the words falsely and maliciously.

Thirdly, because it is not an answer to an action for oral slander for a defendant to show that he heard it from another, and named the person at the time, without showing that the defendant believed it to be true, and that he spoke the words on a justifiable occasion.

DECLARATION for slander stated, that the plaintiff before the time of the committing of the grievances thereinafter mentioned, and from thence had been and

still was a coach proprietor, and sold and disposed of cattle for divers persons for commission, and that he had never been suspected to be insolvent, or unable or unwilling to pay his just debts; that defendant contriving, and wickedly and maliciously intending to injure the plaintiff, and to cause it to be suspected and believed by his neighbours that the plaintiff was poor, and in indigent and bad circumstances, and incapable of paying his just debts, and debts to be by him contracted, and thereby to injure him in his trade and business, falsely and maliciously spoke and published in the hearing and presence of divers good and worthy subjects of this realm of and concerning the plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, the false, scandalous, malicious, and defamatory words following, that is to say,-" His (meaning the said plaintiff's) horses have been seized from the coach (meaning the said plaintiff's coach), on the road, he (meaning the said plaintiff) has been arrested, and the bailiffs are in his (meaning the *said plaintiff's) house," thereby then and there meaning and intending that the said plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. means of the committing of which said grievances by the defendant, he the plaintiff was greatly injured in his good name, &c.; and also by means of the premises, one Morrison, who before the committing of the said grievances was about to send, and otherwise would have sent divers, to wit, eleven head of cattle to the plaintiff, for the purpose of being sold and disposed of by the plaintiff for Morrison for commission and reward payable to the plaintiff in that behalf, to wit, on the day and year aforesaid, wholly refused and declined so to do, and thereby the plaintiff lost and was deprived of the commission which would have been payable by Morrison to the plaintiff. I'lea, that before the speaking and publishing of the several words in the declaration mentioned, and therein supposed to have been spoken and published by the said defendant, of and concerning the said plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, to wit, on, &c., at, &c., one T. W. Woor of Swaff ham, in the county of Norfolk, spoke and published the following words to the defendant of and concerning the plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, that is to say,—"His (meaning the said plaintiff's) horses have been seized from the coach (meaning the plaintiff's coach), on the road; he has been arrested, and the bailiffs are in his house;" thereby then and there meaning that the plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. And the defendant further saith, that at the time of speaking and publishing *the said several words in the declaration as therein mentioned, he the defendant also declared, in the presence and hearing of the same persons in whose presence and hearing the said words were so spoken by him the defendant, that he had heard and been told the same from and by the said T. W. Woor of Swaffham, in the county of Norfolk; wherefore he the defendant, at the said time when, &c., in the said declaration mentioned, did speak and publish of and concerning the plaintiff the said several words in the said declaration mentioned, as he lawfully might for the cause aforesaid. General demurrer and joinder. The Court called upon

Platt to support the plea. It is a sufficient justification to an action for slanderous words first spoken by a third person, for the defendant to show that at the time he repeated them he mentioned the name of that person. In the fourth resolution in Lord Northampton's case, 12 Coke, 134, this is said, "In a private action for slander of a common person, if J. S. publish that he hath heard J. N. say that J. G. was a traitor or thief; in action of the case, if the truth be such, he may justify. But if J. S. publish that he hath heard generally, without a certain author, that J. G. was a traitor or thief, there an action sur le case lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any, but against himself, who published the words, although that in truth he might hear them; for otherwise this might tend to great slander of an innocent." [PARKE, J. According to that resolution the party who

repeats the slander is bound to give the party slandered a complete cause of action against the original *author. The plea here does not show that the words were spoken by Woor under such circumstances as would give the plaintiff any cause of action against him. It does not aver that Woor spoke the words falsely and maliciously. It does not, therefore, show that the plaintiff would have had any cause of action against Woor.

It is not necessary in an action for words to allege that the words were spoken maliciously. If the words themselves be actionable, the law implies malice. Mercer v. Sparks, Owen, 51, Noy. 35. [PARKE, J. That was after verdict, and malice must have been proved at the trial.] In Morrison v. Cade, Cro. Jac. 162, the declaration stated that the plaintiff was a widow, and in communication with the Earl of Kent about her marriage; and the defendant said, "Askot had reported that he had had the use of her body, ubi revera he never made any such report; and upon motion in arrest of judgment, it was held that the words were actionable, though spoken by way of report, but that it must be averred that no such report was made. [PARKE, J. There it was alleged that Askot never reported. That was equivalent to an allegation that the defendant spoke the words falsely.] In Lewis v. Walter, Cro. Jac. 406, it was held that the report of the speech of another, who never used such words, is actionable. [BAYLEY, J. The plea must confess, and avoid the cause of action stated in the declaration. The charge in the declaration is, that the defendant spoke words importing an unqualified assertion. The plea shows that Woor spoke those words, and that the defendant spoke the same words, and then added, that he had heard and been told those words by Woor. According to the plea, *the defendant, therefore, first stated the words of his own authority, and then qualified his expression by alleging that he had heard them from It does, not, therefore, confess the cause of action stated in the declara-The defendant confesses the cause of action stated in the declaration by showing that he spoke the words there charged, and then avoids it by showing that he named the person from whom he heard the words. The principle on which the naming of the first publisher of a libel constitutes a defence is, that the defendant thereby negatives malice. In Davis v. Lewis, 7 T. R. 117, the fourth resolution in Lord Northampton's case was spoken of by Lord Kenyon without disapprobation. In Maitland v. Goldney, 2 East, 426, the Court decided that the defendant was not justified in propagating a report which he knew to be false, because he heard it from others. It may be inferred from that decision that the having heard it would have been a justification in an action for repeating it, if the defendant had not known it to be false. In Roll's Abr. 64, the same rule is laid down without qualification. The decision in De Crespigny v. Wellesley, 5 Bingh. 392, only applies to cases of written slander. There is a material distinction between oral and written slander. In many instances an action may be maintained for slander in writing which could not be maintained if it was spoken.

F. Kelley, contrd, was stopped by the Court.

BAYLEY, J. It seems to me that the plea is bad. The charge in the decla*268] ration is that the defendant *falsely and maliciously spoke and published in the hearing and presence of other persons of and concerning the plaintiff, and of and concerning him in his trade or business of a coach proprietor, the false and malicious words,—"His horses have been seized from the coach on the road; he has been arrested, and the bailiffs are in his house," thereby meaning and intending that the plaintiff was in bad circumstances, and incapable of paying his just debts. Now that imports an unqualified assertion to have been made by the defendant; and, if he had pleaded the general issue only, it would have been incumbent on the plaintiff to have proved, at the trial, an unqualified assertion made by the defendant to that effect: and if, instead of proving an unqualified assertion by the defendant, the plaintiff had proved only that the defendant had said that Woor had told him that the plaintiff had been arrested, &c., the defendant would have been entitled to a verdict or nonsuit. Here the

defendant has pleaded specially. He was bound, therefore, according to the first principles of pleading, to confess the charge he professed to answer, and then to aver some matter as an answer. The charge is, that the defendant made an unqualified assertion, that the plaintiff had been arrested, &c. Unless the plea, therefore, contain an admission by the defendant that he spoke words baving that unqualified sense, it is bad. The plea does not admit that the defendant spoke the words in an unqualified sense. It is therefore bad, because it does not confess the charge stated in the declaration. Another objection pointed out by my brother PARKE is, that the plea gives the plaintiff no cause of action whatever against Woor; and that *according to Lord Northampton's case, 12 Coke, 134, a person to justify the repetition of slander, by naming the original author of the slander, must give the party slandered a cause of action against that other. Now here the plea merely states, that the words were spoken by Woor, without adding that they were spoken falsely and maliciously. They might have been spoken by Woor upon a justifiable occasion, as by way of a confidential communication to a creditor, or in a court of justice. Woor may have been examined in a court of justice, and the words may have been extracted from him by way of cross-examination. Assuming, therefore, that the defendant might rely on the fact of his having heard the words first spoken by Woor, and of his having named Woor at the time as an answer to his action, still he ought by his plea to have shown that the words were spoken by Woor under circum-

stances which did not justify the speaking of them.

Upon the great point, viz. whether it is a good defence to an action for slander, for a defendant to show he heard it from another, and at the time named the author, I am of opinion that it is not. Lord Northampton's case was undoubtedly mentioned without disapprobation by Lord Kenyon, a man of a very powerful mind, acute discrimination, and great learning. But whatever respect I may feel for the memory of that noble and learned Judge, I cannot carry that respect so far as to surrender my own judgment. Look at the terms of the resolution, and try it by the plain principles of reason and common sense. "It was resolved, that if A. say to B. did you not hear that C. is guilty of treason, &c.? this is tantamount to a scandalous *publication: and in a private action for slander of a common person, if J. S. publish that he hath heard J. N. say that J. G. was a traitor or a thief; in an action on the case, if the truth be such, he may justify." Now, assuming that it is not there stated, as a qualified proposition, that a person may justify if he believes the slander to be true, and repeats it on a justifiable occasion; but as a general proposition, if he in truth heard the report from another, and named that other at the time he uttered the slander, that that is in all cases a justification, I think that is a proposition which cannot be supported. At present, I have very great doubts whether the repetition of slander is in any case lawful, unless the party believe it to be true. By repeating slander, a person, although he state at the time that he heard it from another, gives it a degree of credit; for the repetition of it, imports a degree of belief in the truth of the slander. If I hear another say that A. is a thief, and that B., though a person of bad character, told him so, I am induced to think, that the person who repeats it gives some credit-to the statement. It seems to me, therefore, that a person cannot be justified in repeating slander, unless he believes it to be true. But that alone is not sufficient. I think it can only be repeated upon a justifiable occasion. Every publication of slanderous matter is prima facie a violation of the right which every individual has to his good name and reputation. The law, upon grounds of public policy and convenience, permits, under certain circumstances, the publication of slanderous matter, although it be injurious to another. But such act being prima facie wrongful, it lies upon the person charged with uttering slander, whether he were the first utterer or not, to show that he uttered it *upon some lawful cassion. Upon the whole, I am of opinion that a man cannot by law justify the repetition of slander by merely naming the person who first uttered it; he must also show that he repeated it on a justifiable occasion, and believed it to be true.

LITTLEDALE, J. For the reasons already given by my Brother BAYLEY, I think that the plea is bad; but with reference to the resolution in Lord Northampton's case, I will say a few words. That resolution has been frequently referred to within the last thirty years, and though not expressly overruled has been generally disapproved of. The latter part of that resolution is extra-judicial, for it was not necessary to come to any resolution respecting private slander in the Star Chamber. It is somewhat inconsistent with the third resolution, where it is laid down, "that if one hear false and horrible rumours, either of the king or of any of the grandees, it is not lawful for him to relate to others that he heard J. S. say such false and horrible words, for if it should be lawful, by this means they may be published generally." It was resolved then, that in the case of scandalum magnatum it was not lawful to repeat slander, because, if it was, it might circulate generally. Now the same inconvenience, viz., the general publication of slander, though differing in degree, would follow from the repetition of slander in either case. The fourth resolution, however, in terms, perhaps does not go the length of saying that a defendant may justify the repetition of slander generally, but only that he may justify under certain circumstances. Assuming that it imports that a defendant may justify the repetition of slander generally, by showing that he named his original author, I think that it is not law.

*The declaration, which contains a technical statement of the facts *272] necessary to support the action, alleges that the defendant falsely and maliciously published the slander to the plaintiff's damage. In order to maintain such an action, there must be malice in the defendant and a damage to the plaintiff, and the words must be untrue. Where words, falsely and maliciously spoken, as in this case, are actionable in themselves, the law prima facie presumes a consequent damage without proof. In other cases actual damage must To constitute a good defence, therefore, to such an action, where the publication of the slander is not intended to be denied, the defendant must negative the charge of malice (which in its legal sense denotes a wrongful act done intentionally without just cause or excuse), or show that the plaintiff is not entitled to recover damages. It is competent to a defendant, upon the general issue, to show that the words were not spoken maliciously; by proving that they were spoken on an occasion, or under circumstances which the law, on grounds of public policy, allows, as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action, he must plead that matter specially; because the truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess. Now, a defendant, by showing that he stated at the time when he published *slanderous matter of a plaintiff that he heard it from a third person, does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not show that the slander was published on an occasion, or under circumstances which the law, on grounds of public policy, allows. Nor does it show that the plaintiff has not sustained, or is not entitled in a court of law to recover, damages. great an injury may accrue from the wrongful repetition, as from the first publication of slander, the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it. That shows not that the plaintiff has been quilty of any misconduct which renders it Vol. XXI.—16

unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant; and may, consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant. It seems to me, therefore, that such a plea is not an answer to an action for slander, because it does not negative the charge of malice, nor does it show that the plaintiff is not entitled to recover damages.

PARKE, J. It is not absolutely necessary to decide in this case whether the latter part of the fourth resolution in Lord Northampton's case be good law, because, *assuming the rule there laid down to be correct, this plea is bad for two reasons. To be a good plea it must confess and avoid the cause of action stated in the declaration. But this plea either does not confess, or if it confesses, does not avoid that cause of action. It appears from the case of Bell v. Byrne, 13 East, 554, that if a defendant has not made an assertion as his own, but has merely alleged that some other person had made it, it must be so averred: and that an averment in a declaration, that the defendant used slanderous words, must be taken to mean, that he used them as his own words, and as a substantive allegation of his own; and will not be supported by proof, that he used them as the words of another person. To apply the principle of that decision to the present case, if the plea be understood to confess that the words were spoken as those of another person, and not as a direct assertion of the defendant himself, it does not properly confess the matter stated in the declaration of his own, it does not contain any proper avoidance of the matter so confessed: for if one make such assertion of a slander as his own, it can be no answer, even admitting the latter part of the fourth resolution in Lord Northampton's case to be law, if in the same conversation he add that some one else has also said the same thing. In the second place, the plea is bad, because it does not give the plaintiff any cause of action against Woor. It does not state that Woor falsely and *maliciously spoke the words; and though malice may be implied from words actionable of themselves, still the defendant [*275] ought to have stated in the plea, as he must have done in a declaration against Woor, that the words spoken by Woor were false and malicious.

But assuming that the plea were not bad for the reasons already mentioned, I am of opinion that the latter part of the fourth resolution in Lord Northampton's case cannot be law. In the first place, the 12 Rep. is not a book of any great authority. It is said by Mr. Hargrave, 11 St. Tr. 30, to be of small authority, being not only posthumous, but apparently nothing more than a collection from papers neither digested nor intended for the press by the writer. And Mr. Serjeant Hill, in his copy, refers to fo. 18, 19, as showing that the 12 Rep. was And Holroyd, J., in Lewis v. Walter, 4 B. & A. 614, not fit to be allowed. gives an opinion unfavourable to its accuracy. It is to be observed also, that the expressions used in the fourth resolution are equivocal. It is not said in distinct terms, that if the defendant gives a cause of action against another, it will in all cases be an answer to an action for slander: and if it be taken to import a general position, that the repetition of slander is universally lawful, if the party at the time he repeats it mentions the name of the author, I think, that upon no principle can such a position be supported, nor can any satisfactory distinction be made in this respect between oral and written slander. A man's reputation is entitled to the protection of the law, against those slanders which it considers to be injurious; and as every one who publishes such a slander injures that reputation, he is guilty of a *wrongful act, and upon principle is liable in a civil action for any damage arising to another by reason of that wrongful act. I agree with what is said by Lord Chief Justice Best in De Crespigny v. Wellesley, 5 Bingh. 404; "because one man does an unlawful act to any person another is not to be permitted to do a similar act to the same

person. Wrong is not to be justified, or even excused, by wrong." A man

does a wrong by, and is therefore liable to an action for every repetition of slander; and if that be so, is the repeating of the slander less a wrong because the person who repeats it is not the same who first uttered it? There may be a great difference in the degree of injury committed, arising from the character or condition of the party who utters the slander, or the number of persons in whose presence it is uttered. The person who first uttered the slander may be a person of no character, or may have been in a state of intoxication at the time when he Slander uttered by such a person, or under such circumstances, would not receive much attention; but if a person of good character, and in a sound state of mind, were afterwards to repeat that slander, he would thereby not only circulate it more widely, but he would give credit to it by the mere repetition of it, although he stated at the time that he heard it from another. Every wrong to property is the subject of a civil action. Upon what principle can it then be said that a wrong done to the good name and reputation of another is not equally so? It is clear that a wrong to property cannot be justified by alleging that another person has before committed a similar wrong. case, too, the plaintiff alleges, *that in consequence of the words spoken *277] case, too, the plaintin alleges, value in consequences, by the defendant, he sustained a special damage, by the loss of a customer, and non constat, that any such special damage would have arisen from the words originally spoken if they had not been repeated by the defendant. It is there fore clear that the plea is bad and the judgment of the Court must be for the plaintiff. Judgment for plaintiff.

G. SMITH the Younger v. B. SHAW, Treasurer of the Commercial Dock Company.

By an act of parliament, a company was established for making and maintaining certain docks and basins, and was authorized to appoint a dock-master, who was to have power to direct the mooring, unmooring, moving, and removing of all vessels into or being in the docks, and to have the control over the space of 100 yards of the entrances into the docks, so far as related to the transporting of vessels coming in or going out; and the company was to be sued in the name of their treasurer; and if any action should be brought against any person for anything done in pursuance of the act, such action should be commenced within six calendar months after the fact committed.

An action having been brought against the treasurer for an injury done to a vessel (within 100 yards of the entrance of the docks) by reason of improper directions having been given by the dock-master in transporting her into the docks; it was held, that the giving of such directions was a thing done in pursuance of the act of p rliament, and that the action ought therefore to have been brought within six calendar months after such directions were giv. n.

The first count of the declaration, after stating that the ACTION on the case. Commercial Dock Company had extended and improved the docks and workmentioned in the acts thereinafter referred to, alleged that a vessel belonging to the plaintiff was, on the 28th of June, 1827, in the river Thames, and within one hundred yards of the entrance of the Commercial Docks; that the plaintiff was desirous of causing the vessel to enter the docks to unload; that the company had the care, charge, and management of unmooring, mooring, and transporting the said vessel into the said docks for that purpose, according to the said acts of parliament; and that the company so negligently, *improperly, and carelessly conducted themselves in the premises, and so negligently cast off certain ropes by which the said vessel was fastened to a certain capstan near the docks, that the vessel, by and through the negligence and improper conduct of the company and their dock-master in that behalf, took the ground and fell over on one side, and thereby sustained damage exceeding the sum of 5l. There were other counts for the same injury, but varying the

Plea, not guilty. At the trial before Lord Tenterden, C. J., at the London sittings before Hilary term 1829, the jury found a verdict for the plaintiff for the damages in the declaration (such damages to be afterwards more particu-

larly ascertained by a reference), and subject to the opinion of this Court on the

following case:-

The plaintiff was the owner of the Rebecca of 313 tons. The Rebecca, on her homeward voyage from Dantzic, arrived in the river Thames the latter end of June 1827, and in the afternoon of the 28th of June was made fast to the buoy belonging to the Commercial Dock Company, it being the plaintiff's intention to discharge her cargo in that dock. In the same afternoon, an attempt was made by the Dock Company's servants, to take the vessel into dock; and in the course of such attempt, owing to the negligence of the persons employed by the company in that behalf, the injury was sustained which is detailed in the declaration. The defendant is the treasurer of the company. More than six months intervened between the time at which the injury was sustained and the commencement of the action.

By an act of the 50 G. 3, c. 207, intituled, "An Act for maintaining and improving the docks and *warehouses called the Commercial Docks, and for making and maintaining other docks and warehouses to communicate therewith, all in the parish of St. Mary, Rotherhithe, in the county of Surrey," the Commercial Dock Company was established as a joint-stock company, and certain powers were conferred upon the company, which are more particularly set forth in the act.(a) And by the ninety-fourth section it is enacted, "that if any action or suit shall be brought or commenced against any person or persons, bodies politic or corporate, for anything done in pursuance of this act, every such action or suit shall be brought or commenced within six calendar months after the fact committed, or in case there shall be a continuation of damages, then within two months after the doing or committing such damage shall have ceased, and not afterwards.

By an act of the 51 G. 3, c. lxvi., the powers of the said company were

enlarged, and were extended to certain premises not comprised in the first-mentioned act. *By the twentieth section of the last-mentioned act, it is enacted, that in case any person or persons shall at any time or times by or through the negligence, carelessness, or omission of the said company of proprietors, or their servants or workmen, suffer or sustain any damage or injury exceeding the sum of 5l., then and in every such case the whole of the damages so suffered or sustained shall and may be recovered from the said company of proprietors, or their treasurer for the time being, in any of his Majesty's courts at Westminster by action of debt, or on the case, or by bill, plaint, or information, together with costs of suit. And by the twenty-seventh section of the said act it is enacted, that all the powers, provisions, penalties, forfeitures, clauses, matters, and things in the said 50 G. 3, shall extend to and be executed, applied, used, and put in force to all intents and purposes as to this act and the several matters and things therein contained, and all the clauses, powers, and provisions of the said recited act (50 G. 3), and this act shall be put in force and used and applied for carrying into execution the purposes of the said act and of this act; and the said act and this act shall be construed together as one act as fully and

effectually as if all the powers and provisions, matters and things in the said act were repealed and re-enacted in this act, and made part thereof. The question

By s. 72, no ship or vessel should be moored or anchored within the distance of 100 yards of the entrances of the docks, and over that space the dock-master should have control so far at the transfer and the docks.

relates to the transporting ships and vessels coming in or going out of the dock.

By s. 68, the company was authorized to be sued in the name of their treasurer for the time being.

⁽a) By s. 71 of the 50 G. 3, c. cevii., the directors of the company were empowered to appoint a dock-master or dock-masters, who should have authority to direct the mooring, unmooring, moving, and removing of all vessels entering into, lying, or being in the docks, as to the time and manner of their entrance into, lying in, or going out of the same, and their position, loading, and discharging therein; and the time of opening and shutting the gates; and in case the owner or master, &c., having the care of any vessel, should refuse or neglect to moor, unmoor, move, or remove the same to such direction within two hours after notice, then it should be lawful for the dock-master to moor, unmoor, &c., such vessel, and the charges thereof respectively should be repaid, together with the sum of 101 for each offence, by the master or owner of such vessel.

for the opinion of this Court was, Whether this action was commenced by tas

plaintiff against the defendant in proper time?

R. V. Richards for the plaintiff. The question is, Whether the grievance complained of in the declaration was an act done in pursuance of the 50 G. 3, c. *281] cevii. ? The grievance complained of is, that the company by *negligence caused the vessel to take the ground. That is a mere nonfeasance; but assuming the directions given by the dock-master may be considered an act done by the dock-master, the question is, Whether the act was one of that nature that he might reasonably suppose that the statute gave him authority to do it, Cook v. Leonard, 6 B. & C. 356? Here there was nothing to induce the dockmaster to suppose that what he was doing was authorized by the act of parliament. He might have done the same acts if the company had not any power given to them by the legislature. In Edge v. Parker, 8 B. & C. 700, the Court held that the seizing of property by the assignees of a bankrupt was not done in pursuance of the bankrupt act 6 G. 4, c. 16, s. 44. In Wallace v. Smith, 5 East, 115, the words of the act of parliament were more general, viz. in pursuance or under colour of the act. There are many other cases in which questions have arizen in actions against constables, but those cases do not apply, because acts of parliament are construed very liberally in favour of such persons. The reasonable construction of the statute is to confine the protection given by the statute to things done, for the purpose of effectuating the principal object of the act, viz. making and maintaining the docks. It could not have been intended by the legislature to give the company (who are benefited by carrying on the business of wharfingers or warehousemen) protection in cases where they are guilty of negligence in the course of their business. The 51 G. 3, c. lxvi., s. 20, subjects the company to a general liability, without any limitation as to the time within which any action must be brought.

*F. Pollock, contrd. The case of Blakemore v. The Glamorganshire *282] Canal Company, 3 Young & Jervis, 60, shows that though the authority be exceeded, yet if the party act bona fide, supposing himself to be within the authority of the statute, he is protected. Edge v. Parker, 8 B. & C. 700, was decided on the ground that the assignees seized the goods in virtue of their ownership, and not, therefore, in pursuance of the statute. The very form of the record shows that the act complained of was done in pursuance of the statute. The defendant is sued as treasurer. It is the statute alone which enabled the plaintiff to make him defendant. The plaintiff himself (as was said by Lord Ellenborough in Wallace v. Smith), has recognised the act of which he complains, as done under the statute. The 51 G. 3, does not vary the case, because it re-enacts the provisions of the former act. In Sellick v. Smith, 2 Carr & Payne, 284, which was an action of trover brought against the treasurer of the West India Dock Company for refusing to deliver articles deposited in the West India Docks, it was ruled by Best, C. J. (and that ruling was afterwards coufirmed by the Court of Common Pleas), that he was entitled to the protection of the dock act, which required that actions for anything done in pursuance of or under colour of that act should be brought within three months. There the company were charged with a misfeasance. Here the directions given by the dock-master, which occasioned the injury, may be considered an act done by the servant of the company while he was acting in discharge of his duty. declaration states that the defendant's servants had the care and management of the vessel by virtue of the *act of parliament. Unless the company's

servant acted in discharge of what was the duty of the company, the company is not answerable, and the treasurer not liable to be sued. By the act the dock-master is to have power over the space of 100 yards from the dock, as far as relates to transporting vessels going into the dock.

Richards in reply. Great inconvenience would follow if the defendants were held to be protected. A foreign owner of goods might not be able to instruct his agent to commence an action in the space of six months. The decision in

Schick v. Smith cannot be supported.

BAYLEY, J., delivered the judgment of the Court. This was an action against the treasurer of the Commercial Docks for damage to the plaintiff's ship. The damage resulted from improper directions given by the dock-master of the company (upon an attempt by the vessel to enter the docks) within the limits in which the dock-master was authorized by the act to give direction; and the question before us was, whether the action was commenced in time, or whether, under the provisions in the acts which regulate these docks, and give the right to sue the company in the name of the treasurer, it ought not to have been commenced within six calendar months after the directions were given, and the injury done; and we are of opinion, that the action was not commenced in time, and that it ought to have been brought within those six calendar months.

The language of the provision in the Commercial Dock act, 50 G. 3, c. cevii., s. 94, is, "that if any action *shall be brought against any person, or [*284] body politic, for anything done in pursuance of those acts, such action shall be brought within six calendar months next after the fact committed; or in case there shall be a continuation of damages, then within two months after the doing or committing such damages shall have ceased, and the action shall be laid and brought in the county where the matter in dispute shall arise, and not elsewhere;" and according to the decisions upon similar words, a thing is to be considered as done in pursuance of the act, when the person who does it is acting honestly and bona fide, either under the powers which the act gives, or in discharge of the duties which it imposes. Though he may erroneously exceed the powers the act gives, or inadequately discharge the duties, yet if he acts bonâ fide in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the act, and is to be entitled to the protection conferred upon persons while so acting. This is established by Gaby v. The Wilts and Berks Canal Company, 3 M. & S. 580, Theobald v. Crichmore, 1 B. & A. 227, Parton v. Williams, 3 B. & A. 330, and Smith v. Wiltshire, 2 Brod. & B. 619, and Cook v. Leonard, 6 B. & C. 351, establish the same point as to constables and other persons acting in obedience to a justice's warrant. Indeed, this position was not controverted upon the argument; but the points insisted upon were, that the first of the Commercial Dock acts, 50 G. 3, c. ccvii., s. 94, only gave the protection, in those cases in which the act done, was done for making and maintaining the docks, and did not extend to the conduct of the *dock-master in giving directions for transporting vessels into the docks; and that the 51 G. 3, which gives the remedy by action against the company for the negligence, carelessness, or omission of themselves, their servants, or workmen, when the damage exceeds 5l., though it contains a clause which virtually re-enacts and applies to the cases within the latter act, the protection given by the former act, section 94, did not mean it to apply to actions against the company like the present for negligence, but meant to confine it to what was done under the powers of that act, towards maintaining and improving the docks Upon an attentive consideration, however, of the two dock acts, it appears to me, that if the second act had never passed, the protection given by the ninety-fourth section of the first act would have applied to any action which might have been brought for the injury in question; and that if this action is to be considered as founded on the second act, the re-enactment in the second act of what is the nincty-fourth section in the first, will also apply to it. By 50 G. 3, many powers are given for making and maintaining the dock, and no doubt the protection given by section 94 would apply to any actions which might be brought for an excess in the execution of those powers; but it does not follow that it would be confined to them. By section 71 the company are to appoint a dock-master, and he is to have power to direct the mooring, unmooring, moving and removing of all vessels into or being in the docks, &c., &c. By section 72 he is to have the control over the space of one hundred yards from the entrances into the docks, so far as relates to the transporting ships or vessels coming in or going out. It was from impropriety in the directions which the dock-master

*286] *gave, and from the improper exercise of this control, that the injury in question happened. But was not the dock-master acting, in giving these directions and exercising this control, in pursuance of the act? It was only under the act that he had authority to give any directions; but for the act the captain and crew of the ship might have disregarded those directions. Supposing, then, that the 51 G. 3 had never passed, and that the case had stood upon the 50 G. 3, and that an action had been brought against the dock-master for the injury which his improper directions had occasioned, would he not have been entitled to say, I acted under, and therefore in pursuance of the statute? I should never have acted, but for the statute. The statute made it my duty to act; and if I acted erroneously, I am entitled to the protection the statute meant to give to an honest but an erroneous exercise of its powers.

And if in an action against the dock-master under the 50 G. 3, the ninetyfourth section of that act would have applied to him, the argument which would deprive the company of the like protection when they are sued under the 51 G. They are, under the 51 G. 3, in at least as favourable a situation as the dock-master was under the 50 G. 3, and what would have been a defence for Wallace v. Smith, 5 East, 115, seems to him will be also a defeuce for them. us at least as strong a case as the present. There the ground of complaint was, that the West India Dock Company had wrongfully prevented the plaintiffs, as brokers or agents, from landing goods *from ships in the docks, and debrokers or agence, from making goods livering them to the owners; and the question was, whether the 39 G. 3, c. lxix., s. 185, which required fourteen days' notice before any action was brought against the company for anything done in pursuance or under colour of the act, was a bar to the action, no notice having been given, and after taking time to consider, the Court held it was. The defendant's counsel immediately agreed to waive the advantage, and to refer the injury complained of to arbitration.

In deciding this case, it is not necessary to go to the length of Sellick v. Smith, which was quoted at the bar, nor to say whether a mere nonfeasance would be an act done within the meaning of this and similar statutes, a point much doubted in Blakemore v. The Glamorganshire Canal. In the present case the statute authorizes the giving directions, and giving directions is doing an act. There must, therefore, be a nonsuit.

Judgment of nonsuit.

*288] *VERE and Others v. R. S. ASHBY, H. R. ROWLAND, and B. SHAW.

On the 24th of June, 1824, C. agreed to become a partner with A. and B., the business to be carried on in the names of A. and B. for the benefit of A., B., and C.; that the partnership should be considered as commencing on the 18th of May preceding. Before the 24th of June A. and B. had opened an account with certain bankers, which was continued in their names till the 22d of September, when the partnership as to B. was dissolved. All the business with the bankers was transacted by B., and the bankers did not know that C. was a partner till the account was closed. B. used the accounts for the purposes of the firm of which C. was a member. as well as for others. On the 21st of May he endorsed a bill of exchange in the partnership names of A. and B. to the bankers, who discounted it, and placed it to the credit of the account. On the 13th of July he endorsed two others in a similar manner: Held, that as the bankers did not know that the money raised by these bills was intended to be applied to other than partnership purposes, C. was liable on the last two bills, but not on the first, he not having been an actual partner at the time when it was discounted.

ASSUMPSIT for the amount of three bills of exchange and a cash balance claimed to be due to the plaintiffs, bankers in London, from the defendants, who were partners together for the period of time after-mentioned, in the business of engravers, printers, and stationers in Lombard Street. The plaintiffs declared as endorsees, against the defendants, as endorsers of three bills of exchange, one

for the sum of 125l. 16s. 6d., dated the 19th of May, 1824, payable four months after date; another for 148l. 15s., dated the 8th of July, 1824, payable three months after date; and the third for 167l. 0s. 6d., dated the 10th of July, 1824, payable three months after date, with the usual money counts. The defendant Shaw pleaded non assumpsit. The defendant Ashby pleaded bankruptcy, which was admitted, and as to him a nolle prosequi was entered. The defendant Rowland suffered judgment by default. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary term 1827, a general verdict was found for the plaintiffs, damages 557l. 13s., subject to the opinion of

this Court on the following case :-Previous to the 18th of May, 1824, the defendants Ashby and Rowland carried on the business of engravers, *printers, and stationers in Lombard street, in partnership with one Osborne, under the firm of Ashby, Osborne, and Rowland, but on that day the partnership was dissolved by Osborne retiring, and the stock, debts, and effects of the partnership became the property of Ashby and Rowland, who continued to carry on the business in partnership, under the firm of Ashby and Rowland, until the 24th of June, 1824, when the defendant Shaw entered into partnership with the defendants, Ashby and Rowland, and by an agreement then made, signed by them, reciting that the said R. S. Ashby and the said H. R. Rowland were then carrying on the trade and business of engravers, printers, and stationers, at No. 56, Lombard Street, under the name and firm of Ashby and Rowland; and the said R. S. Ashby and H. R. Rowland being desirous of enlarging the capital they had in the said trade, for the purpose of increasing the profits and advantages thereof, had proposed to the said B. Shaw to take him into partnership; it was therefore thereby agreed by the said parties, that Shaw should advance, as his capital in the said business, 1500%, viz. 500l. on his then entering into the agreement, 700l. on the 6th of August, and the remainder, 300l., on the 6th of September then next, making together the sum of 1500l. as his capital stock in the said trade; that Ashby should advance in stock or money 300l. as his share of the capital stock; and H. R. Rowland should advance in stock or money 1500l. as his share of the capital stock, making together 33001. as the capital in the said trade; that the trade or business should be carried on in the names of Ashby and Rowland, and all bills or bills of parcels, drafts for money and securities for money, should be in the names of Ashby and Rowland, and all *acceptances of bills or notes should be accepted by the said R. S. Ashby or H. R. Rowland, or one of [*290] them, in the name of Ashby and Rowland; that the partnership should be considered as commencing on the 18th day of May then last, being the day on which the partnership of Ashby, Osborne, and Rowland was dissolved as it respected the said Richard Osborne only. The agreement then provided for the division of the profits, &c. The business was carried on in pursuance of this agreement, in the names of Ashby and Rowland only, until the 21st of September, 1824, when the partnership was dissolved so far as regarded the defendant Rowland. The business was then carried on by the defendants Ashby and Shaw, who took the stock and effects of the partnership of Ashby, Rowland, and Shaw. Shaw never appeared in the business, nor was he introduced or known to the plaintiffs, nor even to the clerks of the partnership business, as a partner; he was abroad from the commencement of the partnership until about the time when the dissolution thereof took vlace.

Some short time before Mr. Shaw became a partner, Ashby and Rowland had opened an account in their own names with the plaintiffs, which account was continued in the names of Ashby and Rowland, without any rest made therein, or any other alteration thereof, down to the time of the dissolution of the partnership, as Ashby, Rowland, and Shaw; the plaintiffs having no notice that Shaw was a partner until the dissolution, when they received the following letter, signed by Ashby and Shaw, dated the 21st of September, 1824:—"Gentlemen, Mr. H. R. Rowland having withdrawn from the firm of Ashby and Rowland, you will please to take notice, that from this date no transaction to which

he is a party can be *recognised by us." The account so opened by Ashby and Rowland with the plaintiffs commenced on the 29th of April. 1824, and ended on the 22d of September of that year, when the gross amount of the debtor side of the account was 13,993l. 14s. 8d., and of the creditor side 13,9331. 9s. 5d., leaving a cash balance of 60l. 5s. 3d. due to the plaintiffs. The three bills of exchange declared upon were endorsed Ashby and Rowland, in the handwriting of the defendant Rowland, and had been paid to the plaintiffs by him, and discounted by them, and the proceeds carried to the account standing in the names of "Ashby and Rowland" generally. The bill for 125l. 16s. 6d. was discounted by the plaintiffs on the 21st of May, 1824, and the other two bills were discounted by them on the 13th of July in the same year. transactions at the banking-house were with Rowland personally. Neither Parr, John Shaw, nor Barnard (the parties to the bills), had any transactions with the house of Ashby and Rowland. The account was overdrawn at the close 60%. 5s. 3d. by means of placing a bill for 48l. 17s. 4d., dated the 19th of May, 1824, to the debit of the defendants, credit being given for the three bills in question. The bill for 481. 17s. 4d. was discounted by the plaintiffs on the 21st of May, 1824, and the proceeds carried to the account of Ashby and Rowland. defendants Ashby and Rowland were the liquidating partners of the dissolved firm of Ashby, Rowland, and Osborne. During the partnership of Ashby, Rowland, and Shaw, Messrs. Rogers and Co. were the private bankers of the defendant Shaw, and on the 28th of June, 1824, four days after the partnership of Ashby, Rowland, and Shaw commenced, a bill for 8001., accepted by the defend-*292] ant Shaw, payable at *Messrs. Rogers and Co., dated the 24th of June, 1824, was discounted by the plaintiffs, and carried to the account of Ashby and Rowland, in whose names it was endorsed by Rowland, and when due the amount was paid by Rogers and Co. to the plaintiffs. On the 24th of June, 1824, when the agreement of copartnership between Ashby, Rowland, and Shaw was made, the amount of the debtor side of the account of Ashby and Rowland with the plaintiffs was 6752l. 5s. 8d., and of the creditor side 7618l. 5s. 9d., being, if the balance were struck, in favour of Ashby and Rowland of 886l. 1d. During the partnership of Ashby, Rowland, and Shaw, the account with the plaintiffs was used by the defendant Rowland for the general purposes of the late firm of Ashby, Osborne, and Rowland, for the private purposes of the defendant Rowland, and checks were drawn by Rowland for the payment of wages to the workmen employed in the partnership business of Ashby, Rowland, and Shaw, and other persons to whom the firm was indebted. The defendant Rowland, during the continuance of the account with the plaintiffs, drew out from time to time considerable sums, which he applied to his own private uses and the use of his father, and he frequently paid his father's money to the plaintiffs, to the credit of the account standing in the names of Ashby and Rowland, and paid his father's debts by checks drawn by him upon the plaintiffs, in the name of Ashby and Rowland. Of this, however, the plaintiffs had no knowledge. The bills declared upon were duly presented, and dishonoured, of which due notice was given. The question for the opinion of the Court was, Whether, under the above circumstances, the defendant *Shaw was liable to the whole or any part of the plaintiff's demand?

The Court called upon

F. Pollock for the defendants. Generally speaking, partners are bound by what is done by each other in the course of the partnership business. Here the bills were endorsed by Rowland alone, and not for the purposes of the firm in which Shaw was a partner. That was, therefore, a fraud upon Shaw. [BAYLEY, J. It is not stated that the proceeds of the bills were not applied by Rowland to partnership purposes.] The prior parties to the bills were persons not connected with the firm of Ashby and Rowland. It lies on the plaintiffs to show that they were so applied. Shaw clearly is not liable upon the first bill, for when it was discounted he had not become an actual partner, and, therefore was not liable to third persons. As to the other two bills, at the time when they Vol. XXI.—17

were discounted Shaw was a secret partner in a firm in which the ostensible partners were Ashby and Rowland. Shaw, therefore, would be liable on all bills endorsed by either of his co-partners in the partnership name for the purposes of the firm. In Emly v. Lye, 15 East, 7, it was held, that the endorsement of one partner could not be treated as the endorsement of the firm, so as to render all the partners liable, although the money thereby raised was applied to partnership purposes. [PARKE, J. The case of The South Carolina Bank v. Case, 8 B. & C. 427, shows that if a firm consisting of several carry on business in the name of one of the partners, the whole firm will be bound by acts done by him as *representing the firm.] The account kept by the plaintiffs in the partnership name, was used by Rowland for three distinct purposes. Suppose there had been two distinct firms trading under different names and that Shannar and the Shannar and that Shannar and that Shannar and that Shannar and the Shannar an names, and that Shaw was a partner in one only, and that the accounts had been mind up together, he would not be liable for sums paid by the bankers for the fi... in which he was not a partner. A secret partner is liable not merely because he authorizes the use of the partnership name, but because he shares in profit and loss. The account with the bankers was opened before Shaw became a partner, and the plaintiffs by using due diligence might have learnt the purposes for which the moneys advanced by them were applied. They did not trust Shaw, and that being so, it is incumbent on them to show that the money was applied to partnership purposes. This case is distinguishable from Swan v. Steele, 7 East, 210. There the bill was taken in the course of the business of the firm in which the secret partner was concerned, and it was endorsed with reference to that business, though for the benefit of another.

Wightman for the plaintiffs. When Shaw joined the partnership, the balance of the account was in favour of the firm. [BAYLEY, J. In Baker v. Charlton, Peake's N. P. C. 80, it was decided, that where persons are partners in a particular and single transaction only, and not general partners, they are not liable even to a bonk fide holder on a bill issued by one of them in relation to a different concern.] In this case the bankers were not aware that the money advanced by them upon the bills was to be applied to any other purposes than those of the firm of Ashby and *Rowland, and it does not distinctly appear that it was so applied. At the time when the last two bills were discounted, Shaw was a partner in that firm. He had, therefore, authorized his copartners to bind him, by drawing, endorsing, or accepting bills of exchange. Swan v. Steele, is an express authority to show that he is liable. Ellenborough there says, "that in the absence of fraud on the part of the endorsee, an endorsement by one partner will bind all the partners." The argument on the other side would go to show that Shaw, even if he were an ostensible partner, would not be liable. [BAYLEY, J. Each partner might have limited the authority of his copartners by giving due notice to the bankers.] A sale to one partner is a sale to the partnership, with whatever view the goods may have been bought, and to whatever purpose they may be applied (and even though the purchasing partner meant to cheat his copartners), and all the partners are liable to the vendor for the price of the goods, Bond v. Gibson, 1 Campb. 185. As to the bill endorsed before the 24th of June, it is true, that at the time of such endorsement, Shaw had not given any authority to Rowland to endorse bills for him, but by afterwards agreeing to become a partner from the preceding 24th of May, he adopted and ratified the acts done by either of his copartners in the intervening period, and is therefore as much bound by them as if he had given a previous authority.

BAYLEY, J. The question in this case was, whether Shaw was liable? He became a partner on the 24th of June, it being agreed between him and his copartners that he was to be considered a partner from the 18th of *May preceding, but his name was not to appear in the firm; he in fact continued a partner till the 21st of September. The action was upon three bills of exchange discounted by the plaintiffs, who were bankers of Rowland and Ashby; one between the 18th of November and the 24th of June; the two others on the

13th of July, when Shaw was clearly a partner. The question was, whether Shaw was liable? The general rule is, that where the partnership name is ledged, any person who is either an actual partner, or has allowed himself to be held out to others as a partner, is liable, unless the party to whom the partnership credit is pledged is privy to an intent to misapply the money. Here there was no ground for imputing any such knowledge to the plaintiffs. If it be true that persons who are actually partners, are made liable by a pledge of the partnership name, the only question is, who were partners at the time when the partnership name was pledged? Ashby, Rowland, and Shaw were the persons, though they traded under the firm of Ashby and Rowland. Shaw was actually a partner in a firm assuming a particular name with his assent. The cases of Swan v. Steele, 7 East, 210, and Baker v. Charlton, Peake's N. P. C. 80, go further than it is necessary to go for the purpose of deciding the present case. But applying the principle I have mentioned to this case, there can be no doubt that the plaintiffs are entitled to recover to a limited extent. The first bill was discounted, and the credit of the firm pledged at a time when Shaw was not an actual partner, and the same observation applies to the bill for 48l. 17s. 4d. in the cash account. And although it was afterwards agreed *that he was to be considered a partner from a preceding day, that was a bargain between himself and his partners, and made no pledge of his credit to the plaintiffs. The other bills having been discounted at the time when the three defendants were partners, the plaintiffs are entitled to recover the amount of them against all the three.

LITTLEDALE, J. If a person be an actual partner, or, with his assent, be held out to others as a partner, he is liable. Here Shaw was an actual partner. By the agreement he gave an authority to the two to use their names as representing him. By virtue of that authority, Ashby and Rowland then became, ir all matters relating to the partnership, the same as Ashby, Rowland, and Shaw. The plaintiffs advanced money for the use of the partnership. Shaw, therefore, is liable. But it is said that it was never intended to apply the money given for these bills to the partnership accounts; but of that intention the plaintiffs had no knowledge. The plaintiffs are not entitled to recover upon the first bill, because Shaw was not a partner at the time when that bill was discounted. On

the others they are entitled to recover.

PARKE, J. I am of the same opinion. The three defendants are not liable on the first bill; they are on the second and third, and for so much of the cash balance as became due after the 24th of June. The question is with whom the plaintiffs contracted, and that depends on this. For whom was Rowland authorized to make a contract? There is no question in this case as to an apparent authority as distinct from a real one. The only question is, therefore, by what *298] Persons was *authority given to Rowland to contract. On the 24th of June the agreement for the partnership was made. The effect of that agreement is that Shaw gives to Ashby and Rowland respectively authority to use their names for the three in all dealings and matters in respect of which partners in such a trade usually have authority to bind one another. If the name of the firm had been used in other transactions out of the usual scope of dealing of such a partnership, that user of the name would not have bound Shaw. It would make no difference in this case that the money had been misapplied, it not appearing that there were any circumstances to excite the plainiffs' suspicion that it was intended to be so misapplied. As to the two bills, nerefore, which were discounted after the 24th of June, Shaw is liable. the other I am of opinion he is not liable. The rule as to ratification applies only to the acts of one who professes to act as the agent of a person who afterwards ratifies. Here Rowland at the time when the first bill was discounted, did not profess to act as the agent of Shaw. The retrospective date of the partnership may affect the accounts between the partners, but not the rights of third Postea to the plaintiffs. persons.

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*WISE v. METCALFE.

An incumbent of a living is bound to keep the parsonage-house and chancel in good and sub atantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply or maintain anything in the nature of ornament, such as painting (unless that be necessary to preserve exposed timber from decay), and whitewashing and papering; and in an action for dilapidations against the executors of a deceased rector by the successor, the damages are to be calculated upon this principle.

ACTION on the case by the plaintiff, as rector of the church of the parish of Barley, in the county of Hertford, against the defendant, as the executor of the late rector, William Metcalfe, the immediate predecessor of the plaintiff, to recover the amount of the dilapidations of the rectory-house, barns, stables, and outbuildings thereto belonging, of the said rectory, and of the chancel of the said church, which had arisen at the time of the death of the said William Metcalfe. At the trial before Garrow, B., at the Summer assises for Hertford 1828, the jury found a verdict for the plaintiff, damages 8991. 18s. 6d., subject to the

opinion of this Court upon the following case:-

The deceased, William Metcalfe, became rector of the church of the said parish in 1814, and soon afterwards received from the personal representative of his immediate predecessor, the sum of 1151., being the amount of the dilapidations of the rectory-house, outbuildings, and chancel, at the death of his said prede-Mr. Metcalfe continued to be rector until his death, which happened on the 16th of May, 1827, at which period the annual value of the said rectory was 600l., out of which the sum of 46l. was payable annually for land-tax. In the month of July 1827 the plaintiff became the rector of the church of the said parish, and has so continued ever since. The rectory-house is an ancient structure, built with timber, and plastered on the outside, and has upon it the date of The barns were also old, but not of equal age with the rectory-*1624. The dilapidations of the rectory-house, barns, stables, outbuildings, and of the chancel of the church, amounted to 3991. 18s. 6d., provided the principle upon which the estimate had been made was correct. The principle was, that the former incumbent, William Metcalfe, ought to have left the rectoryhouse, buildings, and chancel, in good and substantial repair; the painting, papering, and whitewashing being in proper decent condition for the immediate occupation and use of his successor; that such repairs were to be ascertained with reference to the state and character of the buildings which were to be restored where necessary, according to their original form, without addition or modern improvement. It was proved by the several surveyors of experience examined on the part of the plaintiff, and also of the defendant, that they had invariably estimated the dilapidations between the incumbent of a living and the representatives of his predecessors upon the above principle.

If, however, the rectory-house, buildings, and chancel were to be repaired in the same manuer only as buildings ought to be left by an outgoing lay tenant, who is bound by covenant to leave them in good and sufficient repair, order, and sondition, the expense of such reparations amounted to 310*l*., the painting,

papering, and whitewashing not being included in the last estimate.

And if the former incumbent, William Metcalfe, was only bound to leave the rectory-house, buildings, and chancel, wind and water tight, or in that state of reparation which an outgoing lay tenant of premises not obliged by covenant to do any repairs, ought to leave them, then the expenses of repairing the rectory, buildings, and chancel amounted to 75*l*. 11s.

*The question for the determination of the Court is, which of the above principles of valuation is the correct one; and according to their decision the damages will stand for 899l. 18s. 6d., or be reduced either to 310l. or to 75l. 11s. The case was argued on a former day during these sittings, by

Brodrick for the plaintiff. The principle first stated in the case is that upon which the estimate ought to be formed. The action for dilapidations is founded

on the custom of England, which is the common law; by that custom the incumbent of a living is bound to leave the premises in the same state of repair as he ought to keep them in. The custom is thus described in Degge's Parson's Counsellor, p. 138, pl. 94: "Omnes et singuli prebendarii, rectores, vicarii regni Anglise pro tempore existentes, omnes et singulas domos et edificia prebendarum, rectoriarum et vicariarum suarum reparare et sustentare, et ea successoribus suis reparata et sustentata dimittere teneantur." That shows that they must be left to the survivor in the state in which the predecessor ought to keep them. By a legatine constitution of cardinal Othobon, promulgated A. D. 1268, 52 H. 3, it is ordered that none through covetousness may neglect the house, nor suffer it to go into ruin or dilapidation. That constitution (a) is as follows:—"Improbam quorundam avaritiam prosequentes, qui cum de suis ecclesiis et ecclesiasticis beneficiis multa bona suscipiant domos ipsarum, et cætera ædificia negligunt, ita ut integra ea non conservent et diruta non restaurent; propter quod ecclesiarum ipsarum statum deformitas occupat et multa incommoda subsequuntur: statuimus et præcipimus, ut universi clerici, suorum beneficiorum domos, et cætera *ædificia, prout indiguerint reficere studeant condecenter." Lyndwode in his comment upon this constitution, and upon the words "prout indiguerint" says, "necessariam refectionem importat; non ergo loquitur hic de refectione presiosze picturze Parrhasii vel Apellis, immo nec de aliis voluptuosis impensis."(b) But it appears from the expression "studeant" that some pains are to be taken that decent and respectable repairs be done. Dilapidations are such repairs and renovations as are proper to make the house habitable, with decent convenience, respect being had to the value of the benefice to which the house belongs. Gibson, in the Codex, Appendix, 1554, under the head of directions in order to a parochial visitation, among the matters to be inspected, mentions the mansion-house of the rector, and other houses, buildings, &c., thereto belonging, and the direction as to them is, "that all of them be kept in good and sufficient repair; and particularly that the mansion or dwelling-house (over and above the repairs which are deemed necessary) be kept in such decent manner as is suitable to the condition of the rector, vicar, or curate," and he refers to the words of Othobon's Constitution, "reficere studeant condecenter." Here the rector had from his rectory an income of 600% per annum; he ought, therefore, to have kept the premises in a state of repair, even as to painting, papering, and whitewashing, befitting for the occupation of a man of that income. In Godolphin's Repertorium, 176, edit. 1689, it is stated, that by the injunctions of King Edward the Sixth to all his clergy, it is required that the proprietors, parsons, vicars, and clerks, having churches, chapels, or mansions, shall yearly bestow upon the same mansions or chancels of their churches, *being in decay, the fifth part of their benefices, till they be fully repaired, and the same so repaired, shall always keep and maintain in good estate." The authorities establish that, by common law, the executors of a deceased incumbent are liable for dilapidations, but they do not define in what state the premises ought to be in order to make it necessary to put them into decent repair. But upon principle the incumbent ought to leave to his successor the premises in the same state of repair in which he is bound by law to keep them; viz., in a state fit for the occupation of a person holding such a benefice. In Percival v. Cook, 2 Carr. & Payne, 460, Best, C. J., at Nisi Prius, stated it to be his opinion that the executors of a deceased incumbent are bound to do nothing more than to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises, and upon his intimating that opinion the case was compromised. There was no opportunity or occasion for questioning the correctness of the rule so laid down. more than a dictum at Nisi Prius, and entitled to very little weight. The incumbent is bound to rebuild as well as repair. The Bishop of Litchfield and

⁽a) Gibs. Cod. Jus. Eccl. 751.
(b) Lvadewood's Provinciale. reficiends, p. 112. Ed. Oxon.

Coventry was suspended for dilapidations, and the profits of the bishopric were sequestered, and the episcopal palace built out of them, Doctor Wood's case, cited 12 Mad. 237. The ordinary may enforce such reparation as the ecclesiastical law requires during the life of the incumbent by sequestration of the profit, or by ecclesiastical censures even to deprivation. By the 57 G. 3, c. 99, non-residents are required to keep their houses in good and sufficient repair; and a 63 provides, that where a curate is appointed by the incumbent, and receives the whole profit of the *benefice, he shall allow any sum not exceeding one-fourth of such profit as shall have been expended in repair of the chancel,

parsonage-house, or residence. The principle last stated in the case, is the one upon which Thesiger, contrà. the estimate ought to have been made, viz. that the incumbent is bound to leave the rectory-house, buildings, and chancel in that state of reparation only in which an outgoing lay tenant, not obliged by covenant to do repairs, ought to leave Damages are recoverable at law for dilapidations, upon the same principle on which they are recoverable in case of permissive waste. not only from the import of the term itself, but from the light in which dilapidation was formerly viewed. With regard to the term, Cowell in his Dictionary says, "It is a wasteful spending or destroying, or the letting buildings run to ruin and decay for want of due reparation." Degge in his Parson's Counsellor, p. 134, says, "A dilapidation is the pulling down or destroying in any manner, any of the houses or buildings belonging to a spiritual living, or the chancel, or suffering them to run into ruin or decay, or wasting and destroying the woods of the church, or committing or suffering any wilful waste in or upon the inheritance of the church;" and to the same effect is Godolphin's Repertorium, p. 173, Black. Com. book 3, c. 7, p. 91. As to the light in which it was formerly regarded, it appears that dilapidation of the house of the bishopric was formerly good cause of deprivation, 3 Inst. 204. Stockman v. Wither, Roll. Rep. 86, and in that case, waste and dilapidation are treated as synonymous. In the Bishop of Salisbury's case, Godb. Rep. 259, it was holden, that if a bishop, parson, or ecclesiastical person, do cut down trees upon the lands, *unless it [*305] be for reparations of the ecclesiastical house, or do or suffer to be done any dilapidations, they may be punished for the same in the ecclesiastical court, and a prohibition will not lie, and the same is good cause of deprivation of their ecclesiastical livings and dignities. But yet for such waste done, they may be punished also at common law, if the party will sue there (meaning by the party the succeeding incumbent). So in 11 Rep. 49 a, Lord Coke, referring to the Year Books, says, if a bishop or archdeacon abates or fells all the wood he has, as bishop, he shall be deposed, as dilapidator of his house. A milder course, however, was to proceed by prohibition, to restrain ecclesiastical persons from committing dilapidations or waste, Knowle v. Harvey, Roll. Rep. 335, 3 Bulstr. 158, and the Bishop of Durham's case cited in Liford's case, 11 Rep. 49 a; but in Jefferson v. The Bishop of Durham, 1 B. & P. 105, it was held by the Court of Common Pleas that they had no power to issue a prohibition. course seems to have been founded on the constitution, already referred to, of Cardinal Othobon, 1268, 52 H. 3 (Gibson's Codex, 751), requiring the bishops and archdeacons to admonish their clerks decently to repair the houses of their benefices and other buildings; and if they neglected for the space of two months, the bishop was to cause the same to be effectually done at the costs and charges of such clerk, out of the profits of his church and benefice, causing so much thereof to be received as should be sufficient for such reparation. The amount to be sequestered was originally left to the discretion of the ordinary. But by injunctions in the reigns of Hen. 8, Edw. 6, and Eliz. (mentioned in the notes to Gibson's Codex, p. 753), *the amount was restrained to one-fifth, and by the Reformatio Legum Ecclesiasticarum to one-seventh. This mode of repairing dilapidations during the incumbency prevails at the present day, and the ecclesiastical court rarely allows more than one-fifth, North v. Barker, l Phill. 309. These modes of proceeding, deprivation, prohibition, and sequestration, all indicate a spoliation or destruction of the property, as the groundwork

of the proceeding.

Thus stood the law with regard to repairs during the incumbency, and so ipartly remains at this day. But as it might frequently happen that an incumbent might resign or die before the repairs were completed, it was necessary to make a provision for such contingency. Accordingly there is to be found in Lindewood's Provinciale, lib. iii. tit. 27, p. 250, ed. Oxon. a very early canon of Edmund Archbishop of Canterbury, in the reign of Henry V., on the subject, which is in the following terms:—"Si rector alicujus ecclesize decedens (which will apply to death or resignation) domos ecclesize reliquerit dirutas vel ruinosas, de bonis ejus ecclesiasticis, tanta portio deducatur quæ sufficiat ad reparandum hæc, et ad alios defectus ecclesiæ supplendos." Lindewood's gloss upon this canon (and that is the first authority as to the nature of the repairs) on the word "dirutas" is totaliter prostratas. On "ruinosas," de proximo vel verisimili casuras; and upon "ad reparandum," "et intellige hanc reparationem fieri debere, secundum indigentiam et qualitatem rei reparandse, ut scilicet im-pensse sint necessarise non voluptuosse." The canon itself makes an equitable reference to the value of the living, "Semper tamen rationabilis consideratio sit habenda ad facultates ecclesisse cum have portio fueret deducenda." Upon the *words "facultates ecclesiæ," the gloss is, "secundum quarum considerationem hæc reparatio est facienda; quia in beneficio pinguiori requiruntur ædificia magis sumptuosa, quam in beneficio minus pingui.'

A remedy seems always to have existed at common law against the executors of a deceased rector; though Gibson, in his Codex, 753, says, that the first writer who advanced the notion of such an action in the temporal courts was Sir Simon Degge, and the first case in which the remedy was established was Jones v. Hill, 3 Lev. 268. After stating that prebends, rectors, and vicars are bound to repair and support their houses and buildings, Degge, in the Parson's Counsellor, Part I. c. 8, p. 138, states the custom, which is the foundation of this action, in the following words, which are nearly the same as in 1 Lutwidge, 116 :- "Et si hujusmodi prebendarii, rectores, et vicarii domus et edificia hujusmodi, successoribus suis sic, ut præmittatur, reparata et sustentata, non demiserunt et deliquerunt; sed ea irreparata et (not vel) dilapidata permiserunt, executores sive administratores bonorum et catallorum talium præbendariorum, rectorum et vicariorum, post eorem mortem de bonis et catallis decedentium successoribus talium prebendariorum rectorum et vicariorum, tantam pecunise summam quantam pro necessaria reparatione et edificatione hujusmodi domorum et edificiorum expendi aut solvi sufficiet, satisfacere teneantur." expressions it is obvious, that the measure of damages against the executor is that sum of money which would be required to repair and sustain that which is ruinous and dilapidated, and which was necessary to be repaired, &c.

*308] *Now the omission to repair what is absolutely necessary, is in fact the case of permissive waste. The foundation of this action is a tort, and it is an exception to the general rule, "actio personalis moritur cum personal." In Sollers v. Laurence, Willes, 421, Willes, C. J., gives a reason for the action lying, that it is not considered as a tort in the testator, but as a duty which he ought to have performed; and, therefore, his representatives, so far as he left assets, shall be equally liable as himself. But the editors of the last edition of Saunders, vol. i. p. 216, observe, "that the action is in form an action on the case in tort, and that it could not possibly be framed in assumpsit, as on a contract, for the plaintiff must be the succeeding rector, who cannot be known until after the death of his predecessor, and of course could not contract with him." The ground of the action being an omission to perform a duty cast by law on the rector, it becomes necessary to consider the relation in which he stands to the benefice. The parson is considered as having the fee, when it is for the benefit of the church that he should be so considered; but when that would be detrimental to the church, he is considered as being tenant for life. He is like a tenant for life, with impeachment of waste, or tenant for years or from year to

year, who is not bound by covenants. Each of these is entitled to the usufruct of the property, and bound by his relation to that property to keep it in a tenantable condition. What would be a breach of their obligation would be a breach of that of the rector. By the statute of Marlbridge, a tenant for life or for years is liable for waste. But it is clear that an outgoing lay tenant is not bound to do more than *necessary repairs. In 2 Ro. Abr. 816, tit. Waste, pl. 36, it is laid down, "If a tenant permit a chamber to be in decay, for default of plastering, whereby the great timber becomes rotten, and the chamber becomes very foul and filthy, an action of waste lies." So if the lessee permit the walls to be in decay for want of daubing, whereby the timber, becomes rotten, pl. 37. Ferguson v. _____, 2 Esp. 390, Russell v. Smithies, 1 Anstr. 96, and Horsefall v. Mather, Holt's N. P. Rep. 7, also show that the obligation of a tenant (not bound by covenant) only extends to necessary repairs. As to ecclesiastical persons, there is no express decision. In North v. Barker, 3 Phillimore, 307, Sir John Nicholls intimates, that the executors of a deceased incumbent are not bound to renovate a building, even in its ancient form, much less in its pristine beauty, and that the thorough repair of the old building is not all to fall on one The rule laid down by Best, C. J., in Percival v. Cooke, 2 C. & P. incumbent. 200, is reasonable, considered with reference to the liability of a lay tenant for life or years. The statute 13 Eliz. c. 10, contains a legislative declaration as to the dilapidations which executors of a deceased incumbent ought to pay for. It recites that persons endowed of buildings belonging to ecclesiastical benefices had not only suffered the same, for want of due reparation, to run to decay, converting the timber, lead, and stones to their own benefit, but had also made deeds of gift and other conveyances of their goods and chattels in their livestime, to the intent, after their death, to defeat and defraud their successors of such just actions and remedies as otherwise they might have had for the *same gazinst their executors of their goods by the laws ecclesiastical. It then against their executors of their goods by the laws ecclesiastical. enacts, that if any incumbent of any ecclesiastical living, whereunto belonged any house, &c., which by law he was bound to repair, should thenceforth make any conveyance of his goods to the intent above mentioned, his successor may have remedy in the ecclesiastical court against the person to whom such gift had been made for the amendment and reparation of so much of the dilapidations and decays as hath happened by his fact or default, in such sort as he might have had if the donees were executors of the last incumbent. The obligation of the fraudulent donee is limited to such dilapidation as happened by the act or default of the incumbent. Now, injuries accruing from time, such as the wear and tear of a house, cannot be said to arise from the fact or default of the incumbent: the words of the statute include no act which would not be waste in a tenant for life or years. If this, therefore, be the measure of damages fixed by the statute to be paid by the fraudulent donee, it is a fair inference that the legislature cast as great a burden on him as the common law did upon a rector who had been guilty of no fraud.

By the 17 G. 3, c. 53, the incumbent, where there is no house, or such house is become so ruinous and decayed that one year's produce of the living will not be sufficient to put the house in repair, may, after having an estimate prepared, with the consent of the ordinary, borrow money to rebuild, and mortgage the glebe tithes, &c.; and by sections 6 and 7 the living is charged, and by section 9 all sums recovered by suit or secured by composition of any former incumbent of the living are to be applied in part of *the payments under the estimate. According to the argument on the other side, this act of parliament can apply to cases only where the incumbent dies insolvent; for if the representatives of a deceased incumbent are to supply whatever is deficient, and restore what is decayed, the house never can become ruinous or decayed, because if it be destroyed by lightning or prostrated by tempest, it must be rebuilt by the rector by virtue of his common-law obligation. There are no decisions expressly in point as to the extent of the liability of a rector. He is entitled to the fair usufruct of the gradually consuming property: he ought, therefore, t

be allowed to treat the premises in such a way as a prudent person having a perpetual interest would do. If the interior of the house is in such a state that the incumbent might fairly take another year's wear out of it, the accident of his death before the expiration of that year, ought not to throw on his representatives the burden of doing it before the time. A succeeding rector who will have a portion of the profits of the benefit, must bear his part in the support of the decaying inheritance.

Brodrick in reply. The premises ought to be put into that state of repair in which the deceased incumbent was bound to keep them: it would not have been sufficient for him to keep them wind and water-tight, but he was bound to keep them in a state fit to be occupied by a person holding such a benefice. If it was sufficient for the deceased incumbent to keep them wind and water-tight, it will be sufficient also for the successor, and the consequence will be, the premises need never be kept in any other state of repair.

Cur. adv. vult.

*BAYLEY, J., now delivered the judgment of the Court.

This was an action for dilapidations by the successor against the executor of the deceased rector; and the question was, by what rule the dilapidations as to the rectory-house, buildings, and chancel, were to be estimated? Three rules were proposed for our consideration. First, that the predecessor ought to have left the premises in good and substantial repair, the painting, papering, and white-washing being in proper and decent condition for the immediate occupation and use of his successor, and that such repairs were to be ascertained with reference to the state and character of the buildings, which were to be restored where necessary, according to their original form, without addition or modern improvement, and the estimate according to this rule came to 3991.

The second rule proposed was, that they were to be left as an outgoing laytenant ought to leave his buildings where he is under covenant to leave them in good and sufficient repair, order, and condition, and the estimate by that rule was 310*L*, the papering, painting, and white-washing not being included.

The third rule was, that they were to be left wind and water-tight only, or, as the case expresses it, in such condition as an outgoing lay-tenant, not obliged by covenant to do any repairs, ought to leave them, and by that rule the estimate would be 751. 11s.

We are not prepared to say that any of these rules are precisely correct, though the second approaches the most nearly to that which we consider as the

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The law and custom of England, or, in other words, the common law, as stated *313] in some of the earliest *precedents, p. 12 & 13 Hen. 8, Rot. 126, C. B., and others which we have searched, and in 1 Lutw. 116 is as follows:—
"Omnes et singuli prebendarii, rectores, vicarii, &c.,* pro tempore existentes, omnes et singulas domos, et edificia, prebendariarum, rectoriarum, vicariarum, &c., repararare et sustentare, ac ca successoribus suis, reparata, et sustentata, dimittere, et relinquere teneantur, et si hujusmodi prebendarii, rectores, vicarii, &c., hujusmodi domus, et edificia, successoribus suis, ut premittatur, reparata et sustentata, non dimisserint, et reliquerint, sed ea irreparata et dilapidata permisserint, eidem prebendarii, &c., in vitis suis, vel eorum executores, sive administratores, &c., post eorum mortem, successoribus prebendariorum, &c., tantam pecuniæ summam, quantam pro reparatione, aut necessaria reedificatione hujusmodi domorum, et edificiorum expendi aut solvi sufficiet satisfacere teneantur."
An averment in terms nearly similar has been usually introduced into all declarations on this subject.

From this statement of the common law, two propositions may be deduced: first, that the incumbent is bound, not only to repair the buildings belonging to his benefice, but also to restore and rebuild them if necessary. Secondly, that he is bound only to repair, and to sustain, and rebuild when necessary. Both these rules are very reasonable, the first, because the revenues of the benefice

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are given as a provision, not for a clergyman only, but also for a suitable residence for that clergyman, and for the maintenance of the chancel: and if by natural decay, which notwithstanding continual repair, must at last happen, the buildings perish, these revenues form the only fund out of which the means of replacing them can arise. The second rule is equally consistent with *reason, in requiring that which is useful only, not that which is matter of

ornament or luxury.

It follows from the first of these propositions, that the third mode of computation proposed in the case cannot be the right one, because a tenant, not obliged by covenant to do repairs, is not bound to rebuild or replace. The landlord is the person who, when the subject of occupation perishes, is to provide a new one And if the second proposition be right, a part of the charges if he think fit. contained in the first mode of computation must be disallowed; for, papering, whitewashing, and such part of the painting as is not required to preserve wood from decay, by exposure to the external air, are rather matters of ornament and luxury, than utility and necessity.

The authorities which have been cited from the canon law, are in unison with

that which we consider to be the rule of the common law.

The earliest provision on this subject is the provincial constitution of Edmund, Archbishop of Canterbury, passed A. D. 1236, 21 H. 3. It is in the following terms :-- "Si rector alicujus ecclesiæ decedens domos ecclesiæ reliquerit dirutas, vel ruinosas; de bonis ejus ecclesiasticis tanta portio deducatur, quæ sufficiat ad reparandum hæc, et ad alios defectus ecclesiæ supplendos." That constitution, therefore, directs the repairing "domos ecclesize dirutas vel ruinosas." Lindewood's commentary upon the word "ad reparandum" is, "Scilicet diruta Et intellige hanc reparationem fieri debere secundum indigentiam et qualitatem rei reparandæ; ut scilicet, impensæ sint necessariæ non voluptuosæ." The next authority cited from the canon law was the following legatine *constitution of Othobon, promulgated A. D. 1268, 52 H. 3, "Improbam quorundam avaritiam prosequentes, qui cum de suis ecclesiis et ecclesiaticis beneficiis multa bona suscipiant, domos ipsarum, et cætera ædificia negligunt, ita ut integra ea non conservent, et diruta non restaurent;" that is the imputation against the clergy. The constitution then goes on :-- "Statuimus et præcipimus ut universi clerici suorum beneficorum domos, et cætera ædificia prout indiguerint reficere studeant condecenter, ad quod per episcopos suos vel archidiaconos solicite moneantur. Cancellos etiam ecclesiæ per eos qui ad hoc tenentur refici faciant, ut superius est expressum. Archiepiscopos vero et episcopos, et alios inferiores prælatos, domos et ædificia sua sarta tecta, et in statu suo conservare et tenere, sub divini judicii attestatione præcipimus, ut ipsi 😆 refici faciant, quæ refectione noverint indigere."

The statute 13 Eliz. c. 10, speaks of ecclesiastical persons suffering their buildings, for want of due reparation, partly to run to ruin and decay, and in some part utterly to fall to the ground, which, by law, they are bound to keep and maintain in repair; and makes the fraudulent donce of the goods of an incumbent liable for such dilapidation as hath happened by his fact and default. If the incumbent was bound by law to keep and maintain the dwelling-house in repair, any breach of his duty in that respect would be a default. The 57 G. 8, c. 99, s. 14, enacts, that a non-resident spiritual person shall keep the house of residence in good and sufficient repair; and directs, that if it be out of repair, and remain so, the parson is to be liable to the penalties of non-residence, until it is put into good and sufficient repair to the satisfaction of the bishop. *There is nothing, either in the authorities cited from the canon law, or in these acts of parliament, to show that the obligation of an incumbent to repair is other than that This T to repair is other than that which I have already stated the common law threw

upon him; viz. to sustain, repair, and rebuild when necessary.

Upon the whole, we are of opinion the incumbent was bound to maintain the parsonage (which we must assume upon this case to have been suitable in point of size, and in other respects, to the benefice), and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and white-washing and papering belong; and the damages in this case should be estimated upon that footing. It will be found that this rule will correspond nearly with the second mode of computation, and probably will be the same if the terms "order and condition" are meant, as they most likely are, not to include matters of ornament or luxury.

It was afterwards referred to the Master to calculate the damages upon this principle, and to report for what the judgment should be entered up, and he

directed it to be for 3691. 18s. 6d., and for that sum there was

Judgment for the plaintiff.

*317] *MIDDLETON and Another v. MELTON.

An entry made by a deceased collector of taxes in a private book, kept by him for his own convenience, whereby he charged himself with the receipt of sums of money: Held to be evidence against a surety of the fact of the receipt of such money in an action on a bond conditioned for the due payment of the taxes by the collector, although the parties by whom the money had been paid were alive, and might have been called as witnesses; and that upon the general principle that the entry was to the prejudice of the party who made it.

DECLARATION stated that the defendant in the lifetime of Thomas Squire deceased (who was the collector for the second part of the bishop's liberty appointed by the commissioners acting for the second division of East Brixton in the county of Surrey, in execution of certain acts of parliament, passed in the forty-third, forty-eighth, fifty-second, and fifty-ninth years of Geo. III., and the first, second, and third years of Geo. IV., relating to the duties under the management of the commissioners for taxes), on the 10th of October, 1825, as surety for Squire as collecter of taxes, by his certain writing obligatory, became bound to the plaintiffs in the sum of 3226l, the same being a sum equal to the amount of the whole duty and sums of money (including compositions under the act of 3 Geo. 4), assessed, and to be collected by Squire as such collector, and that the bond was subject to a condition; which condition, after reciting that Squire had been appointed collector of the rates and duties granted by the above-mentioned acts of parliament, and that one of the duplicates of assessment and of the abstracts of such of the said rates and duties as had been compounded for under the fifty-ninth Geo. III., had been delivered to Squire with warrants for collecting the same, and that Squire had been required by the plaintiffs to give security in pursuance of the first-mentioned act (43 Geo. 3), was, that if Squire and the defendant and John Frost or either of them, should pay, in pursuance of the directions of *the said statutes, all such sums of money assessed and to be collected in the said second part of the bishop's liberty, by Squire as such collector; and if Squire should duly enforce the powers of such acts against such as should make default, then the bond was to be void, otherwise to remain in full force. Breach, that Squire collected large sums of money on account of the rates and duties granted by the said several acts of parliament. but that he Squire and John Frost and the defendant in the lifetime of Squire did not pay, nor had John Frost or the defendant, since the death of Squire, duly paid, the said sums of money collected by Squire, or any part thereof. Plea, that Squire in his lifetime paid the sums collected by him, and upon that issue was joined. At the trial before Alexander, C. B., at the Spring assizes for the county of Surrey, 1829, it appeared that the defendant, together with John Frost and Squire, had executed the bond stated in the declaration; that a duplicate assessment had been delivered to Squire, in which he occasionally made entries of the sums received from the persons assessed: from the entries made

in that assessment, it did not appear that he had received any moneys that he had not paid over to the commissioners. It appeared also that for his own convenience he kept a private book, containing entries (copied from the duplicate assessment) of the names of the persons, and of the sums for which they were respectively assessed, and that it was his usual habit to collect by that private book, and to mark with ticks all the sums he received from the several persons therein mentioned. This book was inspected by John Howard and W. Sefton on the day after Squire's death. They stated that they found in it entries with ticks against them, denoting the sums received from the *persons against whose names those ticks were placed, for which there were not corresponding entries in the duplicate assessment. It was proved that the private book was delivered by Squire's daughter to the defendant, and that the defendant had had notice to produce it. The sums which appeared to be due from Squire by the entries he himself had made in the private book, over and above what appeared by the duplicate assessment to have been collected by him, amounted to 996l.; for some of these sums the plaintiff further produced receipts given to several persons for taxes paid to Squire, and signed by him. It was objected, first, that the receipts were not receivable in evidence, because the parties who paid the money might have been called; and, secondly, that although entries made by Squire in any book which he in the course of his duty as collector was bound to keep would be evidence against the surety, yet that entries made by him in a private book kept for his own convenience were not receivable in evidence to charge the surety. The learned Judge received the evidence, but reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that neither the entries in the private book nor the receipts were evidence, or to reduce the verdict, if they should be of opinion that the entries in the private book were not admissible in evidence, but that the receipts were. A verdict having been found for the plaintiff for 996l., a rule nisi had been obtained pursuant to the leave reserved.

Andrews, Serjt., and Hutchinson now showed cause. The entries in the private book of the deceased collector were declarations made by him against his *interest, for he thereby charged himself with the receipt of certain sums of money, which he was bound by law to pay over to other persons. The entries were therefore admissible in evidence on the ground that they were made by an individual cognisant of a fact not in dispute, and who at a time when they were made had no interest in making false entries, and that they tended to charge himself. And if the entries in the private book were evidence, they were sufficient to entitle the plaintiffs to recover the full amount found by the jury. The

receipts were admissible in evidence for the same reason.

Spankie, Serjt., and Chitty, contrd. The question is, Whether the entries made by Squire in his private book, if that book had been produced, would have been admissible against the defendant as surety? If they were entries made by the principal in the regular course of that duty for the performance of which the defendant as surety had become responsible, they would have been admissible according to Goss v. Watlington, 3 Brod. & Bingh. 132, and Whitnash v. George, 8 B. & C. 556; but in this case, the entries were made in a book which the principal was not under any obligation, in discharge of his duty, as tax-collector, to keep. The defendant when he became a surety undertook that Squire should faithfully discharge his duty. His duty was to make entries of the moneys received by him in the public book, on the duplicate assessment, and such entries would have been evidence against the surety; but when there are no entries in the public book, the presumption is that he had not received the moneys. Here the entries in the public book did not show that Squire had received any moneys *which he had not paid over. Entries made by a principal for his own purposes might have been evidence against the principal himself, but are not to charge a surety. The best evidence should be produced. Cutler v. Newlin, Manning's Digest, 137, shows that an admission by a principal is not, while he is alive, sufficient to charge a surety. In Goss v. Watlington, the entry was

made in a book in which the party was bound to make entries. There is no case in which a mere admission of a principal has been held to be evidence to charge a surety even after the death of the principal. Then as to the receipts, they were not receivable in evidence. The parties who made the payments ought to have been called. Besides, here the bond was given pursuant to the provisions of an act of parliament. If the commissioners had done their duty, there would have been no difficulty. They are required to call the collectors before them, and examine them upon their oaths as to the moneys collected by them. The book in this case is a mere copy of the duplicate assessment; and the only evidence to fix the defendant is, that ticks were made by Squire in his lifetime in that book. They might have been made by him not to denote that he had received the money, but to denote that he expected it to be paid.

BAYLEY, J. The question in this case is, Whether a private book kept by a collector of taxes, containing entries wherein he acknowledges the receipt of sums of money in his character of collector, can be given in evidence against a surety, the collector having been appointed to collect the taxes mentioned in the bond *pursuant to the provisions of an act of parliament. In this case Squire was the collector, and his private book was found after his death, and given by his daughter to the defendant. There was evidence to show, therefore, that it was left in the defendant's possession, and he having refused to produce it at the trial after notice, secondary evidence of its contents was admissible. It was proved that it was the collector's usual habit to collect by his private book, and to mark the sums he received with ticks, and that those ticks denoted that those sums had been received by him. If the entries mentioned in the book were admissible evidence to show that he received those sums, they will be sufficient to entitle the plaintiff to retain the verdict for the full amount; and the question as to the admissibility of the receipts will not necessarily arise. It was contended, on the part of the defendant, that the entries in the book were not receivable in evidence, on the ground that it was a mere private book, which it was not the duty of Squire in his character of collector to keep; and it was said that the cases of Goss v. Watlington, 3 Brod. & Bingh. 132, and Whitnash v. George, 8 B. & C. 556, proceeded on the ground that the entries were in those very books, which, by the condition of the bond, the principal was bound faithfully to keep. The principle there laid down was quite sufficient for the purpose of deciding those cases. But the book in which the entries were made in this case being one which the collector was not under any obligation to keep, it now becomes necessary to consider whether the rule established by those cases is not too narrow, and whether such entries made in this private book may not be evidence against this defendant, *considering the defendant as a mere stranger, without reference to his character as surety, in respect of which he may be identified in interest with his principal. The question then is, Whether such an entry, made by an individual against his own interest, may be evidence of the fact of the receipt of the money against a third party? It is a general principle of evidence, that declarations or statements of deceased persons are admissible when they appear to have been made against their interest. An entry in a book, whereby the party making it charges himself with the receipt of money on account of a third person, or acknowledges the payment of money due to himself, has been held to be evidence of the receipt or payment of such money. The case of Warren v. Greenville, 2 Str. 1129, is a very early authority upon this subject, and it does not appear to have been cited in the case of Goss v. Watlington. "There, upon a trial at bar in 1740, the lessor of the plaintiff claimed, under an old entail in a family settlement, by which part of the estate appeared to be in jointure to a widow at the time her son suffered a common recovery, which was in 1699, and the defendants not being able to show a surrender of the mother's estate for life, it was insisted that there was no tenant to the præcipe for that part, and that the remainder, under which the lessor claimed, was not barred. On the other hand it was said, that at that distance of time a surrender should be presumed; and to fortify this presumption,

the defendant offered to produce the debt-book of Mr. Edwards, an attorney, long since deceased, in which there was a charge of 32l. for suffering the recovery; two articles of which were, for drawing a *surrender of the mother, [*824 20s., and for engrossing two parts thereof, 20s. more, and it appeared by the book that the bill was paid. And this being objected to as improper evidence, the Court was of opinion to allow it; for it was a circumstance material upon the inquiry into the reasonableness of presuming a surrender, and could not be suspected to be done for this purpose; that if Edwards was living he might undoubtedly be examined to it, and this was "now the best evidence. And it was accordingly read." Now the principle upon which that case was decided was, that upon looking at the attorney's book, it appeared that he had made a charge for the surrender, and acknowledged that he had been paid the sum charged. In Stead v. Heaton, 4 T. R. 669, an entry made by the officers of one township of the receipt of a proportion of the church-rates from the officers of another township, was held to be evidence to charge the latter officers with the same proportion in future; and another entry explaining the proportions, made on the same page, was also held admissible. There Ashhurst, J., says, "The last entry of the payment by the officers is clearly admissible, because the officers thereby charge themselves with the receipt." In Barry r. Bebbington, 4 T. R. 514, the right to the soil was in issue, and the plaintiff, who derived title under Lord Barrymore, offered in evidence several items contained in a book in the handwriting of one Ashley, who had many years ago been steward to Lord Barrymore, and was then dead. The items were memoranda of receipts of money by Ashley from different persons by name, but whose situations were not mentioned, for trespasses committed *on the common in question, paid on account of Lord Barrymore. The evidence was rejected, and a new rule was obtained for a new trial on the authority of Warren v. Greenville, 2 Str. 1129, on the ground that the evidence was improperly rejected; and that rule was afterwards made absolute. Lord Kenyon there says:-"It is clear that where a steward charges himself with the receipt of money, it shall be received in evidence before a jury, to show that such sum was received by him." In Higham v. Ridgway, 10 East, 109, an entry made by a man-midwife in a book of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid, was held to be evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery. These cases establish that where a person makes an entry charging himself with the receipt of a sum of money, that entry is evidence of the fact of the receipt of that money against a third person. The question as to the receipts then becomes immaterial. But if the entries in the book are admissible in evidence, because the tick marked against them denotes that the collector had received the money, the receipts signed by him must be evidence of the fact of such receipt of the money upon the same principle.

LITTLEDALE, J. 1 am of the same opinion. I at one time entertained great doubts whether entries made in a private book kept by a person for his own convenience could be evidence against a third party. In Goss v. Watlington, 3 Brod. & Bingh. 132, the books in which the entries were made by the deceased collector were public books delivered *to him by his predecessor in office; [*326 and in Whitnash v. George, 8 B. & C. 556, the book in which the entry was made was one which the principal was bound to keep in the performance of the very duty for which the surety had become bound. Now, if a private book is to be considered in the same light as a public book, these entries were receivable in evidence. The receipts (which are entries made on separate pieces of paper) also were admissible, because the book is nothing more than scraps of paper put together. Warren v. Greenville, 2 Str. 1129, Barry v. Bebbington, 4 T. R. 514, and Higham v. Ridgway, 10 East, 109, establish this general principle, that where a person has peculiar means of knowing a fact, and makes a declaration or written entry of that fact, which is against his interest at the time,

it is evidence of the fact as between third persons after his death. Those cases are distinguishable from the present, because there the entries were all that was intended to be done by the party who made such entries. Here the party evidently meant to make an entry in the public book; the act, therefore, was incomplete. Looking, however, to the principle laid down in the several cases which have been referred to, I think the entries made in this private book were admissible in evidence; and if they are admissible because they are acknowledgments of the receipt of money for which the party might otherwise have a claim, it follows that the receipts themselves must be evidence upon the same principle.

PARKE, J. I am of the same opinion. Secondary evidence of the contents of the private book was properly received, the defendant not having produced it after *notice. The question, therefore, is, Whether entries in a private book, acknowledging that he had received certain sums of money, are, after the death of the party who made them, admissible evidence against third persons, to prove the fact of the receipt of the money? The general rule undoubtedly is, that facts must be proved by testimony upon oath. This case, however, falls within the exception necessarily engrafted upon that rule, viz. that an admission of a fact made by a deceased person, which is against the interest of the party making it at the time, is evidence of that fact as between third persons. Upon that ground entries made by receivers, stewards, and other agents, charging themselves with the receipt of money, have been held, after their death, to be admissible in evidence, to prove the fact of the receipt of such money, and that without reference to the particular character of the person who made such entries. In Warren v. Greenville, 2 Str. 1129, the party who made the entry was an attorney; in Manning v. Lechmere, 1 Atk. 453, a bailiff; in Higham v. Ridgway, 10 East, 109, a surgeon. In Haddow v. Parry, 3 Taunt. 303, a bill of lading signed by a master of a vessel since deceased, for goods to be delivered to a consignee or his assigns on paying freight, was held to be evidence to show that the goods were on board. It being once established that such admissions are evidence of the facts admitted, it can make no difference that the same facts might have been proved by evidence of another kind; as, for instance, by a living witness. And we find that admissions by deceased persons have been received, where the testimony of existing persons might have been given. In Barry v. *Bebbington, 4 T. R. 514, which was tried in 1791, one of the memoranda was a receipt of a sum of money in 1785. The fact of payment, therefore, was probably capable of being proved by the persons who paid the money, yet it was held, that the entry made by the deceased steward, charging himself with the receipt of the money, was evidence of the fact of such a receipt, without calling the persons who paid it. Upon the same principle, applied to this case, the entry made by the deceased collector is proof of the fact of the money having been paid without calling the persons who paid it to them. In Goss v. Watlington, 3 Brod. & Bingh. 132, and Whitnash v. George, 8 B. & C. 556, the entries were held admissible, upon the ground that they were made in a book which it was the duty of the principal to keep, and for the performance of which duty the defendant had become bound. But I think those decisions may be supported on the more general principle, that an entry made by a party cognisant of a fact, and having no interest to make a false entry, whereby he charges himself with the receipt of a sum of money, is evidence of the fact of the receipt of such money. It is unnecessary to consider the question as to the receipts, because the entries in the book, if admissible, are sufficient to entitle the plaintiff to the full amount of the damages which he has But I cannot help thinking that they were admissible; and I doubt the propriety of that part of the decision in the case of Goss v. Watlington, by which the receipts of the deceased collector were held inadmissible.

Rule discharged.

*POWER and Another, Assignees of FULTON, v. BUTCHER and J. D. CAPET.

An insurance-broker effected, on behalf of another person, a policy under seal, with a company of which he was a member. The policy recited that the broker, upon his representation that he was duly authorized as owner, agent, or otherwise, to make assurance upon the vessel mentioned in the policy, and was desirous of making such insurance, had covenanted with the company to pay the premium, and then alleged that, in consideration of the pre mises and of such covenant, the policy was effected. The broker having become bankrupt, without having paid the premium to the company; it was held, that his assignees were entitled to recover from the assured the amount of the premium which he had covenanted to pay.

The declaration stated, that the defendants were indebted to the bankrupt before his bankruptcy for work and labour, as an insurance-broker, and for divers premiums of insurance due and payable from the defendants to the bankrupt, for and in respect of his having underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance for the said defendants, at their request. The plaintiffs, by their particulars of demand, claimed to recover for insurance. The Company would have allowed the broker, when he paid the premiums, to deduct 31l. 1s. as commission: Held, that his assigness were entitled to recover that sum under the words in the declaration, "work and labour" done by the broker, and under the word "insurance," in the particulars of demand.

Held, also, that the assignees were entitled to recover the amount of the premiums which the bankrupt had become liable to pay to the Company under that part of the count which charged that the defendants were indebted to the plaintiffs for premiums due to the bankrupt for and in respect of his having caused and procured to be underwritten divers policies; but that the plaintiffs were not entitled to recover such sums under the count for money paid, because the broker had not actually paid the sums, or done anything which was equivalent

to payment.

One of the defendants pleaded specially, that the plaintiffs, in Easter term 1827, impleaded him for the same causes of action, and that in Trinity term he pleaded the general issue to that action; and paid 51. 152. into court; that the plaintiffs' costs were taxed at 81. 52. 56. 66., and that they agreed with him to take the sum of 51. 152. out of court; that the defendant paid the costs to the plaintiffs, and that they accepted and received the 51. 152.; together with those costs, in satisfaction and discharge of the promises mentioned in the declaration. The plaintiffs replied, that they did not agree with the defendant to take and receive the 51. 152. out of court, and did not accept and receive that sum, together with the said costs, in satisfaction and discharge of the promises mentioned in the declaration. At the trial, it appeared that the plaintiffs received their taxed costs, but gave notice to the defendant that they would not take the 51. 152. out of court, and that they should take out a rule to discontinue the action on payment of costs. These latter costs were taxed, and paid: Held, first, that the plaintiffs, in having received the amount of their taxed costs, could not be considered as having accepted the 51. 152. together with those costs, in satisfaction of the promises in the declaration; and that if, in point of law, it could have been so considered, the defendant ought to have pleaded that matter specially; secondly, that the defendant, by receiving his costs, had assented to the discontinuance of the action upon the terms of the rule to discontinue.

Assumpsit. The first count of the declaration stated, that the defendants were indebted to T. Fulton, before he became a bankrupt, for work and labour by *him bestowed in and about the writing, drawing, and making out of divers policies of insurance of divers ships, &c., before that time written, drawn, and made out by the said T. Fulton, as an insurance-broker; and in about the causing and procuring divers persons to insure divers sums of money upon the said ships, &c., at the special instance and request of the defendants; and for divers sums of money before that time advanced and paid by T. Fulton for the defendants, at their like special instance and request, to divers persons, as and for certain premiums and rewards for the underwriting and subscribing the said policies of insurance before that time underwritten and subscribed for the insurance of the said ships, and during certain voyages undertaken by the said ships, &c.; and for the trouble, care, and diligence of the said T. Fulton in that behalf, at their like special instance and request; and for divers premiums of insurance, and sums of money before that time and then due and payable from the defendants to T. Fulton, for and in respect of T. Fulton having before then underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance for the defendants, at their like special instance and request. There were counts for premiums paid for insurances, common counts for work and labour, money counts, and upon an account stated. Plea, general issue, by both defendants. Plea, also, by Butcher, that

the plaintiffs in Easter term, 1827, impleaded him for the same causes of action, and that in Trinity term in that year he pleaded the general issue to that action. That on Monday next, after fifteen days of the Holy Trinity in the year aforesaid, he obtained a rule to pay 51. 15s. into court, and that he paid that sum into court. That the plaintiffs' costs were *taxed under the said rule at 81. 5s. 6d., and that the plaintiffs agreed with him (Butcher) to take the sum of 5l. 15s. out of court under the rule; that he paid the costs, viz. 8l. 5s. 6d. to the plaintiffs, and the plaintiffs accepted and received the said sum of 51. 15s. together with the said costs, in satisfaction and discharge of the promises mentioned in the declaration in that action. The plea then alleged the two causes of action to be the same, and that the money sought to be recovered in this action might, if recoverable at all, have been recovered in the action brought against him (Butcher) alone. Replication, that the plaintiffs did not agree with Butcher to take and receive the sum of 5l. 15s. out of court under the rule, and did not accept and receive the sum of 5l. 15s. with the said costs, in satisfaction and discharge of the promises and undertaking mentioned in the declaration in this action. At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term, 1828, the jury found a verdict for the plaintiffs, with 6211. 10s. damages, subject to the opinion of this court on the following case:—

The defendants were ship-owners; Fulton, the bankrupt, carried on business as an insurance-broker at Lloyd's Coffee-house, and was employed by the defendants to effect the policies, and the bankrupt accordingly effected the same at the premiums mentioned in the following account:—

Oct. 22, 1825,	Insurance	£3000, Huntcliffe,	at £12	0	£360	0
Ditto,	Ditto,	600, Ditto,	2	5	13	10
Nov. 2, 1825,	Ditto,	2000, Julius Cæsai	, 12	0	240	0
Ditto,	Ditto,	100, Fame	1	5	1	5
Nov. 14, 1825,	Ditto,	300, St. Lawrence	, 1	10	4	10
Ditto.	Ditto.	500, Fame	•		7	10

*A copy of this account formed the particulars of the plaintiffs' demand in the action against Butcher alone, which is hereafter mentioned, and a copy of the same account, except the two items of 1l. 5s. and 4l. 10s., formed the particulars of demand in the present action. These policies were severally effected by the said bankrupt with the "Indemnity Mutual Marine Insurance Company," and, by each of the policies, which were all under the seal of that Company, it was recited that the bankrupt, upon his representation that he was and, by each of the policies, which were all under the seal of that interested in or duly authorized as owner, agent or otherwise, to make assurance upon the vessel mentioned in each policy, and desirous of making such assurance, had covenanted with the company to pay the premium in respect of each of the said several and respective policies to the company; and it was alleged, that in consideration of the premises, and of such covenant, each of the policies was effected. The names of the defendants were not mentioned in any of the policies, each of which purported to be made with the bankrupt. The bankrupt paid to the company sums of 1l. 5s. and 4l. 10s. in respect of the policy of 100l. on the Fame, and that of 300% on the Saint Lawrence, but did not pay any of the other premiums. The bankrupt was at the time of effecting the policies a member of the company. The defendants neither were nor had been members of the company; and by the rules of the company none but members were allowed to effect insurances. The commission due to the bankrupt in respect of the policies amounted to 311. 1s., which sum the bankrupt would have been entitled and allowed by the company to deduct and retain from the amount of the premiums to be paid by him to *the company. In the year 1826, the plaintiffs commenced an action against Butcher, one of the present defendants, to recover from him the before-mentioned premiums, the other defendant (Capet) was jointly liable with Butcher for the several premiums, but the plaintiffs were at that time ignorant of the fact. Butcher in Trinity term in that year pleaded the general issue in that cause, and paid 51. 15s., the amount of the premiums in respect of the Fame and of the Saint Lawrence, into court, under a rule for that purpose, which was drawn up in the usual form on the 1st

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of June, 1827: the costs of the plaintiffs in that action were taxed up to the time of paying money into court, and such costs amounted to 8l. 5s. 6d.: and the costs of the defendant Butcher, subsequent to the time of paying money into court, which accrued in consequence of the plaintiffs having taken some further proceedings in the action, were at the same time taxed, and amounted to 91. 10s. On the 2d of June the plaintiffs received their taxed costs aforesaid, and paid to the defendant Butcher his taxed costs; but the money paid into court was not, though it might at any time afterwards have been, taken out of court by the plaintiffs. On the 3d of January, 1828, the plaintiffs' attorney gave notice to Butcher's attorney, who was also attorney for the present defendants, that he would not take the sum of 5l. 15s. out of court, but that he should take out a rule to discontinue the former action on payment of costs, and at the same time the plaintiffs' attorney left at the office of the defendants' attorney 81. 5s. 6d., which had been received as before mentioned, as the costs incurred by the plaintiffs up to the time of paying money into court, but which the attorney for the defendants refused to *accept as a repayment of the said costs, and on the 1st of February, 1828, a rule was taken out by the plaintiffs' attorney to discontinue the action against Butcher on payment of costs. this rule was served on the defendants' attorney with three appointments to tax. The defendants' attorney did not attend the appointment, and the Master marked the costs of such defaults at 3s. 4d. On the 2d of February, 1828, the plaintiffs' attorney received from the defendants' attorney the following note:-"Gentlemen, Mr. Bell (the defendants' attorney) will feel obliged by your letting the appointment to tax these costs stand over till after the term, he being very busy now." To this proposal the plaintiffs' attorney assented; and in May following, the defendants' attorney delivered to the plaintiffs' attorney a bill of costs from the beginning of the action, as upon a rule to discontinue. This bill amounted to 181. 12s. 4d. From this was deducted on taxation, which taxation was attended by the defendants' attorney, 16s. 8d.; and as the sum of 9l. 10s. had already been paid, the balance that then remained due in respect of the costs was 81. 5s. 8d.; and this sum was paid to the defendants' attorney on the 13th of May by the plaintiffs' attorney. The "Indemnity Mutual Marine Insurance Company" knew, soon after the bankruptcy of Fulton, that the policies had been effected by him on behalf of the defendants, and proposed that they should pay the premiums remaining due to the company. The question for the opinion of this court was, Whether the plaintiffs were entitled to recover the whole or any part of the sum of 6211. 10s.? If they were, the verdict was to stand for such sum as the Court should think right; if they were not, a nonsuit was to be entered. And it was agreed *that the Court should be at liberty to draw any conclusion from the facts stated in this case, which, in their opinion the jury ought to have drawn.

R. V. Richards for the plaintiffs. There are two questions in this case, first, whether assuming that there had been no previous action against Butcher, the plaintiffs are entitled to recover in the present form of action the premiums of insurance which the bankrupt covenanted to pay, but which he had not actually paid to the company. And, secondly, whether what took place in the action against Butcher is a bar to the present. First, the plaintiffs are entitled to recover all the premiums which the bankrupt covenanted to pay. In ordinary cases the broker is entitled to recover the premiums from the assured, though he has not actually paid them. The underwriters cannot sue the assured, their remedy is against the broker only, Airy v. Bland, Mars. on Ins. 300, Grove v. Dubois, 1 T. R. 112, Dalzell v. Mair, 1 Camp. 532, Edgar v. Fowler, 3 East, 222, De Gaminde v. Pigou, 4 Taunt 246. It is true that a policy in the ordinary form contains an acknowledgment by the underwriter that he has received the premium from the assured. The broker, however, is the agent of the assured and of the underwriter; of the assured in effecting the policy, and of the underwriter in receiving the premium from the assured. The broker, indeed, is supposed to have received the premium from the assured for the

benefit of the underwriter; but the whole account, with respect to the premium *336] after the insurance is effected, remains a distinct account between the *underwriter and the broker. Exclusive of fraud, there is an end of everything with respect to the premium between the insurer and insured, Minett v. Forrester, 4 Taunt. 541. Now if that be the law in ordinary cases, it must be so in this case. Here the contract is under seal, and the underwriters have taken a covenant from the broker to pay the premiums. They cannot, therefore, recover the premiums from the assured. Still the defendants, who have the benefit of the policy, must be liable to pay the premiums to some person. They are not liable to the underwriters, and, therefore, must be to the broker, who at their request pledged his credit with the underwriters to pay the pre-The cases of Mayor v. Simeon, 3 Taunt. 497, and Foy v. Bell, 3 Taunt. 493, may perhaps be cited on the other side; but those cases only show that the insured are liable if there be anything like collusion between them and the broker, or bad faith on their part. The plaintiffs are at all events entitled to recover the 311. 1s. which the broker who acted as the agent of the defendant would have been entitled to deduct from the premiums, by way of commission for effecting the policies. Here, by the regulations of the company, the defendants could not have insured with them. They induced the bankrupt to pledge They have paid nothing for the policies, though they have had the full benefit of them as if the premiums had been paid. [LITTLEDALE, J. In the particulars of demand there is no claim for commission.] There is for insurance, and that includes commission. Besides, there is a claim for the whole premiums; and the 31l. 1s. is a sum which the underwriters would have allowed the broker to deduct from the premiums. Secondly, *the matter specially pleaded by Butcher is no answer to the action. The plaintiffs never accepted the money paid into court in satisfaction; and the defendant is estopped from setting up the proceedings in that action, by having afterwards accepted the costs taxed on the rule to discontinue.

Brodrick, contrd. The plaintiffs cannot recover the premiums as money paid, because no money has in fact been paid by the bankrupt to the use of the defendants, Taylor v. Higgins, 3 East, 169, and Maxwell v. Jameson, 2 B. & A. 51. It is undoubtedly true, that in cases of insurance by policies in the ordinary form, the underwriter gives credit to the broker for the premiums, and can resort to him only for payment, and he, and not the underwriter, can recover the premiums from the assured. But the reason of that is, that the underwriter in a policy in the ordinary form, made between him and the assured, acknowledges the receipt of the premium, and is thereby estopped from saying that he has not received it. But where there is no such estoppel, the premium is due from the assured to the underwriter, and may be recovered by him from the assured. Here it appears upon the face of the policy that the premium has not been paid to the underwriter. There being no estoppel, therefore, in this case, the underwriter may recover the premium from the assured. The latter would have no defence to an action brought by the underwriter for the premium. [PARKE, J. There is no express contract by the assured to pay the premium to the underwriter, and the law will not imply a contract by the assured where *338] there is an express one under seal by the broker. The *insurance is made in consideration of a covenant to pay, not of money actually paid.] If a broker take credit in account with an underwriter for a loss upon a policy, and the name of the latter be erased from the policy, the money in the hands of the broker is money had and received to the use of the assured, Andrew v. Robinson, 3 Camp. 199. Here the broker, as agent, effected the policy for the underwriters, and did not disclose the name of his principals. The underwriters, as soon as they discovered the principals, were entitled to sue them for the pre-

Then as to the 31l. 1s., the right of the plaintiffs to recover is confined by the particulars of their demand to premiums. The broker might have been entitled as between him and the underwriters to deduct the sum of 31l. 1s. from

the premiums, but it was not a sum to be paid by the defendants, and the plaintiffs cannot recover it as a compensation for a benefit conferred on the defendants. [PARKE, J. Here the broker effects the policy either as owner or as agent He is liable for the premium on his covenant to the two directors of the company. He has, therefore, effected a policy for the defendants as valuable as if they had actually paid the premium; is he not, therefore, entitled to recover for such services?] He may, undoubtedly, but not in this action. He cannot recover the commission as a compensation for a benefit conferred on the defendants, nor can he recover the premiums under the count for money paid.

Then as to the special plea, it appears upon the evidence that the plaintiffs did accept the 51. 15s. together with costs, in satisfaction of the promises in the *declaration. It is clear that if they had taken the money out of court, [*339 that would have been a sufficient acceptance of the money. The form of the rule to pay money into court is, that the defendant should have leave to bring into court the sum of 5l. 15s.; and that unless the plaintiffs accept thereof, with costs, to be taxed by the Master in full discharge of the said suit, the said sum of 5l. 15s. be struck out of the declaration and paid out of court to the plaintiffs or their attorney, and upon the trial of the issue in the said suit, the plaintiffs should not be permitted to give evidence for the said sum of 5l. 15a Now the acceptance of costs must have been taken in full discharge of the suit. Here, on the 2d of June, the costs had been taxed, and the suit was at an end. The plaintiffs might have taken the money out of court, for the defendant Butcher had no control over it. At that time, therefore, the plaintiffs had accepted the money paid into court, and the taxed costs, in full discharge of the suit. If the effect of that acceptance has been varied by the subsequent pro-

ceedings, those matters ought to have been replied specially.

BAYLEY, J. It seems to me that the plaintiffs are entitled to the judgment of the Court for the whole sum. This is an action by the assignees of an insurance broker for work and labour, and premiums, against the defendants who are ship-owners, and had employed the broker to effect certain policies on their behalf, which he did effect with a company of which he was a member. Now, according to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. *But as between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middle-man between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured, and to pay it to the underwriters. In this case the policies were not in the ordinary form but by deed, and the broker covenanted to pay the premiums to the underwriters; and in consideration of that covenant the policies were effected. The underwriters, therefore, took a covenant from the broker to pay the premium, instead of acknowledging the receipt of the premium as they do in the ordinary case of a policy by simple contract. In such a case the action would be maintainable at the suit of the broker, on the principle that he was entitled to call upon the assured for the payment of those premiums which he had become liable to pay to the underwriters, and which they had acknowledged the receipt of. The assured have had the benefit of the policies; and if the underwriters were liable upon the risk, they were warranted in calling upon the broker to pay the premiums. In point of justice, the assured ought to pay the broker, or in the event which has happened, of his failure, his assignees. In an ordinary case the assurers would have no claim upon the assured for the premium, because by the policy they acknowledge the receipt of it. Here there is no such acknowledgment, and therefore it may be said the assurers may claim the premiums from the assured. A contract cannot be raised by implication of law except in the absence of an express contract. Now *here there was an express contract between the underwriters and the assured through the

agent, and by that contract the underwriter agreed to look to the broker alone for the premiums. The assured have had the same benefit from the policies as if the premiums had been advanced to the underwriters at the moment when the policies were effected. Then it is necessary to consider in what situation the broker stands,—in order to ascertain whether he is not entitled to call upon the assured for the premiums. The underwriters have a claim upon him for the full amount of premiums; and if that be so, he ought to recover those premiums from those persons who have had the benefit of the policies. But a difficulty arises in this case from the peculiar form of the declaration, and the particulars of the plaintiffs' demand. It seems to me that the premiums cannot be recovered as money paid to the defendants' use, because the bankrupt has not actually paid any money; but when we look at the form of the declaration, and leave out parts which may be fairly omitted, I think the plaintiffs may recover the full amount of their present demand; and I am of opinion that they are entitled to recover 31%. 1s., which may be considered as a compensation for the work and

labour of the broker in effecting the insurance.

It has been insisted that by the form of the particulars the plaintiffs are prevented from recovering for work and labour; but I think that is not so. plaintiffs, by their particulars, claim to recover for insurance. Now that term includes in it the compensation he is entitled to for his trouble in effecting the policies. I entertain no doubt, therefore, that he is entitled to recover upon the count for work and labour the sum of *311. 1s. The only other question is, upon what count the plaintiffs are entitled to recover the residue of their demand for the premiums which the bankrupt became liable to pay by the covenant. I think they are entitled to recover upon the latter part of the first count, where it is stated "that the defendants were indebted to Fulton for his care and diligence, and for divers premiums of insurance then due and payable from the defendants to him for and in respect of Fulton's having before then underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance." I think the words, "having before then underwritten and subscribed," may be rejected. The plaintiffs were not bound to prove the entire count, it was sufficient if they proved any part of it; and looking at the words I have mentioned, I think they fairly meet the present case, because the defendants are indebted to the bankrupt for policies by him caused to be underwritten in their behalf, if we are right upon the first proposition that they are indebted to him for the premiums. It seems to me that the plaintiffs are entitled to recover the full amount of their demand, not as for money paid, but part for work and labour, and the residue on that part of the first count, which charges that they were indebted to him in respect of his having caused and procured to be underwritten divers policies of insurance.

The other objection arises upon the special plea. The plea states that the plaintiffs, in Easter term 1827, impleaded the defendant Butcher for the same cause of action; and that in Trinity term 1827 he pleaded the general issue to that action, and that he paid 51. 15s. into Court; that the plaintiffs' costs were taxed at *81. 5s. 6d., and that the plaintiffs agreed with the defendant Butcher to take the sum of 5l. 15s. out of court; that the defendant Butcher paid the costs, viz. 81. 5s. 6d. to the plaintiffs; and that the plaintiffs accepted and received the said sum of 51. 15s., together with the said costs, in satisfaction and discharge of the promises mentioned in the declaration in that action. The replication was, that the plaintiffs did not agree with Butcher to take and receive the sum of 51. 15s. out of court, and did not accept and receive the sum of 51. 15s. with the said costs in satisfaction and discharge of the promises mentioned in the declaration in that action. Now the affirmative of that issue lay on the defendant, who, in support of his plea, was bound not merely to prove that the plaintiffs accepted the sum of 8l. 5s. 6d., but 5l. 15s. also in satisfaction of the promises. The proof was, that they did take the 81. 5s. 6d., but that they suffered the 5% 15s. to remain in court; and the suit was not then

treated by the plaintiffs as terminated, but was terminated by another mode. Although there may be some risk in leaving the money in court, yet if the plaintiffs choose to do so, or to abandon their claim, they are at liberty to do so. I cannot consider money paid into court as conclusively received, because the plaintiff receives the amount of the taxed costs. Upon the whole, therefore, I

think that the plaintiffs are entitled to recover 6211.

LITTLEDALE, J. The first question in this case is, Whether the plaintiffs are entitled to recover anything? They are clearly entitled to recover 31l. 1s. for compensation for insurance. The word insurance in the particulars of demand covers every possible claim which a broker *may have in respect of effecting the policies. It means everything connected with insurance. There is no objection to the plaintiffs recovering on the ground of any defect in the particulars, and if that be so, I think they are entitled to recover 311. 1s., that being the amount of the commission the underwriters would have allowed the broker to retain and deduct out of the premiums paid by him to them for underwriting the policies, and which commission, it may be supposed, the defendants

had authorized him to take.

Then the next question is, Whether the plaintiffs were entitled to recover the residue of the demand? Even where the policy is in the common form, it may be difficult to say upon what principle the broker can recover the premiums as for money paid before he has actually paid them to the assurers. But it has been so decided. Here, however, the policies are in a special form. The broker has covenanted to pay the amount of the premiums to the underwriters. If he had actually paid those premiums, the assured would be bound to repay them to Here they have not been paid. But by the usage the assured may be considered as having entered into an agreement to consider the premiums as having been paid by the broker to the underwriters, and therefore it seems to me, that the plaintiffs would have been entitled to recover if there had been any special count adapted to the circumstances of this case, stating a request to the broker to enter into a covenant to pay the premiums, that he entered into such covenant, and that the defendants thereby became liable. The difficulty I have in this case arises from the peculiar form of the count. It states that the defendants were indebted to Fulton before *he became bankrupt for the work and labour of the said T. Fulton by him performed, in the writing, drawing, and making out of divers policies of insurance. Now it is clear that he is not entitled to recover for the premiums payable to the underwriters under that part of the count. The count then goes on, "and for divers sums of money before that time advanced and paid by Fulton for the defendants to divers persons, as and for premiums for underwriting and subscribing the said policies." Now here the premiums were not paid, and therefore the plaintiffs cannot recover upon those words of the count. Then comes the part of the count upon which it is said they are entitled to recover, "and for divers premiums of insurance and sums of money before that time and then due and payable from the defendants to Fulton for and in respect of Fulton's having before then underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance for the defendants at their like special instance and request." Now Fulton did not underwrite any policies for the defendants. The words "divers premiums" seem to me to apply to the word "underwritten," because the premiums are a debt due from the assured. But it is said, that there is a debt due to Fulton in respect of his having caused policies to be underwritten; but that is not a direct debt due to Fulton, but it is a claim arising in respect of Fulton's having pledged his responsibility by covenant. It rather seems to me, therefore, that there should have been a special count framed for the purpose of meeting this particular case. The effect of this objection, if it ought to prevail, would only be to subject the defendants to another action, for I entertain no doubt whatever upon the first point.

*The last point is upon the special plea, and the question is, Whether that is made out in evidence? The allegation is, that the plaintiffs have accepted the 51. 15s. in discharge of the promises mentioned in the declaration. The proof is, that that sum remained in court, and that the plaintiffs have never taken it into their possession. That would not be evidence to go to the jury that it had been accepted by the plaintiffs in satisfaction of the promises mentioned in the declaration; but it does not rest there. The plaintiffs took out a rule to discontinue the action on payment of costs, and the costs were taxed; and the defendants received the difference between those costs so taxed and the sum which they had previously received under the rule to pay money into court. By receiving those costs, the defendants assented to the discontinuance of the action upon the terms of the rule to discontinue. It is said that the plaintiffs cannot avail themselves of that fact, and that they ought to have replied a waiver. But I think that is not necessary, because the satisfaction has been rendered incomplete by a subsequent fact. Taking the evidence altogether, it shows that the plaintiffs never had accepted or received the 5l. 15s. in satisfac-

tion of the promises in the declaration.

I think the plaintiffs are entitled to recover the full amount of their claim, but not on the count for money paid, for that count cannot be maintained without proving actual payment, or that which is equivalent to payment, Maxwell v. Jameson, 2 B. & A. 51, Taylor v. Higgins, 3 East, 169. The giv-*347] ing of a security to pay is not equivalent to *actual payment. In ordinary cases of insurance, such a form of action (if it can be supported) must be supported on the ground that the insurance is for a present premium paid down by the broker to the underwriter. By the course of dealing, the broker has an account with the underwriter; in that account the broker gives the underwriter credit for the premium when the policy is effected, and he, as the agent of both the assured and the underwriter, is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor. The broker is then considered as having paid the premium for the assured. The fact of giving credit in account by the broker to the underwriter, and the underwriter by the terms of the policy having acknowledged the receipt of the premium, are equivalent to actual payment. Here the policy was not effected for a present premium, and there was no credit in account given by the broker to the underwriter for the premium. The insurance was of a peculiar nature. The underwriter effected the policy in consideration of a special covenant by the broker to pay that premium, and the broker did not give credit for it to the underwriter in an account with him. not been any actual payment of it, nor anything which is equivalent to payment. The plaintiffs, therefore, cannot recover the premium as money paid to the use of the defendants. But they are entitled to recover compensation for the beneficial services rendered by the broker to the defendants; and I think they are not precluded from recovering such compensation in this action by the form of their particulars of demand. It seems to me also that they may recover the whole of their demand as "money due for premiums for policies caused and pro-tured *to be effected by the bankrupt." He undoubtedly did procure to be underwritten for them policies in this particular form; and the defendants have had the benefit of them, and they have been as beneficial to the defendants as if the premiums had been actually paid by the bankrupt to the underwriters; for the company cannot have any recourse to the defendants for the premiums, and in consequence the defendants are liable to pay a sum of money to the plaintiffs. A special count, stating the facts out of which the legal liability of the defendants arose, would be in substance an indebitatus count for policies caused to be effected by the broker at the request of the defendants, expanding the terms of it, and describing the special nature of the policies effected for the defendants upon the credit of the broker. I think, therefore, the plaintiffs are entitled to recover under this particular form of declaration. Then as to the plea; that alleges an acceptance by the plaintiff of the sum of 5l. 15s., together with costs, in satisfaction of the promises mentioned in the declaration. The defendant, therefore, takes upon himself to prove that the plaintiffs actually accepted and received that sum of money. In fact, that sum remained in court;

there was, therefore, no acceptance or receipt of it. If the acceptance of the costs amounted in point of law to an acceptance of that sum, that should have been specially pleaded. Judgment for the plaintiffs.

*The Conservators of the River TONE, in the County of SOMERSET, [*349]
v. ASH and Others.

By an act for making and keeping the river Tone navigable, it was enacted, that the thirty persons therein named and their successors should be conservators of the river, and should have power to cleanse, scour, open, and keep navigable the said river; and also to cut and make a new channel, if occasion should be, through the ground of other persons, making

recompense to the owners.

By another clause the conservators were to contract with the owners of land for the loss or damage which any of them should sustain by making the river navigable; and if the owners and the conservators could not agree touching the value thereof, or if the title were in an infant, feme covert, or any other person unable to contract, then the sheriff was to summon a jury to ascertain the value, and the determination of the jury was to bind all parties; and in case the parties interested in the land should not appear, then the jury, in their absence, were to proceed to determine what satisfaction should be made to them respectively, which determination was to be good, valid, and conclusive, and to vest an estate in fee-simple in the conservators and their successors, or other right, title, or interest in the lands.

By another clause it was enacted, that there should always be conservators of the said river, and that the thirty persons therein named should continue conservators during their lives. unless any of them should be removed for misbehaviour, which the major part of the conservators were thereby empowered to do, and when the number of the conservators at any time by death or removal should be reduced to twenty, then the survivors were to choose other persons to be joined to themselves to be conservators of the river, so as to make up the number thirty; and the conservators were enabled by the name of the conservators of the river lone, in the county of Somerset, to take and receive any gift, legacy, or grant of goods, chattels, money, or lands in fee, or for any other estate or term for the uses aforesaid; and it was made lawful for any persons to convey any estate to the conservators and their successors without license to alien in mortmain. And the conservators, or the major part of them, or any five of them appointed by the major part of them to be a committee, were authorized in writing under their hands and seals to make any contract, which contract should bind the whole body of the conservators, and the conservators might sue and be sued by the said name of the conservators of the river Tone, in the county of Somerset.

By a subsequent act the conservators were authorized to make orders in writing for the government of the boatmen, bargemen, or others, in navigating boats or barges, or floating

timber on the said river :

Held, that as it manifestly appeared from the different clauses of these acts of parliament that the conservators should take land by succession and not by inheritance, although they were not created a corporation by express words, they were so by implication; and that being so, they were entitled to sue in their corporate name for an injury done to their real

property.

An act of the 51 G. 3, for making the Bridgwater and Taunton canal, after reciting, that the making of that canal would be very prejudicial to the tolls authorized to be levied and collected from the Tone navigation, authorized and required the company of proprietors of the canal within three calendar months to contract and agree with the conservators of the river Tone navigation and other persons, proprietors of shares or parts of shares, or otherwise interested therein, for the absolute purchase of their several and respective estates, rights, and interests in and to the same; and also to contract and agree with the overseers of the poor for the time being of the town of Taunton, and the several parishes of Taunton St. Mary Magdalen and Taunton St. James, for the absolute purchase of the respective estates, rights, and interests of the said town and parishes, under and by virtue of the said therein recited acts. The 51 G. 3 was repealed by the 5 G. 4.

Held, by BAYLEY and LITTLEDALE, Justices, that the words, within three calendar months, applied to both branches of the clause, and that the canal company therefore were bound to have contracted within that period with the overseers of the poor of the parishes of Taunton; and not having done so, they could not afterwards compel them to sell their interest; and by PARKE, J., that whether the right to purchase that interest was limited to three months or not; at all events, it was gone when the 51 G. 3, was repealed.

TRESPASS for entering the plaintiffs' wharfs, pens, pounds, bridges, locks, wears, and closes covered with water, in the parish of North Cuny, and fixing and *fastening to and upon the gates and posts of the plaintiffs there divers locks, stapies, ninges, and bolts, and thereby damaging the same, and thereby and therewith shutting, locking, and fastening the said gates, and keeping them so shut for long spaces of time, and at other times unlocking and

opening them, and ejecting the plaintiffs from their said premises, and keeping them so ejected for a long space of time, and during that time receiving tolls and duties belonging to them amounting to 3000l., and during all that time preventing the plaintiffs from using them as they would otherwise have done. Plea, first, not guilty. Secondly, that at the time of exhibiting the said bill, there was not any such body politic or body corporate as the conservators of the river Tone, as by the said declaration was supposed. Thirdly, that at the time of exhibiting the said bill, the said persons so suing as the conservators of the river Tone were not a body politic or corporate as by the said declaration was above supposed. Fourthly, that the persons so suing as the conservators at the time of exhibiting the said bill against the defendants were not enabled or empowered to sue, or capable of suing, as the conservators of the river Tone, upon the supposed causes of action in the said bill and declaration above mentioned, or any of them, or any part thereof. Fifthly, that the messuages, wharfs, pens, pounds, bridges, and closes, were the messuages, wharfs, pens, pounds, bridges, and closes, soil and freehold of the company of proprietors of the Bridgwater and Taunton canal navigation, and justifying as their servants. Sixthly, as to the taking and receiving the said tolls and duties in the declaration mentioned, that *the said tolls and duties at the said several times, when, &c., were certain tolls and duties for the tonnage of certain goods, wares, merchandise, and commodities which had been theretofore carried and conveyed from such part of the said canal and cut mentioned in the act of the 51 G. 3, as was not at the time of passing that act intended to extend, and never did extend, from the parish of Clevedon, in the county of Somerset, to the west side of the river Parrett in the same county, and which tolls and duties were vested in the company of proprietors of the Bridgwater and Taunton canal navigation under and by virtue of the said last-mentioned act, and of a certain other act made and passed in the 5th year of G. 4, and so justifying as servants of the company. Seventhly, as to the taking and receiving the said tolls and duties, that before and at the said several times, when, &c., the said company of proprietors of the Bridgwater and Taunton canal navigation were seised in fee of and in the said tolls and duties, and justifying as their servants. Eighthly, as to the taking and receiving the said tolls and duties, that before and at the said several times, when, &c., the said company were lawfully possessed of and entitled to the said tolls and duties, and justifying as their servants. Upon all these pleas issue was taken and joined. At the trial before Gaselee, J., at the Spring assizes 1828, for the county of Somerset, a verdict was found for the plaintiffs for the damages in the declaration, subject to the opinion of this Court upon the following case :-

By an act of parliament passed in the tenth and eleventh years of William III., for making and keeping the river Tone navigable from Bridgwater to Taunton in the county of Somerset, reciting, that John Mallett, Esq., in pursuance of a commission under the great seal of England granted in the 18th year of Charles I., had at *his very great expense made the said river in some sort navigable from the said town of Bridgwater to certain mills called Ham Mills in the said county; in consideration whereof his late majesty King Charles II., by his letters patent under the great seal of England, in the thirtysixth year of his reign, had granted to the heirs of the said J. Mallett the sole navigation of the said tiver from Bridgwater to Ham Mills aforesaid; and that all the interest of J. Mallett and his heirs in the said river and navigation on the same, and the said commission and letters patent, was, by good and sufficient conveyance in the law, conveyed and assigned to, and vested in, J. Frind, gentleman, and twenty-nine other persons therein named, inhabitants of the parish of Taunton St. Mary Magdalen, Taunton St. James, Bishop's Hull, or Wilton, in the county afores d, who, for a valuable consideration, had purchased the same; and that for the benefit of trade, preserving the highways therein in that behalf mentioned, and employing the poor, the said purchasers were willing to undertake, at their own expense, until they could be repaid as thereinafter was directed and appointed, not only to maintain and keep the said river navigable, Vol. XXI.—20

and make it more beneficially and effectually so, from the said town of Bridgwater to Ham Mills, and to maintain and keep up all bridges and works made or built by the said J. Mallett to that end, but also to erect and build such other bridges and works as should be necessary, and also to clear and effect a passage for barges, boats, and other vessels from Ham Mills to the said town of Taunton; it was enacted, that the said thirty persons and their successors, as thereinafter mentioned, should be and they were thereby declared and appointed conservators of the said river, and that they, or the major part of them, should *have power, and they were thereby empowered and authorized by themselves, their servants, or agents, to cleanse, scour, open, make, and keep navigable the said river Tone from the said town of Bridgwater to Ham Mills aforesaid, and from thence to the said town of Taunton; and for that purpose to dig the banks of the said river or other ground, ditch, brook, or stream near thereunto adjoining, &c.; and also to cut and make a new channel, if occasion should be, through the ground of his Majesty or any of his subjects, making recompense for the same to the owner or owners of such ground, according to their respective interests and estates therein, pursuant to the directions of that act; and likewise to cut, scour, or open any other stream or water-course that should be convenient for making the said passage or river navigable; and also to open, prepare, make, and erect any bridges, wharfs, locks, wears, turnpikes, pens of water, or other works in or near to the said river or passage that should be fit and necessary for the same; and also to make or lay out a path or way on either or both sides of the said river for watermen, boat or bargemen, and others navigating vessels on the said river. The act then provided for the mode of settling the compensation to be paid by the conservators for any lands, &c.. taken or injured by them in carrying into effect the objects of the statute, and provided that the determination so made should be valid, and should vest an estate in fee-simple in the said conservators and their successors, or other right, title, and interest in any lands or hereditaments, according to the tenor of such order. And for reimbursing the said conservators the principal money of the said purchase, and what should be laid out in the making or keeping *the said river navigable, &c., together with interest for the same after the rate of six per cent. per annum, until the conservators should be repaid the said principal and interest of what they had disbursed or should thereafter disburse for the purposes aforesaid, certain tolls therein mentioned were imposed upon every boat, barge, or vessel; and remedies were provided for the recovery of the The act then proceeded to enact that when the conservators should have been fully reimbursed the principal and interest after the rate aforesaid of all moneys advanced, and which should be expended by them respectively in purchasing the interest of the heirs of the said J. Mallett, and in making and keeping the said river navigable, &c., certain lesser tolls therein mentioned should be imposed; and that the said tolls, together with the product of all gifts and grants to the conservators of the said river, should be from time to time applied to the repairing such bridges, wears, &c., as were or should be built or made by the said conservators for maintaining and keeping the said river navigable, and be annually accounted for as therein directed; and the surplus of what should arise by the means aforesaid should be by the said conservators employed and disposed of for the only use, benefit, and advantage of the poor of the said town of Taunton and parishes of Taunton St. Mary Magdalen and Taunton St. James in the county aforesaid, who were empowered and authorized to lay out and dispose of the same in building one or more hospital or hospitals, or otherwise, from time to time according to their best discretions, for the better educating and maintaining such poor children as were or should become chargeable to the town and parishes aforesaid; and such hospital or hospitals when built *should be governed and regulated by such persons, rules, and orders as should be appointed, given, and made from time to time by the said conservators for the time being, so as such rules and orders were first approved by the judges of assize and nisi prius for the county of Somerset, or one of them

The act then directed the mode in which the accounts were to be kept. And it further enacted, that for the better preserving and keeping the said river navigable, when made so, and for making the same navigable, there should always be conservators of the said river; and that the said thirty persons should be and were thereby constituted conservators of the said river Tone, to continue during their lives, unless any of them should be removed for misbehaviour, which the major part of the said conservators were thereby empowered to do; and when the number of the said conservators at any time by death or removal should be reduced to twenty, then the surviving conservators should from time to time assemble, and by the major part of them so assembled choose other persons to be joined to themselves to be conservators of the river Tone, so as to make up the number of the said conservators thirty; and the said conservators were thereby enabled, by the name of conservators of the river Tone, in the county of Somer set, to take and receive any gift, legacy, or grant of goods, chattels, money, or land in fee, or for any other estate or term for the uses aforesaid; and it should be lawful for any person or persons to convey any estate or estates to the said conservators and their successors without license to alien in mortmain; and the said conservators, or the major part of them, or any five of them, being appointed by the major number of them, to be a committee for *transacting anvthing relating to the ends aforesaid, should or might, in writing under their hands and seals, make any contract or agreement, lease or bargain, with any person or persons, body politic or corporate, touching the premises; which contracts, agreements, and leases should be good and valid in law, and bind as well the whole body of the said conservators, and the payments thereby enacted to be made for passage or navigation on the said river, and all the estate, real and personal, which the said conservators should be seised or possessed of, to the uses aforesaid, as themselves and all other persons making and signing the same; and the said conservators should or might sue or be sued on such contracts, by the said name of "The Conservators of the river Tone, in the county of Somerset."

By an act passed in the sixth year of Queen Anne, for the more effectual making and keeping the river Tone navigable from Bridgwater to Taunton, in the county of Somerset, reciting the act of W. 3; that the navigation was partly made, and that by an account allowed by the justices at the general quarter sessions for the county of Somerset in 1707, the balance then due to the conservators was 3966l., the conservators, after building a lock at or near a place called Round Island, were allowed certain additional tolls therein mentioned, and powers were given them to erect the lock and to collect the additional tolls.

By an act of the 44 G. 3, reciting the two acts already mentioned, it was enacted, that it should be lawful for the conservators of the said river for the time being, or the major part of them, to make any orders or regulations in writing for the government of the *boatmen, bargemen, or others, in navigating boats or barges, or floating timber on the said river; which orders or regulations being laid for examination and correction before the justices of the peace assembled at any general quarter sessions for the said county next after Midsummer, and published twice in some newspaper commonly circulated in the said county between that time and the next general quarter sessions to be held after the following Michaelmas, and then approved and confirmed at such lastmentioned sessions, should be duly observed and kept by all persons using the said river for navigating boats, barges, and other vessels or floating timber; and that every person who should offend against any of such orders or regulations, being thereof convicted before any one of his Majesty's justices of the peace for the said county, should for every such offence forfeit a sum not exceeding 51. nor less than 40s.

By an act of the 51 G. 8 which authorized the making of a canal from the river Avon at or near Morgan's Pill, in the parish of Easton in Gordano, otherwise St. George's in the county of Somerset, to or near the river Tone, in the parish of Saint James in Taunton, in the said county, and a certain navigable cut therein described; it was enacted that certain persons therein named, and

their respective successors, executors, administrators, and assigns, or such of them as should from time be possessed of any share in the navigation thereby authorized to be made, should be and were thereby united into a company for carrying on, making, completing, and maintaining of the said canal, cut, rail, or carriage way or stone road, for the passage of boats, barges, and other vessels, carts and carriages, according to the rules and directions thereinafter contained, and *should for that purpose be one body politic and corporate, by the name of the Company of Proprietors of the Bristol and Taunton Canal Navigation. And reciting that differences might arise between the said company of proprietors and the owners of or persons interested in the lands, grounds, tenements, waters, rivers, or hereditaments which should or might be taken, used, affected, damaged, or prejudiced in pursuance of the powers thereby granted, touching the purchase-money or recompense to be paid or made for the same, it was thereby further enacted, that every person seised or entitled in his own right or in right of his wife (but not as mortgagee) at the time of his acting, of or to any freehold or copyhold estate or both in the county of Somerset of the clear yearly value of 1001.; and also every person residing in the said county and within twenty miles of the said intended canal and cut respectively, having a personal estate or a real and personal estate together of the value of 300l. should be and was thereby appointed a commissioner for settling and determining all matters and differences which should arise between the company and the several persons or proprietors interested in any lands, grounds, tenements, waters, or other hereditaments that should be taken, used, or prejudiced in pursuance or execution of any of the powers thereby granted. And it was thereby further enacted, that if the said company of proprietors, or other persons so interested or entitled as therein aforesaid, should refuse to submit such compensation as therein aforesaid to the determination of the commissioners therein mentioned, or should be dissatisfied with their determination respecting the same, or should refuse to receive upon due tender thereof such purchase-money, annual rent, or recompense as *should be so adjusted and determined to be paid as therein aforesaid, or should neglect or refuse to treat, after the notice therein specified, or should not agree with the said company concerning the same, or should by resson of absence be prevented from treating, or should by reason of nonage or other impediment be incapable of treating or making such agreements as should be expedient for enabling the company to proceed in the making and carrying on of the said canal and other the works aforesaid, then and in any or either of the said several cases, the said commissioners, assembled at a meeting to be held in a manner thereinbefore mentioned, were thereby empowered and required from time to time to issue a warrant or warrants under their hands and seals to the sheriff of the said county of Somerset, commanding such sheriff to empannel, summon, and return a jury to appear before the justices of the said county of Somerset at some court of general quarter sessions of the peace to be holden for the said county, and the said justices were thereby empowered also to summon before them all persons necessary to be examined as witnesses; and such jury, upon their oaths, should inquire and assess and ascertain the sum or sums of money or annual rent to be paid for the purchase of such lands, grounds, tenements, or hereditaments as aforesaid, and also what other and distinct sum or sums of money should be paid by way of recompense for the damages which should or might be so sustained as aforesaid; and the justices should give judgment for such purchase-money or recompense as should be assessed by such jury; which said verdict and the judgment to be thereupon pronounced, should be binding and conclusive to all intents and purposes against all bodies politic, corporate, or *collegiate, and all other persons whomsoever. And reciting that by the 10 & 11 W. 3 certain persons therein named and their successors were thereby appointed conservators of the said river, and certain powers were thereby given and granted to them for making and keeping the same river navigable, and other purposes therein mentioned; and that it was thereby

enacted, that the surplus of what should be received or arise from the tolls thereby directed to be levied, after making and keeping the same river navigable, and reimbursing the said conservators the principal money they had or should lay out with interest as therein mentioned, should be by the said conservators employed and disposed of for the only use, benefit, and advantage of the poor of the said town of Taunton, and the parishes of Taunton St. Mary Muglalen and Taunton St. James in the said county of Somerset, who were thereby empowered to lay out and dispose of the same (as in that act mentioned), and reciting the acts of the 6 Anne and the 44 G. 3; and that the making of the said intended canal and other works authorized to be made by virtue of the act so passed in the 51 G. 3 would be very prejudicial to the talls authorized to be levied and collected by the said therein-recited acts from the Tone navigation; the said company of proprietors were by the said act of the 51 G. 3 authorized and required, within three calendar months next after the passing of that act, to contract and agree with the conservators of the said river Tone navigation, and other persons proprietors of shares or parts of shares, or interested therein, for the absolute purchase of their several and respective estates, rights, and interests in and to the same; and also to contract and agree with the overseers of the poor for the time being of the said *town of Taunton, and the said several parishes of Taunton St. Mary Magdalen and Taunton St. James aforesaid, for the absolute purchase of the respective estates, rights, and interests of the said town and parishes, under and by virtue of the said therein-recited acts, or any of them; and that in case any dispute should arise touching the moneys to be paid for any such purchase, or any matter or thing in anywise relating thereto, then the same should be submitted to a jury, to be determined in such and the like manner as the purchasemoneys of any lands or grounds directed to be purchased or taken by virtue of that act should be determined, in case any dispute should arise about the same. And it was thereby further enacted, that the said navigation when so purchased should from time to time, and at all times thereafter, be maintained and supported by the said company of proprietors by and out of the tolls from time to time received by them on the line of such navigation, and that the surplus of such tolls should after such application be from time to time applied and disposed of as directed by the said therein-recited acts, save and except the rights and interests of such person and persons as were directed to be purchased, and intended to be barred by virtue of that act. And it was thereby further enacted, that the said company of proprietors should, after such purchase should be so made as aforesaid, have, use, and enjoy such and the like powers of maintaining and supporting the said navigation, and should be subject to such and the same rules, regulations, penalties, and forfeitures as the said conservators and other persons proprietors of shares or parts of shares, or otherwise interested therein, had and *362] enjoyed, and were *subject and liable to under and by virtue of the said

By an act of the 5 G. 4, to abridge, vary, extend, and improve the Bristol and Taunton Canal Navigation, and to alter the powers of the act of the 51 G. 3, it was enacted, that all and every the powers and authorities in and by that act given and granted for making so much of the said canal as was intended to be made and extended from the said river Avon, at or near Morgan's Pill aforesaid, unto the western boundary of the said parish of Clevedon, should be and the same were thereby repealed. And it was thereby further enacted, that the said company of proprietors of the Bristol and Taunton Canal Navigation should no longer be called by the name of the Company of the Proprietors of the Bristol and Taunton Canal Navigation, but that the same company should, from and after the passing of that act, be called and known, and continue to be incorporated, and have continuance by the name of the Company of Proprietors of the Bridgwater and Taunton Canal Navigation. And it was thereby further enacted, that so much of the said act of the 51 G. 3 as related to the appointment of commissioners for settling, determining, and adjusting such questions, matters, and dif-

recited acts, or any of them.

ferences as were therein mentioned, and all the powers by the said last-mentioned act vested in or given to the said commissioners, should be and the same were thereby repealed. And it was further enacted, that in case of any difference of opinion between the said company of proprietors and any body or bodies politic, corporate, collegiate, or ecclesiastical, corporation aggregate or sole, tenant or tenants for life, for years, or in fee-tail general or special, feoffees in trust *for charitable or other purposes, husbands, guardians, committees, trustees, or any other owners, proprietors, or occupiers, or other person or persons whomsoever, either seised, possessed of, or interested in or to any lands, tenements, or hereditaments, or any part and parts thereof which might be required by the said company of proprietors to be taken or used for the purposes of the said recited act of the 51 G. 3 and that act relative to the price or value to be given for the same, or relative to any damages or compensation which might be claimed by any such person or persons for the same; and in case such price, value, damages, or compensation could not be settled, adjusted, and agreed for by and between the said company and such proprietors and other persons interested in the said lands, tenements, or hereditaments; or if any such bodies politic, corporate, collegiate, or ecclesiastical, corporation aggregate or sole, trustee or trustees, or other person or persons interested or entitled as aforesaid, should refuse to receive, upon due tender thereof made, such purchase-money or such compensation as should be offered to be paid by or on behalf of the said company, it should be lawful for the committee of management or sub-committee, and they were thereby empowered and required from time to time to issue a warrant or warrants under the hands and seals of any three or more of them to the sheriff of the said county of Somerset, thereby requiring such sheriff to impannel, summon, and return a jury to come before such sheriff; which persons so to be summoned, impannelled, and returned as aforesaid, were thereby required to go and appear before the sheriff of the said county of Somerset at such place and time as in such warrant should be named or required; and such *jury upon their oaths should inquire of, assess, and ascertain the sum or sums to be paid for the purchase of such lands, tenements, or hereditaments, or should inquire of, assess, and ascertain whether any and what sum, recompense, or sums of money ought to be paid for any such damage or other matter as should be claimed to have been incurred or sustained by any such party as aforesaid.

The town of Taunton consists of the several parishes of Taunton St. Mary Magdalen and Taunton St. James. There are no officers of the poor of the town of Taunton, except those appointed for those two parishes. In October 1827, the said company tendered to the then churchwardens and overseers of the poor of the parishes of Taunton respectively the sum of 470l. for each of those two parishes, for the absolute purchase of the respective estates, rights, and interests of the same two parishes respectively, under and by virtue of the said three acts of 10 & 11 W. 3, 6 Anne, and 44 G. 3, or any of them, which several sums of 470l. and 470l. the said churchwardens and overseers respectively refused to receive or accept, whereupon the said sub-committee of management of the said company did, on the 17th day of October, 1827, issue a warrant under the hands and seals of four of them, to the sheriff of the county of Somerset, thereby requiring such sheriff to impannel, summon, and return a jury to come before him the said sheriff on the said 26th day of October, 1827, to inquire of, assess, and ascertain the sum of money to be paid by the said Bridgwater and Taunton Canal Company to the conservators of the said river Tone navigation, and other persons proprietors of shares, or otherwise interested therein, for the absolute purchase of their several *and respective estates, rights, and interests in and to the same, and also to inquire of, assess, and ascertain the sum of money to be paid by the said company of proprietors of the Bridgwater and Taunton canal navigation to the said overseers of the poor for the time being for the said parish of Taunton St. James, for the absolute purchase of the estate and interest of the said parish, and of the poor thereof, in the said river Tone navigation, by virtue of the statutes in that behalf made; and also to

inquire of, assess, and ascertain the sum of money to be paid by the sain company of proprietors to the overseers of the poor of the said parish of 'aunton St. Mary Magdalen, for the absolute purchase, estate, and interest of the said last-mentioned parish, and of the poor thereof, in the said river Tone navigation, by virtue of the same statutes. On the same 17th day of October, 1827, a notice was served by the said company on the conservators, and also on the churchwardens and overseers of the several parishes of Taunt in St. James and Taunton St. Mary Magdalen, that the high sheriff of the county of Somerset would impannel, summon, and return a jury to the intent expressed in the said warrant, and repeated in the said notice. In pursuance of the said requisition the sheriff of the county of Somerset summoned, impannelled, and returned a jury as directed by the said last-mentioned act. On the 26th of October, 1827, the said sheriff caused the said jury to come and assemble, and they did come and assemble, in pursuance of the said warrant, at the time and place, and to and for the intent and purpose in the said warrant mentioned. And thereupon afterwards, on the 29th of October, 1827, a certain inquisition, verdict, and judgment of and concerning the premises, and the *proceedings thereon upon that occasion, *366] under the hands and seals of the said sheriff and of the said jury, were returned by the said sheriff to the clerk of the peace of the said county of Somerset, to be entered and kept among the records of the quarter sessions of the same county, where the same were entered and kept.

The jury assessed the damage of the overseers of the parishes at 2001. for each

parish.

On the 1st day of November, 1827, all the costs and charges incurred in summoning, impannelling, and returning such jury, taking such inquisition, and the attendance of witnesses, and recording the verdict and judgment thereon, after notice of an appointment to that purpose, to the churchwardens and overseers of the said several parishes of Taunton St. James and Taunton St. Mary Magdalen were examined into, settled, and ascertained by T. Hassell, Esq., then a justice of peace for the said county of Somerset, not interested in the matter so in question, at the sum of 3481. 15s. 6d., one molety whereof he directed to be paid and borne by the churchwardens and overseers of the parish of Taunton St. James and Taunton St. Mary Magdalen, both in the county of Somerset.

On the 2d of November, 1827, the said company tendered and offered to pay the sum of 212l. 16s. 1½d to the churchwardens and overseers of the poor of the parish of Taunton St. Mary Magdalen, and the further sum of 212l. 16s. 1½d. to the churchwardens and overseers of the poor of the parish of Taunton St. James

aforesaid, which they respectively refused to receive.

On the 6th of November, 1827, the company, with the privity of the accountant-general of the Court of Exchequer, paid into the bank the sum of 300l. for the use of *the churchwardens and overseers of the poor of Taunton St. James aforesaid, and the further sum of 300l. for the use of the churchwardens and overseers of the poor of the parish of Taunton St. Mary Magdalen aforesaid.

The several matters and things complained of in the dectaration were done on the 9th and 10th days of November, 1827, at which times, and for more than twenty years next before those times, the said conservators were in possession of the several premises, matters, and things therein mentioned, and of the said river Tone navigation, and in receipt of the several tolls payable in respect thereof.

The said company of proprietors had for more than five years before the doing of the said several matters and things so complained of purchased all the shares and parts of shares of and in the moneys expended in making the said river Tone navigable, then or still remaining due and payable, and were and are the sole proprietors of all such shares and parts of shares.

The said conservators have yearly accounted to the justices as required by the said acts up to and inclusive of Midsummer 1827; and it appears by their accounts delivered to the said justices for the years 1825, 1826, and 1827, that the

said company were at those times such sole proprietors of all such shares and

parts of shares.

The defendants at different times, some between 1811 and 1822, and some in the latter year, contracted and agreed with the several and respective persons, proprietors of shares or parts of shares of the debt then due from, and for, and in respect of the said navigation, some few of whom were conservators for the absolute purchase *of their several and respective estates, rights, and interests in and to the same shares or parts of shares.

In the statement exhibited at the general quarter sessions of the peace for the county of Somerset, Michaelmas 1823, by the conservators under the said acts of their account of such receipts and payments from the 24th of June, 1822, to the 24th of June, 1823, it is alleged as follows: "The river is debtor to principal moneys due and in arrear on the 24th of June, 1822, to the Bristol and Taunton Canal Company, they being the proprietors of all the shares for moneys advanced for making and keeping the said river Tone navigable, which proprietors are assignees of the conservators." And by the statements exhibited by the conservators of their accounts from the 24th of June, 1824, to the 24th of June, 1825, it is alleged as follows: "The Bridgwater and Taunton Canal Company are entitled to all the money due on the Tone;" and also as follows: "Principal moneys due and in arrear to the 24th of June, 1824, to the Bridgwater and Taunton Canal Company, they being proprietors of all moneys advanced for making and keeping the said river Tone navigable, which proprietors are assignees of the conservators."

The questions for the opinion of the Court were, Whether the defendants were entitled to do or commit the said several matters and things so complained of, or any of them? and, Whether the plaintiffs were entitled to sue by the name and

style of "Conservators of the River Tone?"

R. Bayly for the plaintiffs. The first question is, Whether the conservators of the river Tone are a corporation? In Co. Litt. 250 a, a body politic, is said to be a *body to take in succession framed as to that capacity by policy, and it is called a corporation or a body incorporate, because the persons are made into a body and are of capacity to take and grant. And this body politic or incorporate may commence and be established three manner of ways, viz. by prescription, by letters patent, or by act of parliament." The essence, therefore, of a corporation, according to this definition, is, that it is a body framed by policy to take in succession. Here the conservators of the river Tone are authorized by the act of parliament to take land in succession. It is not necessary to create a corporation that the charter or other instrument by which it is created should contain express words of incorporation. It is sufficient if the intent to incorporate be manifest. Thus, in 1 Rolle's Abr. tit. Corporation (F), 513, l. 15, it is laid down that, if the King grants land to the men or inhabitants of Dale, their heirs and successors, rendering a rent, for anything touching that land, this is a corporation, but not to other purposes. There the intent to incorporate is manifest from the use of the word successors, for the men of Dale could not take by succession, unless they were a corporation. there said, 1. 19, that if the King grant lands to the men or inhabitants of Dale, if they be not incorporated before, the grant is void if no rent be reserved to the King.(a) It would appear, therefore, from this last citation, that a grant of land to the men of Dale without any reservation of rent would be void. If the reason of this be, that unless there be a reservation of rent, the King may be deceived, it does not apply to this case, because the *conservators are made a corporation by the legislature, and there is no ground for saying The conservators are burdened with duties more that they were deceived. onerous than that of paying rent. They have public duties to perform, they a e to do to the land what will make it more valuable, to make and maintain the canal, to collect the tolls which are to continue for ever, to apply those tolls

to the payment of the principal and interest due to the subscribers, and then to apply the surplus to the benefit of the poor of the parishes mentioned in the act of parliament. The case of the Sutton Hospital, 10 Co. 30, Jenk. 270, shows that in the creation of a corporation the law has not restrained itself to any precise words, and that when a corporation is duly created all other incidents are annexed. In Norris v. Staps, Hob. 211, Lord C. J. Hobart says, "that the name argues a corporation." In Anderson, 206, pl. 238, it is said, "A corporation is a body politic, consisting of material bodies, which joined together must have a name to do things that concern their corporation, or otherwise it is no corporation." Here the conservators have a name given to them by the act of parliament. They are to take lands to them and their successors; and by one clause the land which they take, being by virtue of an inquisition of a jury, is expressly vested in them and their successors, by the name of the Conservators of the river Tone in the county of Somerset. They have, therefore, two essential qualities of a corporation, viz. a corporate name, and the power of taking land in succession. It never could have been intended that they should hold in their individual capacity, for then their interest in the navigation would cease as soon *371] as *the debt due to them had been paid. In Rex v. The Conservators of the River Tone, 8 T. R. 286, it was not disputed that they were a corporation.

But, secondly, the conservators, whether they be a corporation or not, are entitled to sue by the name of "Conservators of the river Tone, in the county of Somerset." The 11 W. 3 authorizes the conservators, by that name, to take land for the purposes of the act. They are, therefore, a public body, created for public purposes; and yet, according to the argument on the other side, they can bring no action for any injury to their works, or for any injury to their They are within the statute of mortmain, Co. Litt. 2 b, and there is a clause expressly enabling them to hold, notwithstanding the statute of mortmain. They are entitled, therefore, to hold, as well as to take. Would a release by one bind all? Could it be intended that a single individual should be able to counteract or usurp the rights of the body? It is true that there is a clause authorizing the conservators, or the major part of them, or any five of them, being appointed by the major number of them, to be a committee, by writing under their hands and seals to make any contract, and such contract is to be good and valid in law, and to bind the whole body of the conservators, and the tolls, and all the real and personal estate which the conservators might be possessed or seised of, to the uses aforesaid; and the conservators may sue or be sued on such contracts by the said name of the "Conservators of the river Tone." Without this provision the conservators could not sue or be sued in respect of any contract made by a committee of five; and such contracts might be neces-*372] sary to be made where *they had not any common seal, and when there was not time to issue a summons, and give notice to call the corporate body together. That provision, therefore, was necessary, and seems to imply that in all other cases the legislature understood that the conservators might sue and be sued in respect of contracts made by the major part of them under their common seal. As to the other part of the clause which makes contracts made by the conservators, or the major part of them, valid and binding upon the whole body of the conservators, and upon the real and personal estate which they shall be possessed or seised of to the uses aforesaid, that was introduced from abun dant caution to show that they were not to be liable individually. But it never could have been intended that the conservators should be individually liable They have no interest of their own, for the surplus of the tolls is to go to the poor of the parishes of Taunton.

Then, assuming that the conservators are entitled to sue, the remaining question is, Whether the defendants were justified by the act of parliament passed for making the Bridgwater and Taunton canal, and by the inquisition taken under that act, in taking possession of the property of the conservators? Now, first, it appears that they have not pursued the mode pointed out by the 51 G. 3.

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By that act the commissioners therein named are empowered to issue a warrant under their hands and seals, directing the sheriff to impannel a jury to assemble at the quarter sessions, and there the matter is to be heard and determined. Now here no warrant has been issued by those commissioners, nor has the matter been heard at the quarter sessions. The warrant has been issued pursuant to the provisions of the 5 G. 4. But that act only authorizes lands to be taken to abridge, vary, *extend, and improve the Bridgwater and Taunton Canal Navigation. Besides, by the 51 G. 3, the Bridgwater and Taunton Canal Company were bound to contract and agree with the conservators within three calendar months after passing the act. That act recites, that the making of the Bridgwater and Taunton canal would be prejudicial to the tolls authorized to be levied by the conservators of the river Tone under their acts, and therefore authorizes and requires the canal company, within three calendar months next after passing that act, to contract and agree with the conservators of the river Tone navigation, and other persons, proprietors of shares, for the absolute purchase of their several interests therein; and also to contract and agree with the overseers of the parishes of Taunton for the absolute purchase of their respective interests. The words "within three calendar months" apply to both parts of the clause. It was a clause introduced for the benefit of the persons who were interested in the navigation of the Bridgwater and Taunton canal, and should be construed most strongly against them. This clause makes it essential that the company should contract within three months; and they are not to wait for an indefinite period of time, and then to purchase when they find it will be beneficial to them. Here they lay by for sixteen years, and then, when they found that the conservators had rendered it a profitable concern, and were paying off the debt fast, they endeavoured to compel a sale. The clause was introduced to bind the company, and to entitle the conservators to sell.

Manning, contrd. The conservators are not a corporation. It is true that they have a public trust to execute, but so have trustees of a turnpike road; and in them the *tolls and toll-houses are vested, and they are bound to apply the tolls in making, maintaining, and repairing the road in the same way as the conservators are towards making and repairing the navigation. is incident to a corporation without any express words in the charter that they should have power to purchase and alien, Sutton Hospital case. (a) Here the conservators of the river Tone could not alien the land which was vested in them for the purpose of making and maintaining the navigation. Another incident to a corporation is that they may plead and be impleaded in their corporate name. Now, if the conservators had a general right to plead and be impleaded, it would have been unnecessary to give them any express power for that purpose; but here there is an express provision enabling them in certain cases to sue in their corporate name, and if that be so, the rule applies "expressio unius est exclusio alterius." It is said that the express power given to them to sue is upon contracts not made by the corporate body, but by a committee of five. But the act of parliament, in the first instance, makes such contracts made by the five binding upon the conservators. It was unnecessary, therefore, if they were a corporation, to insert an express provision that they should be liable to be sued upon those contracts. It is true that, according to the authorities cited from Rolle's Abridgment, a grant of land to the men of Dale, and their successors, makes them a corporation, provided rent be reserved. The reservation of the rent being for the benefit of the crown is essential; it gives the crown a remedy against the grantee. Here no rent was reserved, nor anything equivalent to rent. The case of Rex v. The Conservators of the River *Tone in 8 T. R. does not at all apply to the present. It is part of the prerogative of the crown to create a corporation, and there must be a clear intent to create a corporation either by express words or necessary implication. Here there are neither express words of incorporation, nor is there anything in the act of parliament from which such intent can necessarily be implied. The power of taking land is given to the conservators by the express provisions of the act of parliament; and their power to take land is limited to the particular purposes for which the conservators were established.

Secondly, assuming that the conservators are a corporation entitled to sue as such, the defendants were justified under the 51 G. 3 in taking possession of the property in question. The defendants have done something towards purchasing the interest of the two parishes. They were not bound to treat with the conservators as trustees for themselves, but as trustees for the poor of the parishes. It is found that all the debts were purchased by the canal company. Then the conservators are trustees for the canal company. [BAYLEY, J. The canal company have purchased the interest of the conservators as individual shareholders. I When the 51 G. 3 directs the purchase to be made from the conservators and from the parishes, it must be construed reddendo singula singulis from the conservators as to the debt, and from the parishes as to their interests. Had the debt been extinguished instead of being pany purchased the whole debt. purchased, the conservators would have ceased to have any interest but for the benefit of the parishes mentioned in the act of parliament. The clause whereby *376] the company are within three calendar months to treat with the *conservators or shareholders is directory only. It would defeat the object of the legislature to construe it to be imperative. For it might be impossible to contract within that period. Shareholders might not be in the country. Vin. Abr. tit. Corporation, 297, (M), pl. 9, it is said, "Although a charter directs that the aldermen shall be elected annually, such clause is only directory, and the office of alderman is not thereby determined at the end of the year after his election." [PARKE, J. Assuming that the act is directory in this respect, you have not pursued the course pointed out by the 51 G. 3. The jury were not assembled in pursuance of a warrant issued by the commissioners to appear at the quarter sessions.] The commissioners were put an end to by the 5 G. 4,

and the company have proceeded under the latter act. BAYLEY, J. I entertain no doubt upon any of the questions that have been raised in this case. The first question is, Whether the conservators of the river Tone are a corporation? It is clear that a corporation may be created by act of parliament. The question therefore is, Whether it appears by the terms used in, or the powers given to the conservators of the river Tone by, the act of parliament, that it was the intention of the legislature that they should be a corporation? Now corporators take land by succession; individuals by inheritance, and where individuals take as joint-tenants the land vests in the survivor and the heirs of the survivor. If the conservators took land as individuals, whenever new conservators were appointed, the right to the land would remain in the conservators in whom it had been before that new appointment, unless it was *conveyed by deed to the new conservators. The statute of W. 3 begins *377] by enacting that "the thirty persons therein named, and their successors as thereinafter is mentioned, shall be and they are thereby declared conservators of the river Tone." They are to execute certain public purposes. First, they are to make and keep that river navigable, and next they are to reimburse the persons who have subscribed their money to effect these purposes of the act, by paying them their principal, together with interest at the rate of 6 per cent., and then the surplus, if any, is to be for the use, benefit, and advantage of the poor of two parishes in Taunton, and that surplus is to be laid out in the building of hospitals for the better educating and maintaining poor children. The conservators do not appear necessarily to have any private purposes of their own to answer. All the purposes for which they are appointed are distinctly pointed out by the act of parliament; and if they have no private purpose of their own to answer, one should rather expect, a priori, that they would be made a body corporate, especially if the functions which they have to execute render that necessary. Now, first, the conservators are enabled, by the name of Conservators of the River Tone, in the County of Somerset, to take and receive any gift,

legacy, or grant of goods, chattels, money, or lands in fee, or for any other estate or term for the uses aforesaid. They are therefore entitled to take, not in their natural names, but by a name which, if they were incorporated, would be a proper name of incorporation, and they are to take for the uses aforesaid. All those uses, with the exception of that of repaying to the individuals who have subscribed their principal and interest, are public purposes. Then the act empowers *any person to convey any estate to the conservators or their successors without license to alien in mortmain. That provision "without [*378] license to alien in mortmain" would have been wholly unnecessary if they took in their individual capacity. The act then proceeds to enact that the said conservators, or the major part of them, or any five of them, being appointed by the major number of them to be a committee for transacting anything relating to the ends aforesaid, shall and may, in writing under their hands and seals, make any contract, &c., with any person touching the premises, which contracts shall bind the conservators, and they shall be liable to be sued upon them. It is said that that implies that the body at large was not intended to be a corporation But the power given by that clause is one which, if it were not expressly given, a corporation would not have had. A corporation can only do corporate acts at a corporate meeting. Here the legislature authorizes certain individuals of the company to do an act which is to be binding on the body at large, subject to a condition that those acts shall be done in writing under their hands and seals, and then enacts that the conservators may sue or be sued on such contracts by the said name of "The conservators of the river Tone, in the county of Somerset." Now it has been contended, that as the legislature gives a special power to the conservators to sue on those contracts by the name of the conservators, that implies a negative, and that they cannot therefore be entitled to sue in any other case by that name. It appears to me, however, that that provision was made for a special reason, and that it is perfectly consistent with the notion that they were a body corporate and entitled to sue as such in respect of ordinary *corporate acts, because the legislature thereby gives them a right to sue, not in respect of an ordinary corporate act, but in respect of an extraordinary act, which any five members nominated by the body at large might sanction by writing under their hands and seals. That is not a corporate act; and if it be not, the corporation would not have been entitled to sue in respect of such an act, unless a special authority had been given to them for that purpose. Giving them that power in that specific manner implies that the legislature understood that they had previously given them a right to sue in their corporate name in respect of any ordinary corporate act.

Then as to the power given by the 44 G. 3 to make by-laws. A corporation, generally speaking, have a right to make by-laws to bind their own members, but not to bind strangers. Now the 44 G. 3 authorizes the conservators, or the major part of them, to make any orders or regulations in writing for the government of the boatmen, bargemen navigating boats, &c., or floating timber on the river. That is a by-law to bind strangers, which they could not have made unless the act of parliament had enabled them to do so. It seems to me that that furnishes a strong argument to show, that the conservators were a corporation with a power to make by-laws in general binding upon their own members, a special power being given to them by this clause to make by-laws binding on The provision made for filling up the number of conservators also shows that they were intended to be a corporation; for what would be their state if they were not a corporation? Thirty conservators are named in the first place, and then, when the number is reduced to twenty, the surviving conservators *are to assemble, and, by the major part so assembled, to choose ten other persons to be joined to themselves to be conservators, so as to make up the number thirty. When the conservators, therefore, are reduced to the number of twenty, they may add ten. Then what is to be the consequence of adding these ten? Are they to have all the rights of conservators as soon as added, or is something more required to be done before they acquire those rights?

If the property originally taken by the conservators, or afterwards given to them, vested in them as a corporation, the very moment that the new conservators are added the corporate lands will vest in them as well as in the former conservators; but if the land vested in the conservators, as individuals, and not as a corporation, there must be some conveyance from the twenty to vest the property in the ten together with them. That would not only occasion expense, but might also, unless it was specifically provided for, make the ten tenants in common with the twenty, whereas they ought to be joint-tenants. Considering, therefore, that the act authorizes any person to convey any estate to the conservators and their successors, in the first instance, and that it is necessary and convenient that the new conservators, as soon as they are elected, should have all the corporate property vested in them, it seems to me that the conservators are a corporation; and if they are, that they have a right to sue in their corporate name.

Then the remaining question depends on the construction of the 51 G. 3 and the 5 G. 4. The defendants insist that they have a right to take the property which belongs to the plaintiffs, and they justify under a clause in the 51 G. 3, *381] C. 138. That act recites, the sum of the tolls authorized to be Taunton Canal would be very prejudicial to the tolls authorized to be levied and collected from the Tone navigation, and the company of proprietors were authorized and required, within three calendar months next after the passing of that act, to contract and agree with the conservators of the river Tone navigation for the absolute purchase of their several and respective estates, rights, and interests in and to the same, and also to contract and agree with the overseers of the poor for the time being of the town of Taunton, and the said several parishes of Taunton, for the absolute purchase of the respective estates, rights, and interests of the said town and parishes." The first part of the clause says. "They shall, and they are hereby authorized and required, within three calendar months next after the passing of the act, to contract and agree with the conservators of the river Tone, and also to contract with the overseers of the poor of the two parishes in Taunton." The words, "and required within three calendar months," are not embodied in the second part of the clause; and the question is, whether the canal company were or were not bound within that period of time to contract with the overseers of the poor for the absolute purchase of the respective estates, rights, and interests of the said town and parishes. Now, in the first place, the canal company are authorized and required to do a particular act within three calendar months. It is contended, that those words are directory only. They are embodied in that part of the act which gives power and authority to do an act, and which contains a requisition that it shall be done. It seems to me that, instead of being directory, they are an essential part and parcel of that clause, and *that, unless an application be made within that period of time, by the parties who choose to insist on the right to purchase, they are too late. If the act had said, "They shall and are hereby authorized to contract and agree," and then said, "It is hereby directed that the application for the absolute purchase shall be made within three calendar months," that would have been directory; but when the words limiting the time are contained in that part of the clause which describes the power given, and the act required to be done, I think that they are not directory, but compulsory. They are an essential part of that clause. But, independently of that clause, it seems to me, the defendants have no ground for saying, that what was done was warranted by either of those acts. There was an offer of 470l. Whether there was any previous treaty on the subject of this interest does not appear. The act states, "that in case any dispute shall arise for any such purchase" (I now assume that a dispute had arisen between the Bridgwater and Taunton Caual Company and the overseers of these respective parishes), "the same shall be submitted to a jury, to be determined in such and the like manner as the purchase-moneys of any lands or grounds directed to be purchased or taken by virtue of this act shall be determined in case any dispute shall arise about the

same." Now what is the provision of that act as to the purchase-money of any lands or grounds to be purchased by virtue of that act? The commissioners are empowered and required to issue a warrant under their hands and seals directed to the sheriff of the county of Somerset, commanding him to impannel a jury, which jury is to assemble at the quarter sessions, and there the matter is to be heard *and determined. Now, in this instance, there has not been any ranks warrant issued by the commissioners, nor any hearing or adjudication at the quarter sessions. The provisions, therefore, of the 51 G. 3 have not been followed. The 5 G. 4 is not retrospective so as to apply to land which the Bridgwater and Taunton Canal Company might require under the provisions of the 51 G. 3, but applies purely to such land as they should thereafter want, and as to such land only is any new mode of summoning the jury prescribed. The new mode is substituted in case of any difference of opinion between the company of proprietors and any other persons interested in any lands, tenements, or hereditaments which might thereafter be required by the company to be taken. Then, in case there shall be any difference of opinion, there is not to be a warrant issued by the commissioners, but by the sheriff, or coroner, or under-sheriff, to require a jury to appear, not before the sessions, but before the sheriff, coroner, or under-sheriff. That is the plan which the canal company have pursued in this case. It is sufficient to say, that in this case the powers given by the act of parliament have not been pursued, and the defendants not having acquired a right to do the acts complained of, the plaintiffs are entitled to the

judgment of the Court. LITTLEDALE, J. I think the plaintiffs are entitled to the judgment of the The first question is, Whether the conservators of the river Tone are a corporation? Upon that it becomes material to consider in what way a corporation may be formed. Now a corporation may exist, first, by common law, as a king, bishop, or parson; secondly, by authority of parliament; *thirdly, by charter; and, fourthly, by prescription. In this case, the conservators of the river Tone claim to be a corporation by authority of parliament. The question then is, Has the statute of William made them a corporation? To create a corporation by charter or act of parliament it is not necessary that any particular form of words be used. It is sufficient if the intent to incorporate be evident. In the case of the Sutton Hospital, 10 Coke, 28, which is the great case on corporations, it is laid down, that the words, "incorporo, fundo, erigo" are not, in law, requisite to create a corporation, but that other equivalent words are sufficient. None of those words are contained in this act of parliament; and the question is, Whether the legislature has used any equivalent words which show a manifest intention to incorporate? According to the case of Marriott v. Mascall, Anderson, 206, a corporation is a body politic, consisting of material bodies, which, joined together, must have a name to do things which concern the corporation, or else it is no corporation; and in Rolle's Abridgment, Corporation, 512, citing the Sutton Hospital case, it is laid down, that the name of incorporation is as a proper name, or a name of baptism. A name, therefore, is essential to a corporation. The act of parliament in this case gives a name, vis. "The Conservators of the River Tone." Then, having a name, do these things which they are empowered to do by this act show that they were intended to be a corporation? The act begins by reciting that "J. Mallett, Esq., in pursuance of a commission under the Great Seal, in the reign of Charles the First, had, at a very great expense, made the river Tone navigable, in consideration whereof King Charles the *Second granted to Mallett and his heirs the sole navigation of the river; and that the interest of Mallett had become vested in the thirty persons therein named." It then enacts, "that the said thirty persons and their successors, shall be conservators of the river Tone, and shall have power to make and maintain the same navigable." It therefore provides, that the conservators shall have a succession; and then, by a subsequent clause, means are provided for filling up the number of conservators. The first of these clauses, therefore, shows a manifest intent that there should be a succession; and

the second contains a provision whereby that succession may be rendered perpetual. Then the conservators are to do certain things towards making and keeping the river Tone navigable. They are to cut a channel through the ands of others, and make wharfs; and as the doing of those things may be prejudicial to the inheritance of persons that have lands adjoining to the river, it is enacted that the conservators shall contract for the loss or damage which any of those persons shall receive by making the river navigable; and if any of the owners of the land and conservators cannot agree touching the value thereof, or if the title in possession, remainder, or reversion, be in an infant, feme covert, or any other person unable in law to make a contract concerning any of the said lands, either for the present or so as to bind the inheritance and fee-simple of the same. a jury is to be summoned; and after the jury have assessed the value, and after payment of the money assessed, the conservators may enter on the land; and if the parties interested in the land do not appear, the jury may proceed in their absence to determine the value, and their determination shall be valid, and vest an estate in fee-simple in the conservators and their successors." They *are, therefore, to take lands in succession, as a corporation would do, and not by inheritance as individuals. It then contains a provision for reimbursing the subscribers by tolls, and for lessening those tolls after they shall have been paid the principal advanced and interest; and after they shall have been fully reimbursed, the surplus tolls are to be employed for the use of the poor of the two parishes therein mentioned. It then enacts, that for the better preserving and keeping the river Tone navigable when made so, there shall always be conservators of the said river, and that the persons therein named shall be conservators, to continue during their lives; and that when the number shall be reduced to twenty, the survivors shall choose ten others to make up the number thirty, and they are enabled, by the name of "The conservators of the river Tone, in the county of Somerset," to take and receive any gift, legacy, or grant of goods, chattels, money, or lands in fee, or for any other estate or term for the uses aforesaid. What can be more directly forming them into a corporation, without using the word "incorporate?" It has been held, that if the King grant land to the men of D., hæredibus et successoribus suis, rendering rent, for anything touching this land they are a corporation, but for no other purpose.(a) There it is implied, from the word successoribus, that the King intended them to be a corporation. It is true, the rendering of rent is there stated to be essential. That may be to show that the King has not been deceived when he made the grant; but that reason does not apply to the case of a corporation created by act of parliament. Besides, the obligation of the conservators to advance money for the purpose of *making the river navigable, and to perform the other duties cast upon them, is equivalent to, and more onerous than the obligation imposed on the men of Dale to pay rent. The act of parliament, therefore, contains provisions which show a manifest intent in the legislature to make the conservators of the river Tone a corporation; and if that be so, then they are a corporation for all the purposes of keeping the river Tone navigable, and all the incidents of a corporation will attach to them. The case of the Sutton Hospital, 10 Coke, 28, shows, that it is not necessary that a thing incident to a corporation should be conferred on it by express words in the charter which makes the corporation. One of the incidents to a corporation is, that it may sue and be sued in its corporate name. The several clauses of the act of parliament which I have referred to are amply sufficient to show that the conservators are a corporation; and if they are, then, as incident to a corporation, they have a right to sue, and are liable to be sued, by their corporate name. Any doubt on that point (if there were any) is removed by the clause which gives a special power to a committee of five of the conservators to make contracts in writing under their hands and seals, and to the conservators the right to sue, and imposes on them the liability to be sued on such contracts by the name of the Conservators

of the River Tone. Without such a provision they could only sue or be sued in respect of a contract entered into by the corporate body. The legislature, therefore, by making this special provision, must have assumed, that for all matters done by the corporate body (and not by the committee) they may sue or be sued in their *corporate name. I am therefore of opinion, that the plaintiffs are a corporation, and are entitled to sue as such for any breaches of contract, or for any trespasses committed on their property.

Then, if that be so, the conservators of the river Tone were in possession of property, and the defendants have committed a trespass on that property. They are, therefore, liable in this action, unless they can show that they were authorized to do the same by law. They allege that they were fully authorized to do what they have done by the 51 G. 3 and the 5 G. 4. The first of these acts authorized them to take land for the purposes of the canal. But a power to take land would not authorize them to take the navigation of the river Tone into their own possession. It was necessary for that purpose to give a special power to them to unite the navigation of the river Tone to their canal. The act recites, that the making of the Bridgwater Canal would be prejudicial to the tolls authorized to be taken by the conservators of the river Tone, and authorizes and requires the canal company, within three calendar months after the passing of that act, to contract and agree with the conservators of, or other persons proprietors of shares in the river Tone, for the absolute purchase of the several and respective interests in the same; and also to contract with the overseers of the poor of the parishes of Taunton for the absolute purchase of their interest. I think that that clause makes it an absolute condition to the right to purchase the interest of the proprietors in the river Tone or of the overseers of the poor, that the contract should be made within three months. If the conservators of the Tone would be prejudiced by the making of the canal, it is *reasonable that the purchase of their interest should be made within a specified time, and not after an interval of many years. Taking the whole act together, I think it is manifest that it was the intention of the legislature, that the purchase of the interest of the shareholders in the navigation of the river Tone, or that of the overseers of the poor of Taunton, should be made within the limited time. When they are authorized to take land for the purposes of their navigation, they are at liberty to do it in a convenient time. But in the clause which states that the conservators would be prejudiced, a limited time is mentioned. If that clause were only directory, the effect of that would be, that they could not be called upon to treat in less than three months. The clause is compulsory on all parties, to treat within the limited time. It is possible, undoubtedly, that some of the creditors might be absent from the kingdom, so that they could not treat within the limited period. But to bind the interest of the conservators or the overseers of the poor of Taunton, the canal company must have treated with them within three calendar months. The canal company might (if they had purchased within that period) perhaps be trustees for the creditors to pay the amount of the debt secured on the tolls; but that is not the question here. I am of opinion, then, that as the Bridgwater Canal Company did not treat with the overseers of the poor within three calendar months, they could not afterwards claim a right to purchase their interest. The other objection is, that they have not, in fixing the compensation to be paid, pursued the mode pointed out by the 51 G. 3. The jury were not summoned in pursuance of a warrant directed by the commissioners under the 51 G. 3 to the sheriff, but in [*300] *pursuance of a warrant under the hands and seals of four of the commissioners under the 5 G. 4; and the inquisition was not taken at the quarter sessions, but before the sheriff. Then it is said that the company had a right to proceed under the 5 G. 4. That act of parliament applies to land to be taken for the purposes of that act. It does not apply to the river Tone. Surposing, therefore, the inquisition to have been taken in due time, it was not in the proper mode, and could not bind the parties.

PARKE, J. I am of the same opinion. There are two questions in this case.

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First, Whether this action is maintainable by the plaintiffs in their corporate name of "The conservators of the river Tone, in the county of Somerset," for an injury done to their works, locks, ponds, and pens, and real property described in the declaration? Secondly, Whether the defendants, who appear to justify under the Bridgwater and Taunton Canal Company, had a right to enter and take a portion of that property by virtue of any power given to the Bridgwater and Taunton Canal Company? As to the first question, it appears that the property or which the injury was committed was acquired by the conservators of the r. er Tone by the statute 10 & 11 W. 3, and by virtue of an inquisition taken under it in pursuance of the provisions of that statute. By that statute, the land taken under the inquisition is vested in the conservators of the river Tone and their successors. The question is, whether, taking all the provisions of the act of parliament together, it appears to have been the intention of the legislature that they should be a corporation for the purpose of acquiring and holding If it does, *then it follows as an incident to their being a corporation, that they may maintain an action for an injury to their corporate property, and that they may plead and be impleaded in their corporate name, without having any special authority for that purpose. It appears to me, from the provisions of the act of parliament, that they are made a corporation, not by express words, but by necessary implication. There are several authorities collected in Rolle's Abridgment, tit. Corporation, and Viner's Abr. Corporation, which show that a corporation may be created by charter by implication. One is, "If the King grant land to the men of Dale, their heirs and successors, rendering a rent; for anything touching that land, but not to other purposes, they are a corporation." The condition that the land be subject to a rent may operate in one of two ways. It may prevent the grant from being void for want of consideration. If that be the reason why the reservation of a rent is essential for the purpose of making the men of Dale a corporation, it does not apply to this case. For this is not a grant by the crown, but by the three estates assembled in parliament, and there can be no deceit on the crown. If the reason why a reservation of rent is necessary, be to give the crown a remedy, then it appears that by reason of the provision of this act of parliament the crown will have a remedy against the conservators; for there are obligations cast on the conservators of the river Tone in respect of that property in which the public have an interest, and obligations equal to or more onerous than that of rendering rent; and the conservators may be indicted for not applying the property to the uses there stated for the benefit of the public. The case, however, does not rest on *392] that; for this act of parliament enacts, that there shall always *be conservators, and reserves a power of amotion for misbehaviour; besides they are expressly enabled by the name of "The conservators of the river Tone, in the county of Somerset," to take lands in fee to them, and their successors. seems to follow, by necessary implication from this provision, that for the purpose of acquiring and holding real property necessary for maintaining the navigation, they are a corporation; and then it is a necessary consequence that they have a right to maintain an action in their corporate name for an injury done to that property. As to the second point, whether the proprietors of the Bridgwater and Taunton Canal are entitled to take possession of the property, the defendants say that the proprietors of the Bridgwater and Taunton Canal are so entitled under a clause in the 51 G. 3, c. 168. Now, without considering whether they were bound by that clause to proceed within three calendar months (a point upon which I have not yet made up my mind, though at present the inclination of my opinion is that they were), it is quite clear that they could only acquire the right by the means pointed out by that act of parliament; and those means are, by the inquisition of a jury summoned by warrant from the commissioners, to appear before the justices at the court of quarter sessions. If the company, therefore, have let slip the opportunity of acquiring the property by those means during the time that that act was in force, and when the commissioners had the power of issuing a warrant, they could not do it afterwards,

when the power of the commissioners had been taken away by the subsequent statute of the 5 G. 4. Their right to acquire the property in the river Tone, even if they had it, after three months, was altogether taken away by the latter sta-They, therefore, acquired no right by means of an *inquisition [*393] taken before the sheriff, and had, consequently, no right to take possession of the property; and as the plaintiffs can maintain an action in their corporate name they are entitled to a verdict. Judgment for the plaintiffs.

The Company of Proprietors of the BRIDGWATER and TAUNTON Canal Navigation v. JOHN BLUETT.

By an act of the 44 G. 3, for making the river Tone navigable, conservators were appointed, and all powers given by two former acts of parliament to the Bishop of Bath and Wells and the justices of the peace for the county of Somerset, to examine, state, correct, and allow the accounts of the conservators of the river Tone, were repealed; and instead of such powers, it was enacted, that the accounts of the conservators should be made up to the 24th of June yearly, and that the accounts so the conservators should be made up to the 24th brought before the Bishop of Bath and Wells, or any five of the said justices without the said bishop, between the 1st day of August and the then next general quarter sessions of the peace to be held for the county of Somerset, at a place appointed by the bishop, or any five of the justices without the bishop, then and there to be examined, stated, and corrected, and the accounts, whether or not the same should have been examined and corrected by the said bishop and justices, were to be brought before the bishop and justices, or any five of the justices in the absence of the bishop, at the opening of the court of the next quarter sessions to be held after the 1st day of August yearly; and the bishop and justices at the said sessions, or any five of the justices in the absence of the bishop, were required to examine. state, and allow the said accounts of the conservators, and that allowance was to be final and conclusive: Held, that the bishop and justices were bound to examine, state, and allow the accounts at the first sessions, and had no authority to adjourn the examination to a

subsequent sessions.

subsequent sessions.

subsequent sessions.

subsequent sessions.

subsequent sessions. Semble, of holding lands, but for the purpose of receiving the tolls.

Assumpsit for money had and received by the defendant to the use of the plaintiffs, and upon an account stated between them. Plea, general issue, non assumpsit, upon which issue was joined. The defendant paid into court 2921. 9s. 8d. upon the whole declaration. At the trial before Gaselee, J., at the Lent assizes for the county of Somerset 1828, a verdict was found for the plaintiffs, damages 5161. 14s. 10d. beyond the sum paid into court, subject to the opinion of this Court on the following case:—
The case then set out the statute of 10 & 11 W. 3 as *in the last case.

The only clause material to the present case is the following:—

And it was thereby enacted, that a true and perfect account of all expenses, costs, and charges disbursed or to be disbursed by the conservators, or any of them, or by their order, and of all money by them or any of them, or by any other by their appointment, to be received for the passage of boats, barges, or vessels on the said river, or by any other means for the making and maintaining the said passage and river navigable, and repairing and making bridges over the said river, or anything relating thereto, should be duly kept and entered in a book or books to be provided and kept by the said conservators for that purpose, and that every year the said books and account, and the vouchers for the same, should be brought before the Lord Bishop of Bath and Wells and the justices of the peace for the said county, or any five or more of them, at such time and place within the town of Taunton, or ten miles thereof, as by them, or any three or more of them, should be appointed, then and there to be examined, stated, corrected, and allowed. And the bishop and justices, or any five or more of them, were thereby empowered to examine, state, correct, and allow the said accounts, and to appoint and make distribution of all that should have been received, that should not have been laid out, or ordered to have been laid out, for the making and keeping the river navigable, or the making or repairing bridges, wears, turn

pikes, ways, and passages, and other the ends and purposes aforesaid, to and amongst the said conservators, their executors, administrators, or assigns, in proportion to the money advanced by them respectively, in the first place, for the payment and *discharge of the interest, after the rate aforesaid, due to every of them for the money by each of them advanced; and if there was, and as often as there should be, any surplus, in the like proportion for the lessening and in discharge of the principal so advanced by them respectively, until the whole principal and interest should be paid and discharged; which account of the receipts of every year should end and be made up to the 24th day of June inclusive, and should be examined, stated, corrected, and allowed, and distribution thereupon made by the said bishop and justices, or any five or more of them, at the next general quarter sessions of the peace to be holden for the said county of Somerset after the 24th day of June. And that for the better preserving and keeping the river Tone navigable when made so, and for the making the same navigable, there should always be conservators of the said river.

The conservators were also empowered by the act of W. 3 to appoint servants and officers to manage estates which should or might be given to or purchased by the said conservators, and constitute receivers of duties granted by that act, to be taken and levied on boats, barges, and vessels passing on the said river, and also a cashier or treasurer, and to take security of them for their true and faithful account and payment of the said money, from time to time as they should be directed by the conservators pursuant to that act, and the same receivers, cashiers, treasurers, officers, agents, and servants to remove, and others to place in their room at their good pleasure.

The conservators proceeded, soon after the passing of the said act, to execute the powers thereby given to them, and in the same year by such inquisition and *396] *order of a jury as therein mentioned, became seised in fee of divers lands for the purposes of the said act, and erected divers locks, pounds, gates, toll-houses, and other works upon them for those purposes, and were so seised and possessed thereof for those purposes at the several times hereinafter mentioned, and for more than twenty years before, the same being parts of the closes, locks, pounds, gates, toll-houses, and other works therein mentioned. The conservators having under this act much improved the navigation of the said river, but not having rendered it completely navigable at all times, the act of 6 Anne was passed. The case then recited that act as in the former case.

By the statute 44 G. 3, reciting the two former statutes, and that the conservators had expended considerable sums in making the river navigable, and that doubts had arisen on the construction of some of the provisions of the aforesaid acts relating to the examination, settlement, and allowance of the accounts of the conservators, it was enacted, that all powers and authorities given or granted to or vested in the Bishop of Bath and Wells for the time being, and the justices of the peace for the county of Somerset for the time being, or any of them, by virtue of the said acts of the 10 & 11 W. 3 and 6 Anne, or either of them, to examine, state, correct, and allow the accounts of conservators, were repealed, and the accounts of the conservators were thereby directed to be made up to the 24th day of June yearly, and the accounts so made up and the vouchers for the same if and when required by the bishop and justices, or any five of the justices without the bishop, were to be brought before the bishop and justices, or any five of the justices without the bishop, between the 1st day of *August and the then next general quarter sessions of the peace to be holden in and for the said county, at such place within the said town of Taunton, or ten miles thereof, as by the bishop and justices, or any five of th justices without the bishop, should be appointed, then and there to be examined, stated, and corrected; and the accounts so made up by the conservators, whether or not the same should have been examined and corrected by the bishop and Justices, or any of them, as therein last before mentioned, were to be brought before the bishop and justices, or any five of the justices in the absence of the bishop, at the opening of the court of the then next general quarter sessions of the peace to be held in and for the said county, after the 1st day of August yearly, there to remain during the whole of that sessions for the inspection of any persons desiring the same, without fee or reward, and the bishop and justices at the said sessions, or any five of the justices, in the absence of the bishop, were thereby authorized and required to examine, state, and allow the accounts of the conservators; and the said accounts being so examined, stated, and allowed as in that act therein last before mentioned, were to be final and conclusive unless some accident, error, or mistake should appear therein, which error or mistake might be reviewed and corrected in the said accounts of the next succeeding year, but not afterwards, and except in case of such error or mistake, the balance appearing to be due to the conservators on each respective account so examined, stated, and allowed was always to form and be the basis of the then next succeeding account. And it was thereby further enacted, that any person thinking himself aggrieved by any conviction, order, judgment, or determination of *any justice or justices of the peace made in pursuance of that act, might within six calendar months after such order, judgment, or determination should have been made, first giving twenty days notice of the complaint to the person or persons against whom the same was intended to be made, complain to the justices of the peace at their general quarter sessions to be held in and for the said county of Somerset, and that the said justices should hear and determine the matter of such complaint in a summary way." The 51 G. 3 and the 5 G. 4 were then set out as in the former case.

The plaintiffs at different times, some between 1811 and 1822, and some in the latter year, contracted and agreed with the several and respective persons, proprietors of shares or parts of shares of the debt then due from, and for and in respect of the said navigation (some of whom were conservators), for the absolute purchase of their several and respective estates, rights, and interests in

and to the same shares, or parts of shares.

The plaintiffs having purchased the debt due from the river Tone navigation, and being the proprietors of all the shares for moneys advanced for making and keeping the river Tone navigable, have, for six years last past, received the annual interest thereof, and so much of the principal money as the conservators have been annually enabled to discharge out of the receipts of the same navigation. And the conservators of the river Tone have, as they are required to do by the said acts, annually exhibited a statement of their account of the receipts and payments, from and for the navigation to the 24th of June in every year up to Midsummer 1827.

By the statement exhibited by the conservators under *the said acts [*399] of their account of such receipts and payments from the 24th of June, 1822, to the 24th of June, 1823, it is alleged as follows:--" The river is debtor to principal moneys due and in arrear on the 24th of June, 1822, to the Bristol and Taunton Canal Company (they being proprietors of all the shares), for moneys advanced for making and keeping the said river Tone navigable, which proprietors are assignees of the conservators;" and by the statements exhibited by the conservators of their accounts from the 24th of June, 1824, to the 24th of June, 1825, it is alleged as follows:—"The Bridgwater and Taunton Canal Company are entitled to all the money due on the Tone;" and also as follows, "principal moneys due and in arrear to the 24th of June, 1824, to the Bridgwater and Taunton Canal Company, they being proprietors of all moneys advanced for making and keeping the said river Tone navigable, which proprietors are assignees of the conservators."(a) At the opening of the general quarter sessions of the peace for the county of Somerset, Michaelmas 1827, the defendant as cashier and treasurer of the conservators, delivered to the said Court an account, as and for the annual account of the conservators under the said acts, in which there was a charge of 1636l. for disbursements and salaries from the

⁽a) Several of these accounts had affixed to them the common seal of the company.

24th of June, 1826, to the 24th of June, 1827. In that charge were contained a sum of 97l. 15s. for throwing out of the river 755 tons of gravel; 162l. 10s., the costs of an ejectment brought by Mr. Southwood; 37l. 7s. 1d., costs of a prosecution against one Wiltshire; 16l. 7s. 9d., similar costs against one Good*400] land; and 300l. paid on *account of certain law proceedings between the conservators of the Tone, and the Bridgwater and Taunton Canal Company, then pending. Which account of the said conservators of the river Tone, so delivered at the opening of the said sessions, remained during the whole of the sessions for the inspection of any person desiring the same; and that Court deeming it expedient to adjourn over and postpone the examination, correction, and allowance of the said account, until the first day of the then next general quarter sessions of the peace to be holden at the city of Wells on the 14th January then next, adjourned and postponed the same accordingly, but there was no adjournment of the sessions.

At the general quarter sessions of the peace for the county of Somerset, on the 14th day of January, 1828, the Court, upon due consideration and examination of the accounts so made up by the said conservators, disallowed items of disbursement amounting to 516l. 4s. 10d. And it was by the said Court ordered, that the said sums should be deducted from the said account of disbursements, amounting to 1636l. 8s. 7d., thereby reducing the same to the sum of 1120l. 3s. 9d., and the said accounts were, at the said last-mentioned general quarter sessions of the peace, examined, corrected, stated, and allowed by five of his majesty's justices of the peace of the county of Somerset. The accounts were then set out, in which the sum for disbursements was reduced to 1120l. 3s. 9d. Credit was given for 1928. 18s. 3d. tolls received, 10l. for a year's rent, and the whole sum remaining due to the Bridgwater and Taunton Canal Company was 41381. 15s. 2d. This account was signed at the said last-mentioned sessions by *401] five of his majesty's justices of the peace for the county of Somerset, and a *duplicate thereof was made, and is kept amongst the records of the sessions of the peace of the said county, and the said justices at the said lastmentioned sessions did appoint and make distribution as follows of the sum of 808l. 14s. 6d., being the balance of the said sum of 1928l. 18s. 3d. so received for tolls, and 10l. for rent as above stated, after deducting the said sum of 1120l. 3s. 9d. (the amount of the account of disbursements as also above stated), being all that had been received which had not been laid out for the making the said river navigable, viz. the sum of 280l. 0s. 11d. in payment and discharge of one year's interest at 6 per cent. of the said principal sum of 4667l. 8s. 9d. due on the said 24th June last to the Bridgwater and Taunton Canal Company; and the sum of 5281. 13s. 7d., residue of the said sum of 8081. 14s. 6d., to be paid to the Bridgwater and Taunton Canal Company towards lessening the principal stated to be due to them as aforesaid; and the said justices did, at the said lastmentioned sessions, also state and allow the sum of 41381. 15s. 2d. to be the principal sum due on the 24th of June then last, to the Bridgwater and Taunton Canal Company after lessening the principal as aforesaid.

The said conservators thinking themselves aggrieved by the said order and determination of the said justices, and intending to complain thereof against the said plaintiffs, and to appeal therefrom to the justices of the sessions hereinafter next mentioned, did give due notice of such complaint and intention to the said plaintiffs, and afterwards and before the commencement of this suit, at the next general quarter sessions of the peace to be held for the said county, complained thereof against the said plaintiffs, and appealed against the same, which said *402] appeal and complaint was appeared to by the said *plaintiffs, and remained pending and undetermined at the time of the trial of this cause.

If the Court should be of opinion that the plaintiffs were entitled to receive the above-mentioned sum of 516*l*. 4s. 10d., and that the present action can be maintained for the same against the defendant as one of the conservators, or as cashier or treasurer to the conservators, then this verdict is to stand, otherwise a nonsuit to be entered

Manning for the plaintiffs. The justices had authority under the 10 & 11 W. 3 to settle the accounts. Here the accounts have been stated and allowed by the justices, and a certain sum is found to remain due to the plaintiffs. It will be said that the clause giving the appeal controls the former relating to the accounts. If that be so, there will be two inconsistent provisions. The one which says that the decision of the justices shall be final, the other allowing an appeal against that decision; but the appeal clause does not relate to the allowance of accounts at the sessions. The power to allow the accounts at sessions is a species of visitatorial power. The appeal is given against convictions and other acts of justices when exercising their ordinary jurisdiction. The act requires that notice of appeal be given to the justices; how could that be if they were to hear the complaint against themselves? In The King v. The Conservators of the River Tone, 8 T. R. 286, it was held that under the 10 & 11 W. 3 the sessions in one year had no authority to revise or correct any errors in the accounts upon which a balance was struck and allowed at the sessions in any preceding year. It is *true that decision took place before the statute 44 G. 3, but the two statutes are the same as far as relates to that point,

and therefore, the decision is applicable to this case.

Then the order made by the justices pursuant to the act of parliament, operates as a statutory declaration that the person holding the money holds it to the use of the party beneficially entitled to it. The defendant, as cashier and tressurer, must be taken to have the money in his hands, for it was his duty to receive it. It may be said that, assuming the money to be due to the plaintiffs, it is due, not from the defendant, but from the conservators of the river Tone, and therefore that this action is not maintainable. It must be conceded that the conservators by their corporate name of the conservators of the river Tone may sue for any injury done to their real property. But they are a corporation for the special purpose of holding lands, and not for the purpose of receiving these tolls. The term corporation in its largest sense applies to individuals or societies invested by law with a political character and personality, wholly distinct from their natural capacity, and chiefly intended as the means of perpetuating in succession their rights and their duties, 1 Woodeson, 431. Cudding v. Eastwick, 1 Salk. 193, shows that a municipal corporation, invested with the local government, have the incidental power of making by-laws to bind strangers.(a) If the conservators had been a corporation *for general purposes, that power was unnecessary; and therefore the giving of the power shows that they were a corporation for certain specific purposes only. It is clear, however, that there may be a corporation for special purposes, as in the case put in Vin. Abr. tit. Corporation (F), pl. 4, of the grant of lands by the king to the men or inhabitants of D. hæredibus et successoribus suis, rendering a rent, for anything touching these lands, this is a corporation, but not to other purposes. If this was a general corporation, and there were no restriction on their power of alienation, they might alienate their lands, and yet this would defeat the object of their incorporation. A corporation, therefore, may be a corporation for limited purposes, and then it will have no other powers but such as those limited purposes require. In Co. Litt. 9 a, it is said, "a chantry priest incorporate took a lease to him and his successors for a hundred years, and after took a release from the lessor to him and his successors; and it was adjudged that by the release he had but an estate for life, for he had the lease in his natu ral capacity, for it could not go in succession, and 'his successors' gave him no estate of inheritance for want of these words 'his heirs.' If the king by his letters patent giveth lands decano et capitulo, habendum sibi et hæredibus et successoribus suis; in this case, albeit they be persons in their natural capacity to them and their heirs, yet because the grant is made to them in their politic capacity, it shall enure to them and their successors. And so if the king do grant

⁽a) In Dodwill v. The University of Oxford, 2 Vent. 34, control, it is said per Curiam, "Without act of parliament, or express prescription, a corporation cannot make a by-law which are not of the body."

lands to J. S. habendum sibi et successoribus sive hæredibus suis, this grant shall enure to him and his heirs." And the reason given in a note to that passage is, that a chantry priest *was a corporation sole, which regularly could not take in succession chattels real or personal, in possession or action, though a corporation aggregate may, and 4 Coke, 65, Hobart, 64, are In Co. Litt. 94 b, it is laid down, that if lands be given to a dean and chapter, or any other corporation aggregate of many, the gift must be by deed; and in the note (99) to this passage it is said, "that in general a corporation aggregate cannot take away or pass an interest in land, or even do any acts of importance without deed; though there are several exceptions to the rule." Assuming, however, that the conservators are a corporation for the purpose of receiving the tolls; at all events, the action lies against the defendant as cashier or treasurer. In Fitzh. N. B. 121 F. (d) it is said, that if a man have a patent from the king to have a certain sum for term of years, or for life, out of the customs of London, and thereupon he have a liberate to the customer to pay him, which he delivereth to the customer, at which time the customer hath enough in his hands to pay him; now, by the delivery of the liberate, and the assets in the hands of the customer, the customer is debtor unto him, and he shall upon this matter have debt against him; and in the note to this it is said, "And so if after delivery of one tally, another is delivered, it lies for that first delivered, and 21 H. 6, and Fitzherbert's Abridgment, Debt., pl. 45, is cited for that. In Priddy v. Rose, 3 Mer. 102, it was held that a suit may be maintained against a public officer, having in his hands money issued by government for the use of an individual, for the recovery of such money, although there is no privity of contract between them.

*R. Bayly, contrd. The conservators of the river Tone are a corpora-*406] tion not merely for the purpose of holding lands, but for the purpose of receiving the tolls. It is material to consider what they are required to do by the act of parliament: they are to dig the land, to scour the river, and keep it clear, and they are to continue conservators for ever. Part of the tolls is received in respect of the use of the land taken for the purposes of the navigation. In Rolle's Abr. tit. Corporation, 513, (F) l. 22, it is laid down, that if the king grants to the men of Islington to be discharged of toll, they are a good corporation to that intent, but not to purchase lands. Now, if that makes the men of Islington a corporation to be discharged of tolls, the conservators here must be a corporation for the purpose of enjoying the tolls. The fee simple of the land is vested in the conservators, and for the use of that land they are to receive tolls. Assuming, therefore, that they are a corporation for a special purpose only, they are so for the purpose of receiving these tolls. But, secondly, they are not a corporation for a special purpose only. As to the argument derived from the express power given them to make by-laws, that power is introduced from too great caution, for that power occurs in almost all charters, although it is incident to all corporations. But the defendant is not liable to be sued, unless it be shown that the money came to his hands. The account was not rendered by him, but by the conservators. [BAYLEY, J. He delivered it as cashier and treasurer.] Buller v. Harrison, Cowp. 565, shows, that if money be paid over by the agent, he is not liable to an action. Here the *defeudant, by order of his principals, paid over the money to the different persons mentioned in the account. The plaintiffs are bound to show, not only that the money was in the defendant's hands, but that he had authority to pay it over to them, Grant v. Austen, 3 Price, 58.(a) This action, therefore, is not maintainable, unless it be shown that the defendant had the money in his hands for the specific purpose of paying it over to the plaintiffs. Another objection to the action is, that the justices had no power to do what they have done; and if so, no action can arise upon their settlement of the accounts. The bishop and justices are required at the said sessions to examine, state, and allow the accounts

of the conservators. They were bound, therefore, to determine all matters relating to the accounts at the next quarter sessions after the accounts were delivered in. Here the sessions were not adjourned, but the question as to the accounts was adjourned. Besides, the act is not an act of the quarter sessions, but of the bishop and justices, or the five justices only if the bishop does not appear. It does not even appear that the same five justices were present at the next sessions, when the accounts were settled.

Manning in reply. The conservators are not a corporation for the purpose of enjoying the tolls; for, by the statute, the tolls are to go to the executors of the conservators. As to the cases which have been cited as to actions against agents for money had and received, the answer is, that if the agent pays over after notice, he is liable, Edwards v. Hodding, 5 Taunt. 815; and here the defendant had notice by the act of parliament of the *claim of the plaintiffs. Rex v. The Justices of Wilts, 13 East, 352, is an authority to show that the court of quarter sessions might adjourn the matter to the next sessions. The accounts show that there were certain tolls received and certain disbursements made; some of those were disallowed, the balance, therefore, must be considered a sum of money still in the defendant's hands.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the Court.

The question in this case is, whether the defendant is personally liable to the plaintiffs in an action for money had and received, for any greater sum than 2921. 9s. 8d., the money paid into court.

It was contended on behalf of the plaintiffs that he is, because the conservators of the river Tone are not a corporation for the purpose of receiving the tolls and accounting for them; and, therefore, a liability attaches to the individual conservators who receive, or their treasurer, to account and pay over the surplus fund due from the conservators under the provisions of 44 G. 3.

By that act the conservators are the persons who are to account, and the receiver is their servant. The consequence of making the receiver personally liable would be to give a remedy against him and his effects, and to render him liable for costs, though he might have acted only in obedience to the commands of the conservators.

This Court decided in the recent case of the Conservators of the River Tone v. Ash, that those plaintiffs were, by the 10 & 11 W. 3, made a corporation for the purpose of acquiring and holding lands, in order to *carry into effect the intended improvements of the navigation, and could maintain an action in their corporate character for an injury to such lands; and it seems to follow, that, in the same character, they are entitled to receive the profits of those lands, and that the tolls for which an account is to be rendered, are in part, if not altogether, to be considered as such profits.

But supposing it to be otherwise, and that the conservators are not a corporation in this respect, another questior arises, whether the justices at sessions had any power to adjourn and postpone the examination and allowance of the accounts, to a subsequent sessions, as has been done in this case, and we think that they had not. The power to allow or disallow is not given to the sessions as a court; but it is a special authority given to the bishop and justices, or five justices present at the first general quarter sessions of the peace after the first day of August yearly; and the effect of the adjournment is, to devolve the authority upon the bishop and justices, or five justices who may happen to be present at a subsequent sessions, thus changing the persons to whom, by the act of parliament, the jurisdiction on this subject is intrusted. If it had appeared that the same five justices present at one sessions had adjourned the consideration of the account, and were present at the second sessions, and they, and they only, ultimately decided upon the accounts, it might have been otherwise.

Judgment for the defendants.

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*SERVANTE and Others v. JAMES.

Coverant by the master of a vessel with the several part-owners and their several and respective executors, administrators, and assigns, to pay certain moneys to them, and to their and every of their several and respective executors, administrators, and assigns at a certain banker's, and is such parts and proportions as were set against their several and respective names. Held, a several covenant, upon which each covenantee must sue severally in respect of his several interest, and that they could not maintain a joint action.

COVENANT by E. Servante, R. James, H. Stephens the younger, T. Britton, and J. Bull the younger (survivors of W. Baker, T. Read, R. Russell, and W. Slocombe), on articles of agreement made between the plaintiffs and the other parties since deceased, and the defendant; whereby, after reciting that defendant was then commander of a vessel called the Lord Hobart, employed in the service of his majesty's postmaster-general, and that the several persons whose names and seals were thereunto subscribed and affixed were respectively owners of the said vessel in the several parts, shares, and proportions set against their respective names, it was covenanted, concluded, and agreed by and between the said parties and the defendant in manner and form following; that is to say, that he, the defendant, his executors or administrators, should and would from time to time, and at all times thereafter during so long time as the said ship Lord Hobart should be employed in the service of his majesty's postmaster-general, and he, the defendant, should continue to be the commander of the said ship, well and truly allow and pay, or cause to be paid, unto the owners or proprietors of the said ship, and to their and every of their several and respective heirs, executors, administrators, and assigns, the yearly sum of 480% of lawful money of Great Britain, or such other sum of money as should be allowed to the owners of the said ship by his majesty's postmaster-general for the time being for and as the hire of *the said ship, to commence from the 25th day of August then instant, and to be paid to them by half-yearly payments, at the bankinghouse of Messrs. Banfield and Co., bankers, Falmouth, or such other bank as the said defendant and the said several and respective owners should at any time thereafter appoint, and in such parts and proportions as were set against their several and respective names, and should and would well and truly pay or cause to be paid half-yearly, and at such banking-house as aforesaid, unto the owners or proprietors of the said ship, and to their several and respective executers, administrators, and assigns, in the parts and proportions aforesaid, one full and equal third part of the amount of the freight of all such coin, mouey, bullion, and other things for which freight should be paid, as should be from time to time carried and conveyed in such ship during so long time as she should be so employed, and he, the said defendant, should continue commander of her as aforesaid. And it was thereby mutually covenanted, concluded, and agreed upon by and between the parties thereto, that when and in case the said ship should be discharged from the service of his majesty's postmaster-general, or he, the said defendant, should die or resign, or otherwise give up or quit the said ship, that then, or in either of the said cases, the cables, anchors, sails, rigging, and other the tackle, apparel, and materials belonging to the said ship, should be valued and appraised by two sets of tradesmen, one set to be chosen by and on the behalf of the said defendant, his executors, administrators, or assigns; and the other set to be chosen by or on the behalf of the said owners or proprietors of the said ship, their executors, administrators, or assigns; and the difference *412] of the value *between such appraisement and the original cost of such cables, anchors, sails, rigging, and all other the tackle, apparel, and ma terials belonging to the said ship, or the cost of the like articles if they were to be purchased new at the time of such valuation and appraisement as aforesaid, should be made good to the said owners or proprietors, their executors, adminis tritors, and assigns, according to their shares and proportions aforesaid, by the said defendant, his executors, administrators, and assigns, and which he, the said defendant, did thereby covenant and promise for himself and them to make Vol. XXI.—23

SENTENTE T. JAMES. M. I. 1020. see a sering immediately after such valuation should have be-Baker, T. Read, R. Russell, and F. and the said pointifs, then and there, to wit, on the tely separated their names and affind the sections thereto, in manner following: to Lames Et Separa the younger, W. Baker, T. Br.: mt J Ball the rounger, W. Baker, T. Britanger, as respectively being each it the state of the said ship, the said W. Slocomic. said said W. Sloomite. The professional translation of the profession of the The became uses proceeded to assign as breat ne non-harment of the movey allowed for the resmany was defendant on the difference beremake when defendant gave up the commit a us maner situated by the *articles of agree par learner sot pure sot pure s The action is not maintainable by in no men are a restant being several. All the law a den n increases being several. All the law to be the principal fearly established is this the no new parties to the nation of the nation o The processes is just, all the coveries to the processes to parties to the action are to be in marries is junt, all the covenantees must jit is a veral, the action must be sum! are not suffice to make a joint covenant. If one of some of the vessel whose proportion of the of the times whose proportion of the money had a There there can be not one had died, his executors might be Lee its a expressly in point. There the hard the several part-owners which to the several part-owners "that after the last the several part-owners "that after the last the several should be made out to the several part-owners "that after the last the several should be made out to the several should be sh with the several part-owners "that after with the several part-owners "that after with a should be made out of the contract at the divided according to the reas should be made out of the country and the divided according to the property and a charges and expenses;" and it was the pears should be divided according to the proper and charges and expenses;" and it was belief the proper is a treach of this agreement was proper is properly had done The practice haid down in Eccleston c. Clipsham carring to "that principle this action is not be coveraged." n the eventual is joint. The whole sum due n the eventual is joint. The whole sum doe that is to be done bank, or if any other are product is joint. The whole sum due the product is to be done by all the covenantes is in a section is rightly required to be done by all the covenantes is in the section of the sect that is to be done by all the covenantees joint. It be exclusion of the others; his date the exclusion of the others; his duty was to particular therefore. of all, and the banker was the agent to make a therefore, was in its nature joint, and in the case of Ouston . Oak was was the agent to make a sent upon which the case of Ouston r. Ogle proor Ouston r. Ogle promote must be judgment for the defendant made with the several part-owner. re made with the several part-owners of the resci made with the several part-owners of the reservors, administrators, and assigns; steed pay the right to sue were in all the parisipay the money is not to pay it to the right to sue were in all the parisipay the money is not to pay it to the right to sue were in all the parisipay the money is not to pay it to the right to sue were in all the parisipay the money is not to pay it to the right to sue were in all the parisipay. pay the money is not to pay it to the osner pay the money is not to pay it to the other and every of their several and reportions as the parts and proportions as the parts. He and their and every of their several and rejecting the name. He was not to pay it so that the name of the death of name of the covenant his personal representative might the executor of the survivor only could main the name of the nam

*their several and respective executors, &c. Again, if the covenant were joint, a release by any one would defeat an action brought by all, an enience that the several parties might wish to avoid. For these reasons a that the language of the covenant is several, and that the interests of the are several, and, consequently, that the action brought by all jointly; be maintained.

TLEDALE, J. I am of the same opinion. The rule laid down in Eccle. Clipsham is not disputed; and I think that the interest of the parties is I; each is entitled to a separate share of the profits of the ship, and ought

able to claim his share separately.

EKE, J. The only question is, Whether the interest is joint or several; seems to me quite clear that it is several. The money was to be paid into inkers, in several proportions, to the separate account of each part-owner. and been paid to their joint account, all must have concurred in any order we it out; that would have been very inconvenient, and contrary to the mt intention of the parties.

Judgment for the defendant.

*WALKER v. MOORE and Another.

ring contracted with B. for the purchase of a real estate, the vendor acting bona fide, vered an abstract, showing a good title; and A., before he examined it with the original sequent examination of the abstract with the deeds A. discovered that the title was setive, and thereupon the sub-purchasers refused to complete their purchases and he seed to complete his purchase from B., and brought an action, wherein he claimed as tages the expense which he had incurred in the investigation of the title; the profit twould have accrued from the ressle of the property; the expense attending the ressle; I the sums which he was liable to pay to the sub-contractors for the expenses incurred by m in examining the title: Held, that he was entitled to recover only the expenses that he incurred in the investigation of the title, and nominal damages for the breach of contract, so fraud could be imputed to the vendor.

HIS cause came on to be tried at the Spring assizes for Lincoln 1829, when as agreed that a verdict should be entered for the plaintiff, damages 6000l., ject to the award of a barrister, who was to be at liberty to order for whom for what sum the verdict should be finally entered, and was to state specially his award the distinct grounds of damage, if any; it being left to this Court imately to determine for what sum a verdict should be entered for the plain-, or whether a nonsuit should be entered. The arbitrator directed that the rdict for the plaintiff should stand for 17221, and added the following stateant:—This was an action of assumpsit on an agreement for the sale of certain rms and messuages in the county of Lincoln. The declaration stated that by certain memorandum of agreement in writing, dated the 5th July, 1827, in maideration of 8000l., the defendants contracted to convey on or before the 6th sy of April, 1828, to the plaintiff, or to whom he should appoint, all those four adivided parts, and also the life estate and interest by nonclaim of the defendate for and during the life of Henry Wheate in the remaining fifth part in the memises above mentioned; and the plaintiff agreed to pay the sum of 8000l. on the said 6th of April, upon *receiving a conveyance and a good legal and marketable title being made to the premises at the expense of the defendmia, the abstract of which was to be delivered to the plaintiff or his appointees within one month after the date of the said memorandum of agreement. It was then averred that the plaintiff was ready to pay the purchase-money at the time Pecified, on receiving a conveyance and a good title made out to the premises, but that no such good title and no proper conveyance was made by the defendhalls to the plaintiff, or to any other person appointed by him, whereby plaintiff had lost the profits which might have accrued to him from having a good and of the conservators. They were bound, therefore, to determine all matters relating to the accounts at the next quarter sessions after the accounts were delivered in. Here the sessions were not adjourned, but the question as to the accounts was adjourned. Besides, the act is not an act of the quarter sessions, but of the bishop and justices, or the five justices only if the bishop does not appear. It does not even appear that the same five justices were present at the next sessions, when the accounts were settled.

Manning in reply. The conservators are not a corporation for the purpose of enjoying the tolls; for, by the statute, the tolls are to go to the executors of the conservators. As to the cases which have been cited as to actions against agents for money had and received, the answer is, that if the agent pays over after notice, he is liable, Edwards v. Hodding, 5 Taunt. 815; and here the defendant had notice by the act of parliament of the *claim of the plaintiffs. Rex v. The Justices of Wilts, 13 East, 352, is an authority to show that the court of quarter sessions might adjourn the matter to the next sessions. The accounts show that there were certain tolls received and certain disbursements made; some of those were disallowed, the balance, therefore, must be considered a sum of money still in the defendant's hands.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the Court.

The question in this case is, whether the defendant is personally liable to the plaintiffs in an action for money had and received, for any greater sum than

2921. 9s. 8d., the money paid into court.

It was contended on behalf of the plaintiffs that he is, because the conservators of the river Tone are not a corporation for the purpose of receiving the tolls and accounting for them; and, therefore, a liability attaches to the individual conservators who receive, or their treasurer, to account and pay over the surplus fund due from the conservators under the provisions of 44 G. 3.

By that act the conservators are the persons who are to account, and the receiver is their servant. The consequence of making the receiver personally liable would be to give a remedy against him and his effects, and to render him liable for costs, though he might have acted only in obedience to the commands

of the conservators.

This Court decided in the recent case of the Conservators of the River Tone v. Ash, that those plaintiffs were, by the 10 & 11 W. 3, made a corporation for the purpose of acquiring and holding lands, in order to *carry into effect the intended improvements of the navigation, and could maintain an action in their corporate character for an injury to such lands; and it seems to follow, that, in the same character, they are entitled to receive the profits of those lands, and that the tolls for which an account is to be rendered, are in part, if

not altogether, to be considered as such profits.

But supposing it to be otherwise, and that the conservators are not a corporation in this respect, another question arises, whether the justices at sessions had any power to adjourn and postpone the examination and allowance of the accounts, to a subsequent sessions, as has been done in this case, and we think that they had not. The power to allow or disallow is not given to the sessions as a court; but it is a special authority given to the bishop and justices, or five justices present at the first general quarter sessions of the peace after the first day of August yearly; and the effect of the adjournment is, to devolve the authority upon the bishop and justices, or five justices who may happen to be present at a subsequent sessions, thus changing the persons to whom, by the act of parliament, the jurisdiction on this subject is intrusted. If it had appeared that the same five justices present at one sessions had adjourned the consideration of the account, and were present at the second sessions, and they, and they only, ultimately decided upon the accounts, it might have been otherwise.

Judgment for the defendants.

*4107

*SERVANTE and Others v. JAMES.

Covenant by the master of a vessel with the several part-owners and their several and respective executors, administrators, and assigns, to pay certain moneys to them, and to their and every of their several and respective executors, administrators, and assigns at a certain banker's, and in such parts and proportions as were set against their several and respective names. Held, a several covenant, upon which each covenantee must sue severally in respect of his several interest, and that they could not maintain a joint action.

COVENANT by E. Servante, R. James, H. Stephens the younger, T. Britton, and J. Bull the younger (survivors of W. Baker, T. Read, R. Russell, and W. Slocombe), on articles of agreement made between the plaintiffs and the other parties since deceased, and the defendant; whereby, after reciting that defendant was then commander of a vessel called the Lord Hobart, employed in the service of his majesty's postmaster-general, and that the several persons whose names and seals were thereunto subscribed and affixed were respectively owners of the said vessel in the several parts, shares, and proportions set against their respective names, it was covenanted, concluded, and agreed by and between the said parties and the defendant in manner and form following; that is to say, that he, the defendant, his executors or administrators, should and would from time to time, and at all times thereafter during so long time as the said ship Lord Hobart should be employed in the service of his majesty's postmaster-general, and he, the defendant, should continue to be the commander of the said ship, well and truly allow and pay, or cause to be paid, unto the owners or proprietors of the said ship, and to their and every of their several and respective heirs, executors, administrators, and assigns, the yearly sum of 4801. of lawful money of Great Britain, or such other sum of money as should be allowed to the owners of the said ship by his majesty's postmaster-general for the time being for and as the hire of *the said ship, to commence from the 25th day of August then instant, and to be paid to them by half-yearly payments, at the bankinghouse of Messrs. Banfield and Co., bankers, Falmouth, or such other bank as the said defendant and the said several and respective owners should at any time thereafter appoint, and in such parts and proportions as were set against their several and respective names, and should and would well and truly pay or cause to be paid half-yearly, and at such banking-house as aforesaid, unto the owners or proprietors of the said ship, and to their several and respective executors, administrators, and assigns, in the parts and proportions aforesaid, one full and equal third part of the amount of the freight of all such coin, money, bullion, and other things for which freight should be paid, as should be from time to time carried and conveyed in such ship during so long time as she should be so employed, and he, the said defendant, should continue commander of her as aforesaid. And it was thereby mutually covenanted, concluded, and agreed upon by and between the parties thereto, that when and in case the said ship should be discharged from the service of his majesty's postmaster-general, or he, the said defendant, should die or resign, or otherwise give up or quit the said ship, that then, or in either of the said cases, the cables, anchors, sails, rigging, and other the tackle, apparel, and materials belonging to the said ship, should be valued and appraised by two sets of tradesmen, one set to be chosen by and on the behalf of the said defendant, his executors, administrators, or assigns; and the other set to be chosen by or on the behalf of the said owners or proprietors of the said ship, their executors, administrators, or assigns; and the difference of the value *between such appraisement and the original cost of such cables, anchors, sails, rigging, and all other the tackle, apparel, and ma terials belonging to the said ship, or the cost of the like articles if they were to be purchased now at the time of such valuation and appraisement as aforesaid, should be made good to the said owners or proprietors, their executors, administrators, and assigns, according to their shares and proportions aforesaid, by the said defendant, his executors, administrators, and assigns, and which he, the said defendant, did thereby covenant and promise for himself and them to make Vol. XXI.—23

good and pay accordingly, immediately after such valuation should have been made. Averment, that the said William Baker, T. Read, R. Russell, and W. Slocombe, since deceased, and the said plaintiffs, then and there, to wit, on the day and year first aforesaid, respectively subscribed their names and affixed their seals to the said articles as executing parties thereto, in manner following; that is to say, the said R. James, H. Stephens the younger, W. Baker, T. Britton, T. Read, R. Russell, and J. Bull the younger, as respectively being each the owner of one sixteenth part or share of the said ship, the said W. Slocombe, as the owner of two sixteenth parts or shares thereof, and Elizabeth Servante, as the owner of six sixteenth parts or shares thereof, to wit, at Falmouth aforesaid, in the county aforesaid. The declaration then proceeded to assign as breaches of these covenants the non-payment of the money allowed for hire of the vessel, or of one third of that paid for freight of bullion, &c., or of the difference between the valuation of the tackle, &c., made when defendant gave up the command, and the original cost, in the manner stipulated by the *articles of agreement or otherwise. Demurrer and joinder.

The action is not maintainable by the Campbell in support of the demurrer. plaintiffs jointly, the interest in the covenants being several. All the law on the subject is to be found in Eccleston v. Clipsham, 1 Saund. 153, and the notes by Serjeant Williams, and the principle clearly established is this, that whatever may be the form of the covenant, the proper parties to the action are to be determined by the interest. If the interest is joint, all the covenantees must join in bringing the action; but if the interest is several, the action must be several, even although the words may suffice to make a joint covenant. If one of several covenantees may sue severally they cannot all join. Here there can be no doubt that any one part-owner of the vessel, whose proportion of the money had not been paid, might have sued for it; or if one had died, his executors might have Owston v. Ogle, 13 East, 538, is expressly in point. There the defendant, a ship's husband, agreed with the several part-owners "that after she returned from a certain voyage, a full account should be made out of the ship and concerns, and the neat profits should be divided according to the proportions in the said ship, after deducting all charges and expenses;" and it was held that an action by one part-owner alone for breach of this agreement was properly

Alderson, contrd. The principle laid down in Eccleston v. Clipsham cannot be disputed; but according to *that principle this action is rightly throught, for the interest in the covenant is joint. The whole sum due [*414] to all the covenantees is to be paid into the same bank, or if any other place is appointed for the payment, that is to be done by all the covenantees jointly. It never was intended that the defendant should have power to pay the shares of some of the part-owners to the exclusion of the others; his duty was to pay the money in one sum to the use of all, and the banker was the agent to make a division of it. The covenant, therefore, was in its nature joint, and in this respect differs from the agreement upon which the case of Ouston v. Ogle proceeded.

BAYLEY, J. I am of opinion that there must be judgment for the defendant. The covenants in question are made with the several part-owners of the vessel and their several and respective executors, administrators, and assigns; which latter words would be quite inoperative if the right to sue were in all the parties jointly. Again, the covenant to pay the money is not to pay it to the owners generally, but to pay it to them and their and every of their several and respective executors, &c., at a certain place in such parts and proportions as were set against their several and respective names. He was not to pay it so that the banker might make distribution, but was to make the distribution himself; and if he paid in the proportions of some and not others, each of those would be injured in respect of the non-payment of his share. In case of the death of one part-owner, by the words of the covenant his personal representative might sue. If the covenant were joint, the executor of the survivor only could main-

tain an action; but such a construction would be quite at variance with the words

*their several and respective executors, &c. Again, if the covenant were
joint, a release by any one would defeat an action brought by all, an
inconvenience that the several parties might wish to avoid. For these reasons
I think that the language of the covenant is several, and that the interests of the
parties are several, and, consequently, that the action brought by all jointly
annot be maintained.

LITTLEDALE, J. I am of the same opinion. The rule laid down in Eccleston v. Clipsham is not disputed; and I think that the interest of the parties is several; each is entitled to a separate share of the profits of the ship, and ought

to be able to claim his share separately.

PARKE, J. The only question is, Whether the interest is joint or several; and it seems to me quite clear that it is several. The money was to be paid into the bankers, in several proportions, to the separate account of each part-owner. If it had been paid to their joint account, all must have concurred in any order to draw it out; that would have been very inconvenient, and contrary to the apparent intention of the parties.

Judgment for the defendant.

*4167

*WALKER v. MOORE and Another.

A. having contracted with B. for the purchase of a real estate, the vendor acting bons fide, delivered an abstract, showing a good title; and A., before he examined it with the original deeds, contracted to resell several portions of the property at a considerable profit. Upon a subsequent examination of the abstract with the deeds A. discovered that the title was defective, and thereupon the sub-purchasers refused to complete their purchases and he refused to complete his purchase from B., and brought an action, wherein he claimed as damages the expense which he had incurred in the investigation of the title; the profit that would have accrued from the resale of the property; the expense attending the resale; and the sums which he was liable to pay to the sub-contractors for the expenses incurred by them in examining the title; Held, that he was entitled to recover only the expenses that he had incurred in the investigation of the title, and nominal damages for the breach of contract, as no fraud could be imputed to the vendor.

This cause came on to be tried at the Spring assizes for Lincoln 1829, when it was agreed that a verdict should be entered for the plaintiff, damages 6000l., subject to the award of a barrister, who was to be at liberty to order for whom and for what sum the verdict should be finally entered, and was to state specially in his award the distinct grounds of damage, if any; it being left to this Court ultimately to determine for what sum a verdict should be entered for the plaintiff, or whether a nonsuit should be entered. The arbitrator directed that the verdict for the plaintiff should stand for 17221., and added the following statement:—This was an action of assumpsit on an agreement for the sale of certain farms and messuages in the county of Lincoln. The declaration stated that by a certain memorandum of agreement in writing, dated the 5th July, 1827, in consideration of 8000l., the defendants contracted to convey on or before the 6th day of April, 1828, to the plaintiff, or to whom he should appoint, all those four undivided parts, and also the life estate and interest by nonclaim of the defendants for and during the life of Henry Wheate in the remaining fifth part in the premises above mentioned; and the plaintiff agreed to pay the sum of 8000l. on the said 6th of April, upon *receiving a conveyance and a good legal and marketable title being made to the premises at the expense of the defendants, the abstract of which was to be delivered to the plaintiff or his appointees within one month after the date of the said memorandum of agreement. It was then averred that the plaintiff was ready to pay the purchase-money at the time specified, on receiving a conveyance and a good title made out to the premises, but that no such good title and no proper conveyance was made by the defendants to the plaintiff, or to any other person appointed by him, whereby plaintiff had lost the profits which might have accrued to him from having a good and

had been made the plaintiff could have recovered; for it seems to me to be contrary to the policy of the law, that a man should offer an estate for sale before he has obtained possession and a conveyance.

PARKE, J. I am of the same opinion. The cause was referred to an arbitrator to ascertain the amount of the damages to be recovered. He therefore was substituted for a jury. Now a jury ought not, in the case of a vendor in possession, to give any other damages in consequence of a defect being found in the title than those which were allowed in Flureau v. Thornhill, which *was recognised in Johnson v. Johnson, 3 B. & P. 167, Bratt v. Ellis, Sugd. V. & P. App. 7, and Jones v. Dyke, Ib. 8. In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain. Here, however, there are two other sums claimed; but under the circumstances stated in the award, I think the plaintiff is not entitled to them. It is urged that no defect appeared upon the abstract, and that it was only discovered on comparing the abstract with the deeds. Assuming that to be so (although it is not expressly found), yet is there was no fraud, negligence in preparing the abstract is the only thing that can be imputed to the defendants; and the plaintiff, by exercising ordinary care, might have averted the loss that has arisen from that negligence. It is usual and reasonable, before any expense is incurred, to compare the abstract with the deeds; and without giving any opinion as to the right of the plaintiff to resell before he had obtained a conveyance and actual possession, I think he cannot recover those expenses which he has sustained by reason of his having contracted to resell the premises before he had taken the trouble to ascertain whether the abstract was correct or not. Judgment of nonsuit.(a)

(a) As to the damages to be recovered for the breach of a warranty on the sale of personal chattels, see Caswell v. Coare, 1 Taunt. 566. Bridge v. Wain, 1 Stark. N. P. 504; and as to the measure of damages where the vendor fails to deliver goods according to his contract, see Leigh v. Patterson, 8 Taunt. 540, and Gainaford v. Carroll, 2 B. & C. 624.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH.

IN

Bilary Cerm,

IN THE TENTH AND ELEVENTH YEARS OF THE REIGN OF GEORGE IV. 1880.

HAMMOND v. BLAKE. Jan. 25.

The master of a ship is not liable to the penalty imposed by the 6 G. 4, c. 125, s. 58, for refusing to employ a pilot, unless the pilot produces his license as required by s. 66, although it is not demanded.

DEBT for a penalty alleged to have been incurred under the 5 G. 4, c. 125, s. 58, (a) by the defendant, the master of a ship, for continuing to navigate it *425] bo, (a) by the detendant, the master of a surp, the take charge of it. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after last Michaelmas term, it appeared in evidence that the defendant was master of a vessel, and navigating within the limits where he was bound to take a pilot, if one duly qualified tendered himself. That a person, whom the defendant knew to be a pilot, did offer his services, but the defendant refused to employ him, and continued to act himself as pilot. No evidence was given that the pilot produced his license, nor was any question asked about it, and at the close of the plaintiff's case, Campbell for the defendant contended, that as the sixtysixth section (b) of the 6 G. 4, c. 125, imposes a penalty on a pilot who acts in

(a) By which it was enacted, "that every master of any ship or vessel, who shall act himself as a pilot, or who shall employ or continue employed as a pilot any unlicensed person, or any licensed person acting out of the limits for which he is qualified, or beyond the extent of his qualification, after any pilot licensed and qualified to act as such within the limits in which such ship or vessel shall then actually be shall have offered to take charge of such ship or vessel, or have made a signal for that purpose, shall forfeit for every such offence double the amount of the sum which would have been legally demandable for the pilotage of such ship or vessel; and shall likewise forfeit for every such offence an additional penalty of five pounds for every fifty tons burthen of such ship or vessel, if the Corporation of Trinity House of Deptford Strond, as to cases in which pilots licensed, by or under the said corporation shall be concerned, or the said Lord Warden for the time being as to cases in which said Lord Warden for the time being, or his lieutenant for the time being, as to cases in which the cinque port pilots shall be concerned, shall think it proper that the person prosecuting should be at liberty to proceed for the recovery of such additional penalty, and certify the same in writing."

(b) By which it was enacted, "that no person shall take charge of any ship or vessel, or in any manner act as a pilot, or receive any compensation for acting as a pilot, until his license shall have been registered by the principal officers of the custom-house of the place at or nearest to which such pilot shall reside (which officers are hereby required to register the same nearest to which such pilot shall reside (which omcers are nervoy required to require without fee or reward), nor without having his license at the time of his so acting in his per sonal custody, and producing the same to the master of any ship or vessel, or other person who (183)

that capacity without first producing his license, it was necessary to prove that he had produced it, in order to recover a penalty against the master for refusing to employ him. Lord Tenterden was of that opinion, and nonsuited the plaintiff.

*The Attorney-General now moved for a rule nisi for a new trial, and contended that it was not necessary to show that the license was produced. The master knew that the man offering his services was a pilot, and the section which imposes the penalty on the master says nothing about the production of the license. It distinctly provides, that if he continues to act as pilot after a licensed person has offered his services, he shall be subject to a certain penalty. That is wholly independent of the subsequent section which relates to the conduct of the pilot.

Lord Tenterden, C. J. We cannot say that the master is liable to a penalty for not allowing the pilot to do an act, when the latter, by doing it, would also

have been liable to a penalty.

BATLEY, J. I am of opinion that the nonsuit was right. It is true that the fifty-eighth section makes no provision for the production of the license; but there is a subsequent enactment, that no person shall take charge of a ship without producing his license.

LITTLEDALE, J. The subsequent clause amounts to a statutory prohibition

against all persons from acting as pilots unless they produce their license.

PARKE, J. As the evidence stands, we must take it that the license was not produced, and by the act it was necessary that it should, to entitle the pilot to take charge of the vessel. And it is of great importance that the captain should have the means of knowing whether the *person to whose care the ship is intrusted is duly qualified or not. Now, the sixty-sixth section contains no provision that the license is to be demanded, and therefore the pilot must produce it whether it is demanded or not.

Rule refused.

shall be desirous of employing him as a pilot, or to whom he shall offer his services, on pain of forfeiting a sum not exceeding thirty pounds nor less than ten pounds for the first offence; and for the second or any subsequent offence, a sum not exceeding fifty pounds nor less than thirty pounds; and upon further pain as to any person licensed as aforesaid of forfeiting his license, or being suspended from acting as a pilot, by and at the discretion of the corporation or other authority from which such pilot's license was derived, either for the first, second, or any subsequent offence."

FOWLER v. COSTER.

A third commission issued against a trader who had not paid any dividend to his creditors under a first and second commission, is a nullity; and where a bankrupt had obtained his certificate under a third commission issued under such circumstances, Held, that he was not entitled to be discharged out of custody, although the debt for which he was detained was contracted before the issuing of that commission.

The defendant having been arrested in this action, had obtained a rule to show cause why he should not be discharged out of custody, on the ground that a commission of bankruptcy having issued against him on the 7th of May, 1829, he had duly obtained his certificate on the 7th of July, 1829, and the same was duly allowed by the Chancellor on the 6th of August, 1829; and that the debt in respect of which he had been arrested had accrued before the issuing of the commission, and was provable thereunder. It appeared by the affidavits in answer to the rule, that a commission had issued against the defendant on the 1st of October, 1814, under which he had been duly declared a bankrupt, and obtained his certificate; that on the 12th of May, 1826, a second commission was issued against him, under which he was also declared a bankrupt, and duly obtained his certificate, and that he had not paid any dividend under either of tness commissions.

Comyn, in last Michaelmas term, showed cause. The question in this case is, whether the person of a bankrupt, who has obtained his certificate under a

third *commission, but who has not paid 15s. in the pound under the first or second commission, is, by the 6 G. 4, c. 16, s. 127, entitled to protection from arrest in respect of a debt which accrued after the issuing of the second commission, but before any certificate was obtained under the third. The third commission, which issues under such circumstances, is wholly void, for it has nothing to operate upon. Till v. Wilson, 7 B. & C. 684, is an authority to show that a bankrupt can have no property where there have been two commissions issued against him, and he has not obtained his certificate under the first; for all his estate and effects are vested in the assignees under the first. In that case, the question was the same in principle as that which arises in the present case; and Ex parte Proudfoot, 1 Atk. 251, Martin v. O'Hara, Cowp. 823, Ex parte Bold, C. B. L. 12, Ex parte Crew, 16 Ves. 236, Ex parte Bullen, 1 Rose, 134, Ex parte Martin, 15 Ves. 114, Ex parte Thomson, 1 Rose, 285, Ex parte Brown, 1 Ves. & B. 60, and Butts v. Bilke, 4 Price, 240, were there cited, and the Court, after time taken to consider of their judgment, held, that a second commission which had issued against a trader before a former commission had been disposed of, was a nullity; and that a bankrupt, having obtained his certificate under such second commission, was not entitled to be discharged out of custody, although the debt for which he was detained was contracted before the issuing of that commission.

Gurney and Platt now showed cause. The third commission was voidable, but not actually void; and if *that be so, the defendant is entitled to be discharged out of custody. It is said that a second commission cannot have any operation against a bankrupt who has not obtained any certificate under the first, because all his estate and effects belong to the assignees under the first. Assuming that to be so, it does not follow that the second commission is therefore void. A commission of bankrupt may be considered as analogous to an extent, which issues both against the lands and goods of the debtor. extent is not void if there be no land and goods, though it may be inoperative. So a fi. fa. would be valid as process, though there be no property for it to operate upon. The validity of the commission does not depend upon what it may produce. The commission may be superseded by the Lord Chancellor, but until it is superseded, it must be considered in a court of law as valid. This view of the case is justified by the 6 G. 4, c. 16, s. 126, which makes the certificate conclusive evidence of the trading, bankruptcy, commission, and other proceed-The certificate, therefore, is evidence that a valid commission has issued. In Till v. Wilson, 7 B. & C. 684, it was undoubtedly decided that a second commission, issued against a trader before a former commission had been disposed of, was a nullity; but this case is brought before the Court in order to have that decision reviewed. Cur. adv. vult.

Lord TENTERDEN, C. J., in the course of this term delivered the judgment of the Court. This was an application to discharge the defendant out of custody on *the 126th section of the last bankrupt act, 6 G. 4, c. 16, he having obtained his certificate of conformity under a commission issued since that act took effect.

It appears that this was a third commission against him, and that he did not pay 15s. in the pound under the second commission; the second and third commissions having both issued after the statute 6 G. 4 took effect.

On this ground his discharge was opposed under the 127th section; and it was contended, that the third commission was altogether void, and must be so treated in a court of law. On the other side it was contended, that the commission was voidable only, and that by the Great Seal, and must, until superseded, be considered as valid in a court of law; the certificate being by the act made evidence of the trading, bankruptcy, commission, and other proceedings precedent to it. It appears to us, however, that by these words the certificate is only made evidence of the fact of issuing the commission, &c., leaving untouched the question of its validity or of its effect, and the manner and place in which that question may be decided.

There are cases in which it has been held in a court of law that no effect could be given at law to an existing commission against an uncertificated bankrupt. Such was the case of Martin v. O'Hara, Cowp. 823, where a second commission issued a few months after a former, under which the bankrupt had not obtained An application was made to this Court to enter an exoneretur on his certificate. the bail-piece, on the ground that the certificate would entitle the bankrupt to his discharge if surrendered. The debt for which he was sued was *contracted before the first commission. The application was refused on two grounds; first, that the bankrupt would not be entitled to his discharge; because, says Lord Mansfield, an uncertificated bankrupt is incapable of trading or contracting for his own benefit; all the property he acquires belongs to his creditors: if he cannot trade for himself, he cannot be the object of a second commission. In the same case, Mr. Justice Buller said, "I take it to be perfectly clear, that a second commission cannot be taken out against an uncertificated bankrupt; and for this reason, it would be entirely idle and nugatory, because all his effects belong to his assignees under the first.

The opinions which have been given in other cases against the validity at law of such a commission are numerous, and of the highest authority. Lord Hardwicke in the case Ex parte Proudfoot, 1 Atk. 253, Lord Roslyn in Ex parte Brown, 2 Ves. jun. 67, Lord Eldon in several subsequent cases, 15 Ves. 114, 15 Ves. 543, 16 Ves. 236, 473, 1 Rose, B. Cases, 136, 285, 2 Rose, 139, 172, have all stated, that a second commission, before a certificate was obtained under a first, was void at law. Lord Thurlow appears to have been of a different opinion, Ex parte Hollingworth, Co. B. L. 9, and Ld. Chief Baron Thompson, and the Court of Exchequer in a recent case, Butts v. Bilke and Another, 4 Price, 240, desired the question to be stated in a special verdict; but this Court, in the late case of Till v. Wilson, 7 B. & C. 684, upon a consideration of all the cases, de-

cided that a second commission was absolutely void at law.

We see no reason to depart from that decision; and *we consider, that, by the authorities above referred to, it is fully settled that the Lord Chancellor has no power under the bankrupt statutes to issue a commission for the purpose of distributing effects which are already vested in assignees under a prior commission, and that such commission is not merely nugatory but void.

A third commission against one whose effects have not paid 15s. in the pound

appears to us to be equally void.

By the 127th section of the late statute, it is enacted, that if any person who shall have been so discharged by such certificate as aforesaid, &c., shall be or become bankrupt, and have obtained, or shall hereafter obtain, such certificate as aforesaid, unless his estate shall produce sufficient to pay every creditor under the commission 15s. in the pound, such certificate shall only protect his person from arrest or imprisonment, but his future effects (except his tools of trade, &c.), shall vest in the assignees under the said commission, who shall be entitled to seize the same in the manner they might have seized property of which such bankrupt was possessed at the issuing of the commission. The last words differ from those of the 5 G. 2, c. 30, s. 9, which are, that the future effects shall remain liable to his creditors as before the passing of that act, that is, liable to individual creditors; but this did not prevent them from vesting in the assignees under a third commission, according to the cases of Hovil v. Browning, 7 East, 154, and Todd v. Maxfield, 3 B. & C. 222; whereas under the last act the property is expressly made to vest in the assignees, so that the assignees under the second commission are entitled to all the effects of the bankrupt, and there is legally nothing upon which the third commission can operate: in this respect the case is *precisely like the first ground of the decision in the case of Martin v. O'Hara.

We cannot bring our mind to think that we are bound in a court of law to give effect to a commission for the purpose of enabling a man to obtain a discharge which is in law ineffectual for any other purpose whatsoever. Frequent discharges under the bankrupt laws are a great injury to the honest tradesman:

to check these, the payment of 15s. in the pound under a second commission is required to enable a man to trade again for himself: where such a payment has not been made, we think we best follow the spirit and object of that enactment

by deciding against the validity of a third commission.

The consideration of the bankrupt's discharge from his debts is the giving up all that he has to his creditors. The bankrupt, in a case like the present, has nothing to give up; and by contracting debts, he in some sort committed a fraud upon every creditor who trusted him. Rule discharged.

WARE v. CANN.

Testator devised lands to A. B. and his heirs for ever; but if A. B. died without heirs, then to C. D. (who was a stranger in blood to A. B.) and his heirs; or if in case A. B. offered to mortgage or suffer a fine or recovery upon the whole or any part thereof, then to go to C. D.: Held, that A. B. took an estate in fee with an executory devise over, to take effect on conditions which were void in law, and that a purchaser in fee from A. B. would have a good title against all persons claiming under the said will.

By an order of the Vice-Chancellor the following case was stated for the

opinion of this Court :-

William Reynell, deceased, by his will, duly executed and attested for devising freehold estates, after giving specific and pecuniary legacies out of his per-

sonal estate, devised in the words following:-

*" And, lastly, as to all the rest, residue, and remainder of my personal estate and lands in South Tawton and in Samford Courtenay, I give unto Richard Ware, son of Richard Ware of North Tawton, and to his heirs for ever; but if in case the said R. Ware dies without heirs, then to John Powlessland of Spreyton, and his heirs, son of Elisha Powlessland of Spreyton; or if in case the aforesaid R. Ware offers to mortgage, or suffer a fine or recovery upon the whole, or any part thereof, then to go to the aforesaid J. Powlessland and his heirs." The said J. Powlessland was a stranger in blood to the said R. Ware. The testator was at the time of making his will, and thence to and at the time of his decease, seised in fee-simple of a certain freehold estate consisting of a farm and land, called Middle Week and Bar Week, in South Tawton, and other distinct estates in South Tawton and Samford Courtenay.

The said R. Ware having filed his bill in the High Court of Chancery against the defendant, a question has arisen in the suit upon the nature of the plaintiff's

title to the premises under the said will.

The questions for the opinion of the Court were,

First, What estate and interest the plaintiff took in the devised premises under the said will?

Secondly, Whether if the plaintiff were to convey a part of the estate to a purchaser in fee, the purchaser's title could be affected by the plaintiff's afterwards mortgaging or levying a fine, or suffering a recovery of the residue of the

Thirdly, Whether if the plaintiff were to convey the whole estate to a purchaser in fee, the purchaser would have a good title to the fee against all persons claiming under the said will? The case was argued in Michaelmas term by

*Rogers for the plaintiff. The answer to the first question is very clear, for the devise being in the first instance to R. Ware and his heirs for ever, and the devise over being to a stranger in blocd, Ware took an estate in fee, Tilburgh v. Barbut, 1 Ves. sen. 88. Then the second question comes to this: Can a devise over on alienation by tenant in fee be good? or perhaps the plaintiff is not even bound to deny that, for here the devise over is on an offer

to alien. Now although a condition prohibiting an act be good, yet the prohibition of an offer or attempt is too vague and uncertain, and therefore void; for an offer is not an issuable fact, Pierce v. Win, 1 Ventr. 321, Pollexf. 435, S. C.; and according to that case, where the condition is against the offer to alien, actual alienation is not within the condition. Bradley v. Peixoto, 3 Ves. 324, and Mildmay's case, 6 Co. 10, show that a condition restraining attempts at alienation are void; and in the latter case the resolutions of the Court clearly distinguish between such restraints of actual alienation as are valid and those which are void. Rightful alienations cannot be restrained: thus, tenant in tail cannot be restrained from suffering a recovery, nor a married woman, to whom, with her husband, a feoffment in fee is made, from joining in levying a fine; for those are lawful acts, and incident to their estates. But alienation by an infant is against the law: a fine levied by tenant in tail is deemed tortious, and therefore they may be restrained. In Litt. ss. 360, 361, and 362, other cases of conditions restraining alienation are put; and it is laid down that alienation to a particular person may be restrained, but that alienation generally, being repugnant to the estate given, cannot. Bradley v. *Peixoto, and Ross v. Ross, 1 J & W. 154, are express authorities that conditions repugnant

to the interest given are void. (He was then stopped by the Court.)

Preston, contrd. This is not a mere condition. The first devise is conditional, Preston, contrd. This is not a mere condition. and the devise over an executory devise to take effect, in the event of a certain thing being done by the first devisee. The restraint does not extend to his heirs, so that the devise over must take effect, if at all within the time allowed But, taking it as a condition, the restraint is good. All restraints of alienation are not void. The king may restrain it, on account of the interest that he has in his tenant, Com. Dig. Condition (D 4); and in general restraints against alienation may be imposed where a particular estate, as for life or years, is given. The general rule applies to estates in fee and estates tail, but in all cases the question is, whether the condition be or be not repugnant to the estate. Bradley v. Peixoto, and Ross v. Ross, may be laid out of consideration, for they related to personal property only, which, as to this matter, is governed by the rules of the civil law. It is an admitted principle of law that a testator, who has given a fee, may impose a qualification by which he retains some portion or reversionary interest which he may dispose of. He may impose a partial restraint on alienation: thus he may restrain alienation to A. or B., or to a class, as to Scotchmen or Irishmen, the rule of law applying only against general restraints of alienation. Here there is no restraint upon the sale of this property; for tenant in fee may alien without making a mortgage, *or levying a fine, or suffering a recovery. The restraint upon alienation, by either of those methods, may be absurd; but there is nothing in our law which prevents a testator from devising over an estate, upon any absurd event, at his pleasure. Then as to the word offer, it has certainly been said, in several old cases, that an attempt cannot be put in issue; but in modern times the courts have constantly been called on to try such issues. Thus an assault may be committed by an attempt to strike, and an attempt to commit a felony is an indictable misdemeanor. Such cases are constantly tried, and all attempts and offers are matters provable by evidence, and therefore issuable.

Rogers in reply. It is true that Bradley v. Peixoto, and Ross v. Ross, related to personalty; but the doctrine contained in them applies equally to executory devises and conditions. A party cannot by the former restrain alienation where he cannot by the latter; the repugnancy of the restraint operates equally in each In Shep. Touch. 133, after various instances have been stated of conditions void for repugnancy, it is laid down, "And the same law is for the most part of limitations, if they be repugnant, impossible, or against law, as is before showed to be of conditions."

The following certificate was afterwards sent :---

This case has been argued before us by counsel. We have considered it, and are of opinion,

First, That the plaintiff took an estate in fee in the devised lands, under the will of William Reynell, with *an executory devise over, to take effect upon conditions which are void in law.

Secondly, That if the plaintiff were to convey a part of the estate to a purchaser in fee, the purchaser's title would not be affected by the plaintiff's afterwards mortgaging, or levying a fine, or suffering a recovery of the residue of the

Thirdly, That if the plaintiff were to convey the whole estate to a purchaser in fee, the purchaser would have a good title to the fee, against all persons claiming under the said will.

Tenterden.

J. BAYLEY.
J. LITTLEDALE.
JAS. PARKE.

READ v. RANN. Jan. 26.

A ship-broker who has procured a bargain for the hire of a vessel is, by the usage in the city of London, entitled to receive from the owner a certain commission on the amount of freight, if the contract is perfected, but not otherwise: Held, that where a broker had negotiated the hire of a vessel, and a memorandum for a charter was signed by the parties, but the bargain afterwards went off, and the ship was not employed, the broker could not maintain an action against the ship-owner to recover the commission or a compensation for his work and labour.

Assumpsit for work and labour as an agent, and for commission. Quan. mer. and money counts. Plea, the general issue. The plaintiff delivered, under a judge's order, the following particulars of his demand :--" To commission for letting on hire the ship Mermaid, belonging to the defendant, to Captain T. M. Ardlie, on a voyage to and from India, for twelve months, at 12s. per ton per month, which, on 470 tons, amounts to 3384l. at two and a half per cent., 84l. At the trial before Lord Tenterden, C. J., at the London sittings after last Michaelmas term, it appeared that the *defendant was owner of the ship Mermaid, and that the plaintiff, a ship-broker, had negotiated with Captain Ardlie for the hire of that ship for the voyage, and at the freight specified in the particulars of demand. A memorandum for a charter-party was drawn up by the plaintiff, and signed by the defendant and Ardlie, and it was agreed that the defendant's attorney should prepare a charter-party. The memorandum did not specify by whom the ship was to be kept in repair during the The owner insisted that the charterer ought to do it; and he, on the other hand, contended that the owner should bear that expense; and on account of this, and some other disagreement as to matters not provided for by the memorandum, no charter-party was ever effected, and the ship was not employed by Ardlie. It was proved to be the custom in the city of London that a shipbroker, procuring a freight for a vessel, was entitled to receive of the ship-owner five per cent. on the amount, provided a complete contract was made; but that where the bargain went off, and the contract was never perfected, the broker did not receive anything for his trouble in negotiating with the parties. Some witnesses stated, that they thought the plaintiff had done all that was necessary to entitle himself to be paid, although none of them had ever received payment where the contract had not been perfected. Lord Tenterden was of opinion that the broker's claim to commission depended on the custom, and that he had not brought himself within it, and that his particulars of demand did not enable him to raise a question as to his being entitled to some remuneration for his work and labour; the plaintiff was accordingly nonsuited; and now

*440] *Gurney moved for a rule nisi for a new trial. The broker, in this case, having done all that was incumbent on him to fix the bargain, was entitled to recover. It was agreed between the parties that he should not prepare the charter-party; and the bargain ultimately went off on account of an

unreasonable stipulation which was introduced into the charter-party by the defendant. If that were to protect him against this demand, he would profit by his own wrong; but at all events the plaintiff was entitled to something: several brokers said that they considered he had done all that was necessary to entitle him to be paid. Now he only demanded half the usual commission, which cannot be considered more than a reasonable compensation for his trouble.

BAYLEY, J. I am of opinion that the nonsuit was right. The plaintiff claims to be paid, not according to his actual labour, but a sum in proportion to the freight which he procures. That claim is founded on custom, he was therefore bound to prove such a custom as supports his claim. Here, for some cause or other, which we need not examine, the ship was not employed on the voyage contemplated, and in pursuance of the plaintiff's negotiation. What then is the custom under such circumstances? Some witnesses stated that, in their opinion, the plaintiff had done all that was necessary to entitle himself to be paid. But their opinion must not be acted upon, the Court must be guided by that which had been the practice; and not one of these witnesses had, under such circumstances, received payment. Usage is the legal evidence of custom; and upon the evidence it does not appear that there was any such *custom as supported the plaintiff's claim. The whole rested in custom, and that failing, he was not in a situation to claim anything.

LITTLEDALE, J. I am of the same opinion. The plaintiff claims commission on the ground of his having done all that was incumbent on him, and that the ship did not go on the voyage intended by reason of the owner's misconduct. That depends on the custom, and to prove that, it was necessary that evidence of actual payment, under such circumstances, should be given. No such evidence was given; and, therefore, the plaintiff could not maintain the action for the whole of his demand. Neither was he entitled to any part of it on a quantum

meruit, for that was never contemplated by the parties.

PARKE, J. I also am of the same opinion. The claim of the plaintiff rests on the custom, and not on a quantum meruit. The custom supposes a special contract between the parties, and if that is not satisfied, no claim at all arises, for no other contract can be implied. In some cases, a special contract, not executed, may give rise to a claim in the nature of a quantum meruit, ex. gr., where a special contract has been made for goods, and goods sent, not according to the contract, are retained by the party, there a claim for the value on a quantum valebant may be supported, but then, from the circumstances, a new contract may be implied.

Rule refused.

*ISAAC v. IMPEY and Others. Jan. 26.

F*442

A witness summoned by commissioners of bankrupt under the 6 G. 4, c. 16, s. 33, was required by the commissioners to read certain entries in a ledger; and on his refusal to do so, was committed by them for refusing to answer a question: Held, that the request to read was neither in form nor substance a question, and that the commitment was illegal.

This was an action for false imprisonment. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the London sittings after last Michaelmas term, it appeared that the defendants were commissioners under a commission of bankrupt issued on the 15th of June, 1827, against one Samuel Owen; that they summoned the plaintiff before them as a person capable of giving information concerning the person, trade, dealings, or estate of the bankrupt; and it appeared by the warrant of commitment that the plaintiff had been examined several times in order to ascertain whether certain securities were affected with usury. He had been examined with respect to particular sums entered in his own books of account, and he had stated that a sum of 90002 was composed of two sums, being the proceeds of Russian stock, the property of a Mr. Leon. The examination then proceeded as follows:—"Q. Does the account headed Russian stock,

in ledger G., p. 101, contain an account of all the purchases and sales of Russian stock, for Mr. Leon's account, made by you? A. Yes, it does, as well as those purchased by Mr. Leon himself.-Q. Do you mean to state that, in such account, there are entries of Russian stock purchased and sold, or purchased or sold, by Mr. Leon himself, or on his own account? A. Yes, both bought and sold by Mr. Leon himself.—Q. Refer to ledger G., and the account in it headed Russian A. I have now referred to it.—Q. You are now requested to read all the *113] entries contained in that account. A. Acting under the advice *of my counsel, I demur to answer the question, inasmuch as the matters relating to that account are not relating to the bankrupt Owen. It is, therefore, I submit, with the advice of my counsel, that I am not bound to read the entry; and I request the commissioners to allow me to consult my counsel on the propriety of the question put, so that I may give a proper and legal answer to it; but in case the commissioners refuse, I request that the counsel may be allowed to enter for me such proper protest as he may see necessary. When I say that I demur to answer the question, I mean to say that I refuse to comply with the request to read the entries contained in the account alluded to." The warrant then proceeded, "which last-mentioned question, the witness (the plaintiff) having so refused to answer, they, the defendants, committed him until such time as he should submit himself to them, and full answer make to their satisfaction to the said question." Lord Tenterden was of opinion, that as the defendants had committed the plaintiff for not answering a lawful question, it was necessary for them to show that such a question had been put to him. The request to read the entries was neither in form nor substance a question. A verdict having been found for the plaintiff,

F. Pollock now moved for a new trial. The commissioners, in substance, asked a question, when they gave the plaintiff, under examination, to understand that they required information. The mode in which the information was asked for, though not in the form of a question, was one in substance. The plaintiff understood it as such, and refused to answer; for he expressly says, that he *444] demurs to the question. [BAYLEY, J. The *commissioners required the plaintiff to read an entry which they were capable of reading themselves.] It is sufficient if the mind of the party under examination be informed that the commissioners require information. The plaintiff knew that the commissioners did not want him to read the entry, but to give them an explanation of its contents. In refusing to comply with that request, he refused to give the defendants the information required, viz. to explain the entries in the book.

Lord Tenterden, C. J. The authority of the commissioners of bankrupt to commit persons, whom they summon before them to give evidence touching a bankrupt's estate, depends entirely on the act of parliament. To that, therefore, we must look, to see in what cases they are authorized to commit. First, they may commit for a refusal to answer lawful questions respecting the bankrupt's estate; and, secondly, they may commit for a refusal to produce books. It does not appear that in this case the plaintiff had refused to answer any questions or to produce books. If he had done so, the defendants would have been authorized to commit him; but he has merely refused to read an entry; and the act of parliament gives the commissioners no authority to commit a person for refusing to read an entry in a book which he produces. No man of plain common sense can say that asking a man to read an entry in his ledger is asking a question.

Bayley, J. If the plaintiff had refused to produce the book, so as to prevent the commissioners from reading the entries, they might have committed *445] him, and he would not have been entitled to his discharge *until he had produced it. Here the commisment was for refusing to answer a question. But it appears by the examination, that the commissioners had requested him to read certain entries in a book, and that he refused so to do. It is impossible to say that the request to read those entries was, either in form or substance, a question; and if it was not, then the commitment was illegal.

LITTLEDALE and PARKE, Js., concurred. Rule refused.

HARRISON v. HODGSON. Jan. 27.

A person may under particular circumstances, lay hands on another, in order to serve him with process.

TRESPASS for an assault and false imprisonment.

Pleas, first, not guilty; secondly, that the plaintiff first committed an assault on the defendant, whereupon he gave him in custody to a peace-officer who was present and saw the breach of the peace. Replication, that plaintiff was employed to serve the defendant with process, and in order to do so, necessarily laid his hands upon him, which was the assault mentioned in the second plea. Rejoinder, excessive violence, and issue thereon. At the trial before Lord Tenterden, C. J., at the Westminster sittings after last Michaelmas term, a verdict was found for the plaintiff; and now

J. Williams moved to arrest the judgment, on the ground that it could not be necessary for the plaintiff to lay hands on the defendant to serve him with process; and that, at all events, the necessity should have been shown by the

replication.

*Per Curiam. The defendant, by rejoining excess, has admitted, that if in any case it can be necessary to touch a party in order to serve him with process, it was necessary in this instance; and we are not prepared to say that it may not, under particular circumstances, be necessary and lawful to do so. The judgment, therefore, cannot be arrested. Rule refused.

WATTS v. FRIEND. Jan. 28.

Where A. agreed to supply B. with a quantity of turnip seed, and B. agreed to sow it on his own land, and sell the crop of seed produced therefrom to A. at 1l. 1s. the Winchester bushel; and the seed so produced at the price agreed upon exceeded in value the sum of 10l.: Held, that this contract was within the seventeenth section of the statute of frauds. and void for want of a memorandum in writing.

Semble, that since the 5 G. 4, c. 74, an agreement to sell by the Winchester bushel, not containing any declaration of the proportion which that measure bears to the imperial bushel.

is void.

Assumpsit on a special agreement between the plaintiff and defendant, that the former should furnish the latter with a certain quantity of turnip-seed, which he (defendant) should sow on his own land, and sell and deliver the whole of the seed produced therefrom to the plaintiff, at the price of 1l. 1s. the Winchester bushel. Averment, that plaintiff supplied the seed; that defendant sowed it, and harvested the crop, but did not sell and deliver the seed produced to the plaintiff, but wholly refused, &c. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the Kent Summer assizes 1828, the facts stated in the declaration were proved; and also, that the seed produced was 240 bushels and that the plaintiff could not, at that time, obtain it for less than 1l. 10s. the bushel; but it was objected, that the contract, which was verbal only, was within the seventeenth section of the statute of frauds, and therefore void; and, secondly, that the contract to sell by the Winchester bushel was invalid, by force of the *5 G. 4, c. 74. Lord Tenterden gave the defendant leave to move for a [*447 nonsuit on those points; and the plaintiff having obtained a verdict, a rule nisi for a nonsuit was granted in Michaelmas term, 1828.

Gurney and Comyn now showed cause, and contended, that the case did not fall within the seventeenth section of the statute of frauds. It was not a contract for goods and chattels, but for the crop to be produced from seed, which was not even sown at the time when the bargain was made. This is a stronger case than Towers v. Osborne, 1 Str. 506, Clayton v. Andrews, 4 Burr. 2101, or Groves v

Buck, 3 M. & S. 178; for there the contract was for the sale of some articles to be made, the materials of which then existed. Here the bargain was for a thing of which no part was in existence at the time. Garbutt v. Watson, 5 B. & A. 613, is distinguishable; that was a contract for the sale of flour, the wheat from which it was to be made was in existence, and grinding was the only thing necessary to be done before the contract was performed. Then, as to the question on the statute 5 G. 4, c. 74, the fifteenth section enacts, "that from and after the 1st of May, 1825, all contracts, bargains, sales, and dealings which shall be made or had within any part of Great Britain and Ireland, for any work to be done, or for any goods, wares, merchandise, or other thing to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be made and had according to the standard weights and measures ascertained by this act." Here *448] there was a special agreement for the sale by the *Winchester bushel, the case, therefore, does not come within that part of the section. But the act goes on, "and in all cases where any special agreement shall be made with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be uull and void." This was not an agreement with reference to a measure established by local custom, but to that which was in use as the standard measure all over the country before the statute passed. It is not, therefore, within either branch of the section.

Spankie, Serjt., contrd, was stopped by the Court.

Lord Tentenden, C. J. The rule for entering a nonsuit must be made absolute. According to good common sense, this must be considered as substantially a contract for goods and chattels, for the thing agreed to be delivered would, at the time of delivery, be a personal chattel (a) The case, therefore, came within the seventeenth section of the statute of frauds; and the contract being verbal only, and for goods of more than 101. value, was not binding. This being our opinion on the first point, it is unnecessary to decide the other; but I cannot forbear observing, that if a contract for a sale by the Winchester bushel made as this was is to be deemed valid, the object of the statute 5 G. 4, c. 74, will be Rule absolute.(b) in a great degree defeated.

(a) Smith v. Surman, 9 B. & C. 561.

(b) It would seem that the case would not have been within the seventeenth section of the statute of frauds if the value of the seed produced, at the rate agreed for, had been less than 10l.; and, therefore, whether it would be within it or not was uncertain at the time *449] when the agreement was made. Now it has been held, that cases depending upon contingencies which may or may not happen within the year are not within the fourth section of the statute of trauds, even although the event does not in fact happen within the year. It seems, therefore, that the seventeenth section is in this respect to receive a different construction from the fourth.

HOLDSWORTH v. JAMES HUNTER the Younger. Jan. 28.

The drawee (who was also payee) of a foreign bill of exchange drawn in three parts, accepted and endorsed one part to a creditor to remain in his hands until some other security was given for it: and afterwards accepted and endorsed another part for value to a third person. The for it; and afterwards accepted and endorsed another part for value to a third person. acceptor substituted another security for the part first accepted, whereupon it was given up to him: Held, that under these circumstances the holder of the part secondly accepted was entitled to recover on the bill against the acceptor, and that the bill being foreign did not require a stamp: Held, also, by Lord Tenterden, C. J., and Parke, J., that the acceptor would have been liable on the part secondly accepted, even if the first part had been endorsed and circulated unconditionally.

Assumpsit by the plaintiff as endorsee against the defendant as acceptor of two bills of exchange, one for 5000l., the other for 4399l. 19s 7d., drawn by M'Kenzie and Co. in the following form:-

" 5000l.

Calcutta, 12th July, 1825.

"At six months after sight pay this, our first of exchange (second and third not paid) to the order of Messrs. W. Hunter and Co., the sum of 50001. Sterling. Value in account. "T. M'KENZIE and Co.

To Messrs. James Hunter, Jun., and Co.,

"London."

Plea, the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term, 1828, the following facts appeared in evidence: -The bills of exchange in the declaration mentioned were drawn in Calcutta by M'Kenzie and Co.; and in the month of December 1825 the defendant J. Hunter, who was also a partner in the firm of W. Hunter and Co. (the payees), received the second part of each of these two bills, which he accepted, and endorsed to his father, to *whom the firm of W. Hunter and Co. were largely indebted. The defendant afterwards, in January 1826, received from [*450] M'Kenzie and Co., by a different ship, the other parts of the bills, and accepted and endorsed the first part of each to one Fennell, who endorsed them for value to the plaintiff. The acceptance of these latter parts was ante-dated 14th November, 1825. At the time when they were actually accepted and endorsed, the parts previously accepted were in the hands of the defendant's father; but other bills were afterwards substituted for them, and they were given up to the defendant. Upon these facts, the Attorney-General contended, that the plaintiff could not recover for two reasons; first, that the party who first obtained the acceptance of any one part of a set of bills was entitled to the whole of them, and, therefore, the plaintiff could have no right to those parts upon which the action was brought; and for this he cited Perreira v. Jopp and Another; (a) secondly, that if *the defendant was to be held bound by his acceptance [*45] of a second part, it must be treated as altogether a separate bill drawn,

(a) We have been favoured by the Attorney-General with the following note of this case,

(a) We have been favoured by the Attorney-General with the following note of this case, taken by himself at the trial before Lord Kenyon at Guildhall in 1793:—
"Trover for a bill of exchange for 1000!. drawn by persons in Jamaica upon the defendants, in favour of one Jeremish Mais, and by him endorsed to the plaintiff. The plaintiff gave notice to the defendant to produce the bill, which appeared to be the second of a set of bills drawn is favour of Mais, and dated 5th of December, 1792. The bill was endorsed to the plaintiff stated in the declaration. The plaintiff then proved that on the 31st of October, 1793, being nearly eleven months after the date of the bill, he presented it to the defendants for acceptance, and upon a subsequent demand they refused to return it. The defendants proved, that one Abraham Levien had absconded in September 1792; that after he had absconded, the plaintiff purchased a debt due from Levien to Hunter and Co. for 10s. in the pound, and obtained the necessary power to attach certain property of Levien's, then in Jamaica, in the hands of the same Jeremiah Mais; that before these attachments were laid against Mais in Jamaica, viz. on the 5th of December aforesaid, Mais had transmitted the first of the same set of bills of which the second was now in question, endorsed to A. Levien; that in consequence of Levien's abthe second was now in question, endorsed to A. Levien; that in consequence of Levien's absorbing, the letter enclosing the said first bill to him did not come either to his hands or to those of his assignees, he being a bankrupt, until the 8th of November, 1793; that in the mean time, the plaintiff having heard of the transmission of the first bill of the set, and that it had not made its appearance, wrote out to Jamaica, and, by means of an indemnity, prevailed upon Mais to endorse and transmit the second of the bills to him, which arrived on the 31st of October, 1793, and was retained by the defendants upon presentation in consequence of a October, 1793, and was retained by the defendants upon presentation, in consequence of a notice given to them by the assigness of Levien of the circumstances; that a few days afterwards the letter containing the first bill endorsed to Levien was discovered. This bill was prowards the fetter containing the first bill endorsed to Levien was discovered. In so till was produced in Court, and it appeared to be the first bill of the same set of which the second was claimed by the plaintiff. Upon this evidence Lord Kenyon, C. J., thought the defendants clearly entitled to a verdict, because the sum which that bill represented had never been attached in the hands of Mais, he having endorsed and transmitted the first bill to Levien before the attachment could operate; consequently, the property represented by that bill, and in the hands of defendants the drawees, was vested in Levien or his assignees, and the endorser Mais could not divest that property by endorsing the second bill to the plaintiff; the plaintiff had.

could not divest that property by endorsing the second bill to the plaintiff; the plaintiff had therefore, no title to the money which these bills represented.

"Mingay, for the plaintiff, then observed, that if the plaintiff was not entitled to the 1000L, ne had at least a right to the piece of paper which he had left at the desendants, and which they refused to return. But Lord Kenyon denied this, and mentioned a case of Miller and Race, tried by Lord Mansfield, in which this very point was contested in an action of trover for a promissory note; in which Lord Mansfield said, he could never bring himself to think for a moment that a man who had no title to the value of a bill or note, could recover in an action of trover for the paper merely, which was of no value whatever. Upon this Lord Kenyon continued, that Sir Richard Lloyd put this case to Lord Mansfield, Whether, if instead of a piece of paper a diamond ring had been given for a promissory note, the person who possessed the of paper a diamond ring had been given for a promissory note, the person who possessed the

as well as accepted, in England, and, therefore, liable to the stamp-duty; and that as the bills in question were not stamped they were invalid. Pollock, contrd, contended, that it was a question for the jury, whether there ever had been a perfect unconditional transfer of the parts first accepted to the father? or, whether they were only deposited with him until other securities were provided? If the latter were the case, then as soon as these parts were restored to the acceptor, the jus tertii ceased, and could not be set up as an answer to the action. Lord Tenterden was of that opinion, and left the question to the jury directing them to find *452] for the plaintiff if they thought that the parts of *the bills first accepted were delivered to the defendant's father to be kept only until other securities were given. The jury found that they were so given, and returned a verdict for the plaintiff. In Hilary term, 1829, a rule nisi for a new trial was obtained on the objections made at the trial, and also, that the question of fact ought not to have been left to the jury.

F. Pollock and Patteson now showed cause. The bills in this case having been drawn on the defendant, and in effect payable to his own order, all the parts were transmitted to him, and he was thereby enabled to accept and put forth more than one of them. Now, although it may be true that, as far as the drawer is concerned, the part first accepted is alone available, so that he cannot be charged more than once upon the same set of bills, yet there is no case or principle of law to prevent the drawee from accepting all the parts, and making himself liable three times over. In the case of Perreira v. Jopp there never was *453] any intention, in any of the *parties, to be liable more than once. Besides, in fact, this defendant has not been charged more than once; the parts delivered to his father were deposited as a security for a debt, and afterwards delivered up upon the substitution of other securities; they have never been paid. Then as to the second point, no stamp is necessary on a bill drawn in Calcutta to be accepted in England. Unless, therefore, the bill is to be considered as altogether concocted in England, the objection fails; but it cannot be so considered without making the defendant guilty of a forgery, and the court will not allow him to set up his guilt as an answer to the action.

The Attorney-General and Campbell, contrd. The case of Perreira v. Jopp established that when there are several parts of a foreign bill, they form together but one bill, and he who has the first title to any one part has a right to the others also. Here one part of each bill was first endorsed to the defendant's father, for a valuable consideration. It was left as a question to the jury, whether they were so endorsed in order that he might sue upon them, or only keep them until others were substituted? but there was no evidence for the jury of such an agreement having been made, and, in fact, the bills were in the father's hands, and he had a legal right to them at the time when the other parts were endorsed to the plaintiff. The property, in those parts, was, therefore, in the father. In order to obviate this difficulty, the plaintiff must treat them as separate bills; but then they must be considered as emanating entirely from the defendant, not as forgeries on M'Kenzie and Co. at Calcutta, but as drawn in England in the name of a fictitious person, and, consequently, liable to stamp duty.

*Lord TENTERDEN, C. J. According to the verdict of the jury, the delivery of the bills to the defendant's father was not absolute but conditional, and I think that the facts of the case justified that finding. The parts first accepted cannot, therefore, be said to have been paid, for they were redeemed by the substitution of other securities. That being so, what was there to prevent the defendant from putting in circulation another part of the bills? But I am inclined to go further, and to say that the plaintiff would have been entitled to

ring, though without title to the value it represented, might not bring trover for it? To this Lord Mansfield replied, "that the case was very ingenious, and that he might not, perhaps, without some consideration, be able to answer it satisfactorily; but yet, it did not shake his opinion, that the plaintiff ought not to recover for the piece of paper under the circumstances of the case before him. Mingay then chose to be nonsuited."

recover, even if the transfer to the father had been absolute and unconditional. For suppose two parts of a foreign bill come to the hands of the drawee, he accepts both, and endorses first one part to A. and afterwards the other part to B. In any question as to property between them, A. might be entitled to both. But the question here is, whether the acceptor and endorser shall be allowed to defend himself against the holder of the one part, on account of the previous circulation of the other part? I am not aware of any principle of law upon which such a defence can be supported. But it has been further contended, that this bill must be considered as drawn in England, and therefore liable to the stampduty. That would be to put the law in opposition to the fact, for we know that the bill was actually drawn in Calcutta; and I think we ought not to strain the stamp-act to meet such a case as this. If the bill had, in fact, been drawn in England, though purporting to be drawn in Calcutta, the case would have been different. For these reasons the rule must be discharged.

BAYLEY, J. Where a bill is drawn in sets, the party claiming as holder ought to have all the parts, for the payment of any one part to another person may defeat *him. Here there were three parts; and it so happens that all of them were sent to the drawee, who was also payee, and he had power to deal with them in those two characters. He accepted two parts, and the plaintiff claims on one of those as endorsee. The other was endorsed by the defendant to his father, and that endorsement was prior, in order of time; and if it had been unconditional, and payment had, in fact, been made to the father, there might have been a difficulty in the case which does not now exist. The endorsement to the defendant's father was conditional only, and the other endorsement to the plaintiff is clearly available, the father not having insisted on payment to himself. By the acceptance, the defendant undertook to pay that first of exchange, the second and third not being paid. They have not been paid, and no one has a valid claim on them; the plaintiff is therefore

clearly entitled to recover on the first part.

LITTLEDALE, J. I agree in thinking that the plaintiff was entitled to recover. First, it seems to me that a stamp was not necessary to these bills. They were, bona fide, drawn in Calcutta as foreign bills; and even if they be considered binding on the defendant by estoppel, as separate bills, they cannot be treated as drawn in London. I feel some difficulty, however, in putting the case on this ground, for I think that the doctrine of estoppel is not to be imported into a transaction taking effect by the usage and custom of merchants. The three parts of each set originally formed but one bill, and the defendant could not divide it into two or three. But upon the other ground, I am of opinion that the plaintiff is entitled to retain the verdict. The defendant *can only the liable on one part; and if one part had, in the first instance, been lendorsed unconditionally to his father, he would not have been liable to the plaintiff; but as it was conditional, and the father afterwards waived that endorsement and gave up the bills, the endorsement of the other part to the plaintiff is binding.

Parke, J. I concur in thinking that the verdict for the plaintiff was right. The action was on two foreign bills accepted by the defendant. But it was said in defence that he had before accepted another part of each bill, and endorsed it away for value. Assuming that to be so, still I think that, although the defendant had not, after so doing, power to bind the drawer, he is estopped from disputing the regularity of his own acceptance. I cannot agree that the doctrine of estoppel is inapplicable to bills; for an acceptor is always estopped from disputing that the bill was regularly drawn. Then as to the question on the stamp act, it clearly is not a foreign bill within the schedule of the 55 G. 3, c. 104, nor is it an inland bill, for it was not drawn in England. Snaith v. Mingay, 1 M. & S. 87, appears to be exactly in point, where Le Blanc, J., observes, "Whether this was a perfect bill in Ireland is not so much the question as whether it was a bill drawn in England." So here the question as to the stamp is, Was this

bill drawn in England; certainly it was not; and we ought not by construction to extend the provisions of the stamp act to meet such a case as this. The rule for a new trial must, therefore, be discharged.

Rule discharged.

*457]

*BUDGEN v. BURR. Jan. 28.

Where process was returnable in Easter term, and the plaintiff, in Michaelmas term following, filed common bail for the defendant as of Easter term: Held, that it was too late and irregular.

COMYN moved to set aside the judgment that had been entered up in this case, and the execution issued thereon, for irregularity. The action was in debt. Process was issued and served on the defendant, returnable in Easter term last, and a declaration was afterwards filed conditionally as of that term. In Michaelmas term last common bail was filed by the plaintiff as of Easter term, and final judgment was signed on the 9th of December. Smith v. Painter, 2 T. R. 719, is a direct authority that common bail must be filed at the latest in the term following that in which the writ is returnable.

Langelow showed cause in the first instance. Smith v. Painter was a very different case from this. There the bail was filed as of a different term from that in which the writ was returnable. Here the common bail was filed as of the term in which the writ was returnable, which is necessary in order to keep the cause in Court. But the time within which that may be done is not limited, provided it be not until eight days after the return, and before final judgment,

Wansay v. More, 5 T. R. 65.

The Court consulted the Master as to the practice, who reported that common bail may be filed at any time during the term next after that in which the writ is returnable, or the following vacation, but that in this case common bail was filed too late, whereupon the Court made the rule absolute for setting aside the judgment and execution.

Rule absolute.

*4587

*FURNISH v. SWANN. Jan. 28.

Procedendo awarded where an action of trover had been removed by certiorari from an inferior court and the return filed, the defendant not having entered into a recognisance to pay debt and coats as required by the statute 7 & 8. G 4, c. 71, s. 6.

This was an action of trover, brought in the Guildhall Court of the city of Norwich, and the damages were laid at 191. The defendant removed the cause by certiorari, but did not enter into any recognisance for payment of the debt and costs. After the return was filed, a rule nisi for a procedendo was obtained, on the ground that such a recognisance was necessary.

Austen showed cause, and contended, first, that in trover no such recognisance was necessary; and, secondly, that as the return had been filed, the record could

not be sent back.

F. Kelly, contrd. The statute 7 & 8 G. 4, c. 71, s. 6, is general in its terms, and applies to all actions where the cause of action does not amount to 201; and the statute having expressly enacted that the cause shall not be removed unless the defendant enters into a recognisance, that enactment cannot be repealed by any supposed rule of practice. The filing of the return is, therefore, no answer to this application.

Per Curiam. The entering into a recognisance is required in trover as well

power, and, therefore, takes precedence of the judgment. Sir Edward Clere's case, 6 Co. 18, Roach v. Wadham, 6 East, 289, Ray v. Pung, 5 B. & A. 561, and Maundrell v. Maundrell, 10 Ves. 255, fully support this position. The first depended on the law of tenure; and there a man seised of three acres of land, which he held in capite, made a feoffment of two acres to the use of his wife for life for her jointure, and afterwards made a feoffment of the third acre to the use of such persons, and for such estates, as he should appoint by will; and it was held that he might, by such appointment, well dispose of the third acre, although by the statute of wills he could only have devised two-thirds. In Roach v. Wadham lands were conveyed to A. in fee, to the use of such persons and for such estates as B. should by deed or will limit or appoint; and for default of appointment to the use of B. in fee, yielding and paying a *certain rent, which B. thereby covenanted to pay. A. and B. conveyed the estate to C., by way of appointment, and it was held that C. was not liable to the rent or covenant as assignee of B. In Ray v. Pung the right of a wife to dower was held to be barred by the execution of a power of appointment; and that can hardly be distinguished from this, for the right of the wife attached before the execution of the power, but was afterwards defeated by it. In Maundrell v. Maundrell Lord Eldon, C., says, that "the fee vests until execution of the power, and the execution of the power is the limitation of a use under and by the effect of the instrument by which the power was reserved." Besides all these authorities, there is the case of Witham v. Bland, 3 Swanst. 277, n., published since the present question arose, where it was held that a sequestration was defeated by the execution of a power of appointment. Now a sequestration in equity is like a judgment at law, this authority, therefore, is directly in point.

Richmond, contra. This attempt to defeat a judgment creditor is entirely new, and cannot be supported. Judgments bind the land by the statute West. 2, c. 18, and in Sir J. Moleyn's case, 30 Ed. 3, 24 a, it was held that, if a person against whom a judgment is recovered has lands which he afterwards aliens, the creditor may have execution of them, or if he acquires lands after the judgment they also are liable. Again the statute 19 H. 7, c. 15, made uses subject to judgment creditors; now powers are but a modification of uses; and the statute of frauds, 29 C. 2, c. 3, extends the remedy to lands held in trust for the debtor. But it is said that this *general right to have execution of the lands of the debtor does not extend to cases where there is a power of appointment. The abstract idea of powers had no place at common law; no man was allowed to convey what was not vested in him. But when uses were introduced they came to be defined as the right to direct conveyances of the estate, and the right to the rents and profits in the mean time; and now, certainly, the possibility of a power existing independently of the fee must be admitted. To hold, however, that a power appendant would defeat all acts done before the execution of it, would have worked so great injustice, that it was at an early period decided that all acts and charges of the party suspended the power or defeated it pro tanto. Thus, "if tenant for life, with power to make leases or revoke, grants a rentcharge, and then makes a lease according to his power, the lessee shall hold it charged during the life of tenant for life; for he hath power to charge his own interest, which, by his own act, cannot be avoided," Gilb. on Uses, 142, and per Hale, C. B., in Edwards v. Slater, Hardr. 415. Neither can a lease granted by the party be defeated by the subsequent execution of a power, Snape v. Turton, Sir W. Jones, 392, Yelland v. Ficlis, Moore, 788, and per Walmsley, J., in Bullock v. Thorne, Moore, 618, Goodwright v. Cator, Doug. 477. Perhaps it may be said that the lien of a judgment differs from a lease or rent charge, because it is a proceeding in invitum. Judgments, however, are not always in invitum, and there are instances in which proceedings in invitum have been held to supersede powers; thus the bargain and sale by *commissioners of bankrupts has that effect, Doe v. Britain, 2 B. & A. 93. And in Bro. Abr. Feoffment at Uses, pl. 25, a judgment-creditor is assimilated to a grantee. It is said that this cannot be distinguished from a case of dower, but there are

several distinctions, and it seems rather to resemble the proceedings against a debtor by suing out a commission of bankrupt. Dower is a lien not to take effect until the death of the husband, a judgment is a lien from the time when it is entered up. Dower binds at common law, judgments by statute. Dower is allowed to be defeated by the assignment of a term with notice, Mole v. Smith, Jacob, 490, a judgment-creditor is not. Suppose the judgment-creditor had actually been in possession under the elegit, if the argument for the plaintiff is good, he might have been turned out, and the same argument would extend to cases of extents at the suit of the crown; but that they cannot be so defeated was decided in Rex v. Smith, Sugd. V. & P. App. No. 16. The whole of the argument on the other side depends on the assertion that the appointee does not come in under the appointor, but under him who created the power of appoint-That is true, so far as feudal purposes are concerned, but for many purposes he does come in under the appointor. Thus, a deed executing a power over a real estate has been held to be a conveyance so as to come within the statute Eliz. as a fraudulent conveyance.(a) So also the appointee must claim *467] according to the nature of the instrument, 2 Ves. 77; and in Scrafton *v. Quincey,(b) a deed of appointment of lands in a register county was postponed to a mortgage made after it, but which was registered before it.

Preston in reply. According to the judgment of Lord Hardwicke in the Duke of Marlborough v. Godolphin, the meaning of the expression "that persons must take under the power, or as if their names had been inserted in the power," is, that they shall take in the same manner as if the power and the instrument executing the power had been incorporated in one instrument; then they shall take as if all that is in the instrument executing had been expressed in that giving the power, and this agrees with the opinion of Lord Eldon in Maundrell v. Maundrell. Now, if the mortgage to Wigan had been inserted in the instrument creating the power, there could have been no doubt of his having priority over the judgment-creditor.

Cur. adv. vult.

The judgment of the Court was delivered in the course of this term by

Lord TENTERDEN, C. J. This was a special case, argued during the last It appeared by the case that in Michaelmas term 1822 a judgment was entered up against T. Baker at the suit of the defendant, who, on the 13th of December, 1827, sued out an elegit, under which the lands in question were delivered to him by the sheriff. In the mean time, between the entering up of the judgment and the execution of the elegit, viz. in November 1826, the then defendant, Baker, *had acquired these lands by a conveyance to such uses as he might appoint, and in the mean time to the use of himself for life, and so forth. In March 1827 Baker mortgaged the estate for 4000l. to the lessor of the plaintiff, and appointed the use to him for 500 years; and the question for the Court was, Whether this conveyance, under the power of appointment, defeated the judgment-creditor? It has been established ever since the time of Lord Coke, that where a power is executed the person taking under it takes under him who created the power, and not under him who executes it. The only exceptions are, where the person executing the power has granted a lease or any other interest which he may do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception as an act done by the party, for it is considered as a proceeding in invitum, and therefore falls within the rule. We are, therefore, of opinion that the nonsuit must be set aside, and a verdict entered for the plaintiff.

Postea to the plaintiff.

(b) 2 Ver. 413. But in this case the mortgage deed was registered before the deed creating the power.

⁽a) See the Duke of Marlborough v. Godolphin. 2 Ves. 65, where it was said arguendo, that the then Lord Chancellor had so decided, and not denied by him.

COOPER v. J. MEYER and W. B. MEYER. Jan. 28.

Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer; and, therefore, an endorsee may bring evidence to show that the signatures of the supposed drawer, to the bill and to the first endorsement, are in the same handwriting.

Assumpsit by the endorsee against the acceptors of several bills of exchange, some of which were drawn in the name of Woodman, and others in the firm of H. Ullock and Co., payable to the order of the drawer. Plea, the general issue. At the trial before *Lord Tenterden, C. J., at the Guildhall sittings after Michaelmas term 1828, bills corresponding with those set out in the [*469] declaration were produced, and the handwriting of the acceptors proved, and also that the bills were accepted by them for the accommodation of one Darby. The bills drawn in the names of Woodman and Ullock and Co. were endorsed respectively with those names and by Darby, for whom the plaintiff discounted them; and two witnesses for the plaintiff, who knew Darby's handwriting, stated, that they believed the names of the drawers and first endorsers to have been written by him. For the defendant, a person named Woodman, a cousin of Darby, was called, who proved that the name Woodman was not signed by him, and that he never anthorized Darby to draw or endorse bills in his name; and similar evidence was given by a member of a firm of T. Ullock and Co., and no evidence was given of the existence of other persons answering the description of the drawers of these bills. Then a witness was called, who stated that he did not think the names of the drawers and first endorsers were written by Darby; and on cross-examination he was asked by the counsel for the plaintiff, whether he believed the bills to have been signed and endorsed by the same person? This was objected to as a comparison of handwriting. Lord Tenterden allowed the question to be put, and the witness answered it in the affirmative. His Lordship, in summing up, told the jury, that as there was no proof of the existence of such persons as Woodman and H. Ullock and Co., in whose names the bills were drawn, it was sufficient, as against the acceptor, to prove the endorsement to be in the same handwriting as the drawing; but he also desired them to say, whether upon the evidence *they believed the bills to have been drawn and endorsed by Darby. The jury said that they did, and found a verdict for the plaintiff. In Hilary term a rule nisi for a new trial was obtained, on the ground that the witness should not have been allowed to answer the question objected to at the trial, and that the question was not properly presented to the jury.

The Attorney-General and Campbell showed cause. There is no doubt that as a general principle it is wrong to admit proof of writing by a comparison of hands. But this case was very peculiar. The bills appeared to have been drawn in fictitious names, and the question put and objected to was not whether the witness could say that the endorsement was written by A. or B., by comparing it with some other writing, but whether the bills had been drawn and endorsed by the same person. Then the question put to the jury was wholly unexceptionable, viz. whether they believed the bills to have been drawn and endorsed by Darby? and there was abundant evidence to warrant their answer

in the affirmative.

Gurney, F. Pollock, and Ashmore, contra. The bills in question were accepted by one of two partners, in the name of the firm. But one partner cannot bind another by accepting a bill which is a forgery; and the bills in question, drawn in fictitious names, were so. Or, waiving that point, although the defendant, by accepting the bills, gave credit to the writing of the drawer, yet he might dispute the endorsement, Robinson v. Yarrow, 7 Taunt. 455, and therefore the endorsement should have *been proved in the ordinary way. The evidence that the drawing and endorsement were by the same hand ought [*471 not to have been admitted. If it was admissible in this case it would be equally

admissible in all others; for the acceptor is always precluded from disputing the

handwriting of the drawer.

Lord TENTERDEN, C. J. I am of opinion that both the defendants are bound by these acceptances. It is clear that they were given on Darby's credit, and indeed the jury found that he drew and endorsed the bills. The acceptor ought to know the handwriting of the drawer, and is, therefore, precluded from disputing it; but it is said that he may, nevertheless, dispute the endorsement. Where the drawer is a real person, he may do so; but if there is, in reality, no such person, I think the fair construction of the acceptor's undertaking is, that he will pay to the signature of the same person that signed for the drawer. The rule for a new trial must, therefore, be discharged.

BAYLEY, J. The defendants ought not to have accepted the bills without knowing whether or not there were such persons as the supposed drawers. If they chose to accept without making the inquiry, I think they must be considered as undertaking to pay to the signature of the person who actually drew the

bills.

PARKE, J.(a) concurred.

Rule discharged.

(a) LITTLEDALE, J., had gone to Chambers.

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*FISHER v. CLEMENT. Jan. 28.

In an action for a libel, where the language is ambiguous, and it is doubtful whether it imputes any injurious matter to the plaintiff; the proper question for the jury is not whether the intention of the publisher be to injure the plaintiff, but whether the tendency of the matter published be injurious to him.

DECLARATION in the Common Pleas stated, that one Stockdale had falsely, &c., published a libel (contained in a work entitled the Memoirs of, and purporting to be written by, one Harriet Wilson), which imputed gross misconduct to the plaintiff; that the plaintiff brought his action against Stockdale in the Common Pleas, and recovered by verdict 700l. damages; that the defendant contriving, &c., to injure the plaintiff in his good name, and to cause it to be believed that the said libel was true, and that the plaintiff was guilty of the misconduct thereby imputed to him, published of and concerning the plaintiff, and of and concerning the said libel, and of and concerning the said verdict, the false, scandalous, malicious, and defamatory libel, containing the false, scandalous, malicious, and defamatory matter following. It then set out the libel, which purported to be a dialogue between Stockdale and Harriet Wilson. The tendency of it was undoubtedly to hold up to ridicule and contempt Stockdale the publisher, and Harriet Wilson the supposed author, of the Memoirs, in which the first-mentioned libel was contained. In the course of the dialogue two verdicts obtained in actions brought against Stockdale, for libels contained in Harriet Wilson's Memoirs, were alluded to; one in which Fisher the plaintiff had recovered 700l., and the other, in which another person had recovered 300l.; and Harriet Wilson was made to state generally, that what she wrote in her Memoirs was in substance *true, and in particular, that what she had written of the person who had obtained 300l. damages against Stockdale was true. Stockdale is then made to say, "What say you to Fisher's case?" Harriet Wilson's reply was, "That I could answer in its place." There was no other allusion to the plaintiff in the course of the publication. The plaintiff having obtained judgment in the Common Pleas, that judgment was reversed in this Court, and a venire de novo awarded (7 B. & C. 459). The cause was tried before Lord Tenterden, C. J., at the London sittings after Trinity term, 1828. The alleged libellous matter was proved to have been published by the defendant in a weekly newspaper called "Bell's Life in London." It was contended

that the tendency of the publication was injurious to Stockdale and Harriet Wilson only, and not to the plaintiff. Lord Tenterden, in addressing the jury, said, that the question was what the intention of the publication was; and he directed them to consider whether it was intended to cast a reflection on the character of the plaintiff, and to insinuate that the libellous matter which formed the subject of the action against Stockdale was true. If they were of that opinion they should find for the plaintiff, but if they thought the object was not to reflect upon the plaintiff's character, but merely to expose and hold up to public contempt the writer and publisher of Harriet Wilson's Memoirs, they should find for the defendant; and in conclusion he directed them to find for the plaintiff, if any person from reading the matter complained of could conceive an unfavourable opinion of the plaintiff. The jury having found a verdict for the defendant, a rule nisi *had been obtained for a new trial, on the ground that the in-tention of the publication ought not to have been submitted to the jury; [*474] that they ought to have been directed to find for the plaintiff if they thought the tendency of the libel was to cast an unfounded imputation on the plaintiff.

The Attorney-General, Brougham, Denman, and Plutt now showed cause. It must, undoubtedly, be conceded that, generally speaking, the intention of a writer or publisher of a libel is an inference of law arising from the publication of matter injurious to the reputation of another, and, therefore, where, as in this case, it was doubtful from the libel whether it was calculated to injure the character of the plaintiff, the proper question for the jury was, whether that was the tendency of the publication? That question was substantially left to the jury; for assuming that they were told to consider what the intention of the publication was, that expression, though not very accurate, implies the intention of the author or publisher to be collected from the publication itself. But assuming that to be ambiguous, the jury were told to find for the plaintiff, if they thought any person, reading the matter complained of, would receive an unfavourable

impression of the plaintiff.

Campbell and Manning, contrd. The mode in which the question was left to the jury was calculated to lead them to think that they ought to find for the defendant, if the publisher or writer of the libel had any other intention than that which the law would infer from the injurious tendency of the publication. Now malice in law (which imports a wrongful act done intentionally without just cause or *excuse) is implied from the publication of any false charge or slanderous matter, Bromage v. Prosser, 4 B. & C. 247, upon the general principle, that where a man uses noxious and injurious means, he must be presumed to have contemplated and intended the injurious, but natural, con-

sequence of using such means.(a)

Lord Tenterden, C. J. I have not any distinct recollection of the precise mode in which I left this case to the jury; but assuming that I told them to consider what the intention of the publication was, and afterwards added, that if they thought any person, from reading the matter complained of, could conceive an unfavourable impression of the plaintiff, they ought to find in his favour, I think that, although I did not present the case to them with that accuracy of expression which I ought, the direction was substantially correct, and such as men, not of professional habits, would understand as importing that they were to find for the plaintiff if they thought the tendency of the libel was injurious to him. I could hardly have left the intention of the writer or publisher to the jury as a question independent of, and distinct from, the tendency of the publication; for I have always entertained an opinion, and frequently expressed it, that a person who publishes matter injurious to the character of another must be considered, in point of law, to have intended the consequences resulting from that act. I think that, taking the whole of the direction together, the jury must have understood me as directing them to find for the plaintiff, if they thought the tendency of the libel was injurious to him.

*BAYLEY, J. It seems to me that the question was put properly to the jury, whether it was the intention of the defendant to represent that the plaintiff was guilty of the acts imputed to him in the first libel; for they were afterwards told to find for the plaintiff, if they thought any person reading the paragraph alluded to would conceive an unfavourable impression of the plaintiff. The jury, therefore, must have understood that they were to collect the intention of the defendant from the libel itself, and that was, undoubtedly, a question for them.

LITTLEDALE, J. Taking the whole summing up together, I think the ques-

tion was properly submitted to the jury.

PARKE, J. The direction was substantially, though not critically, correct. Taking the whole together, it was impossible for men of common sense to understand that they had to consider any other question than one, viz. whether the tendency of the libel was injurious to the plaintiff.

Rule discharged.

*477] *The KING v. The Justices of KENT. Feb. 1.

An order of justices, for diverting a public highway and substituting a new one for it, containing also an order for stopping up the old highway, is bad, inasmuch as they have no power to stop up the old road until the new one has been made.

An order for diverting an old highway and substituting a new one must show on the face of it that the justices viewed the line of the proposed new road.

A RULE nisi had been obtained for a certiorari to remove into this Court an order made by two justices at a special sessions for diverting and selling a public highway, and an order of the quarter sessions for the confirmation of it, for the purpose of moving that they might be quashed. By the original order (after reciting that the two justices had upon view found that certain parts of a public highway therein particularly described might be diverted and turned so as to be more commodious to the public by opening a new road in a certain direction therein specified, and that they had received evidence of the consent of Sir T. M. W., through whose land the new road would pass), they the said justices did order, "That the said highway thereinbefore described, should be diverted and turned through the lands aforesaid in the course proposed and thereinbefore described; and that so much of the old highway as was thereinbefore described and expressed and intended to be thereby ordered to be diverted and turned, should be stopped up and given to the said Sir T. M. W., the owner of the land through which the said new highway was thereby ordered to be made, in lieu of and in exchange for the said new highway." This order was confirmed at the Midsummer quarter sessions holden at Maidstone on the 16th of July, 1829.

The Attorney-General, Gurney, and D. Pollock showed cause. The parties applying for the certiorari might, *if they had thought fit, have appealed against the order. They did not do so. Now, where an appeal is given by the highway act, 13 G. 3, c. 78, the certiorari is taken away; Rex v. Justices of St. Albans, 3 B. & C. 698; but some technical objection will be taken to the form of the order, and it will be said that the justices had no jurisdiction, and that therefore the case cited does not apply. It may be objected, that the justices ought not to have given the old road in exchange for the new. But by the statute they are required to sell the old road; why, therefore, should they not give it in exchange if the two are of equal value? The statute seems to contemplate such an exchange; for in the schedule No. 22, there is a form given for the consent of the party through whose land the new road is to be made, and that describes the consent to be given "in consideration of the sum of —— to be paid to me for the said land and the soil thereof;" or, "in consideration of the said old highway being sold, exchanged, and to be vested in me, and also of the sum of —— to be paid to me."

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Campbell, Alderson, and Brodrick, contrd. The proceeding in this case was under the 55 G. 3, c. 68, s. 2, and Rex v. Sheppard, 3 B. & A. 414, is a decisive authority that the certiorari is not thereby taken away. The only question is, whether this order is good on the face of it. If it is quashed, and the proposed alteration would be for the benefit of the public, Sir T. M. W. can get another order, and then, on an appeal, the merits may be discussed. The order now before the Court is clearly bad. The justices had no power to give the old road *to Sir T. M. W. in exchange for the new; they were bound to make an order for the sale of the old road, Rex v. Kenyon, 6 B. & C. 640. [Lord TENTERDEN, C. J. In that case there was not any exchange.] That is true: but the statute gives no power to make an exchange in the case of a carriage Again, the statute 13 G. 3, c. 78, s. 17, to which the more recent act refers, gives no power to stop up an old road until the new one has been completed. Here the order for stopping up the old road was contained in the same order which directed the making of the new one. Thirdly, the justices do not say in their order that they have viewed the course of the new road.

Lord TENTERDEN, C. J. I am of opinion that the rule must be made absolute. The original order is not only for making a new road, but also for stopping up the old one. The statute gives no power to make such an order, and there

is no form in the schedule applicable to such a mode of proceeding.

LITTLEDALE, J.(a) There is another fatal objection to the order, viz. that it does not contain any statement that the justices have viewed the course proposed for the new road. (b)

PARKE, J., concurred.

Rule absolute.

(a) BAYLEY, J., had left the Court.

(b) See 13 G. 3, c. 78, sched. No. 16.

DOWBIGGIN, Administratrix, v. HARRISON. Feb. 1. [*480

The stat. 17 Car. 2, c. 8, which enacted, that in certain cases a suit shall not be abated by the death of either party, between verdict and judgment, does not apply to cases of nonsuit.

This action was tried in December 1827, when the plaintiff was nonsuited. The defendant died on the 5th of January, 1828, and no further proceedings were taken until October 1828, when an application was made to the Master by the representative of the defendant, to tax the costs of the suit. The matter was discussed before the Court, and it having been decided that the plaintiff was liable to pay costs, (a) they were taxed, and the Master's allocatur given on the 11th of November, 1829, when judgment was signed and a sci. fa. issued to revive it. In this term a rule was obtained to set aside the sci. fa. for irregularity, against which

Campbell now showed cause. It must be admitted that at common law a suit was abated by the death of a defendant at any time before final judgment; but the statute 17 Car. 2, c. 8, was passed to remedy that inconvenience. It enacted that in all actions, personal, real, or mixed, the death of either party between the verdict and the judgment shall not be alleged for error. It will be said that this applies only where there has been a verdict, and not where a plaintiff has been nonsuited. But the evil is the same in both cases, and if the construction is doubtful, the plaintiff should be left to bring a writ of error, or plead to the

sci. fa.

Godson, contrà. The statute clearly does not apply to nonsuits, and at all events the judgment was entered *too late. The statute only extends to judgments "entered within two terms after the verdict." As to bringing error, the Court, to save expense to the parties, will interfere in a summary way. Copley v. Day, 4 Taunt. 702, shows that the Court have no power to allow judgment to be entered nunc pro tunc.

Per Curiam. The rule must be made absolute. The statute does not apply to cases of nonsuit. Moreover, the defendant died before the day in bank, so that, if the Court could allow judgment to be entered nunc pro tune, it would still be of a term after his death.

Rule absolute.

DOE v. REYNOLDS. Feb. 1.

A party in execution for more than twelve months, for the costs of an ejectment exceeding 20..., is not a person in execution upon a judgment for a debt or damages not exceeding 20..., within the meaning of the 48 G. 3, c. 123; and, therefore, not entitled to be discharged out of custody.

THE 48 G. 3, c. 123, enacts, "that all persons in execution upon any judgment for any debt or damages not exceeding the sum of 201., exclusive of the costs incurred by such judgment, and who shall have been in prison thereupon for the space of more than twelve successive calendar months next before the time of their application to be discharged, shall, upon application to one of the superior courts at Westminster, be discharged out of custody on such execution by the rule or order of such Court."

Steer now moved to discharge the defendant out of custody, who had been in custody in execution for 116l., the costs of a judgment in ejectment, for more *482]

*than the space of twelve successive calendar months, on the ground that the damages recovered against the defendant in ejectment were nominal, and he had been in custody for damages not exceeding 20l. for more than twelve months.

Barnewall showed cause in the first instance. The statute clearly contemplates the relief of persons in execution upon judgments obtained in actions where the object of the plaintiff is the recovery of a debt or damages. The object of a party bringing an ejectment is the recovery of land, and not of a debt or damages. The case, therefore, is not within the statute.

Steer, contrd. The statute was humanely intended to relieve persons detained in prison under executions which they are unable to satisfy; it must consequently receive a liberal construction. If, therefore, the defendant is within the terms of the act, he is entitled to the relief which he prays. Now it is clear that the costs in an action, whatever proportion they may bear to the damages recovered, form no bar to a defendant's claim to the benefit of this statute. The damages upon the postea in this case are 1s. only, and there can be no distinction in principle between the damages assessed for wrongfully keeping the owner of real property out of possession, and any other tort or breach of contract for which damages may be given by a jury. The case, therefore, being within the letter and principle of the enactment, the defendant may claim, as a matter of right, to be discharged.(a)

*483] *Lord Tenterden, C. J. I am of opinion that this is not a case within the statute. The object of the statute was to relieve persons in execution upon a judgment for a debt or damages. Here the defendant is in execution for the costs of an ejectment. The object of a party instituting such a proceeding is to recover the possession of land, and not any debt or damages.

Rule refused.

(a) Ex parte Cusse, Chitty's Stat. 589. Langdon v. Rossiter, 13 Price, 186. Wood v. Kelmerdine, 2 Younge & Jer. 10.

SKEE v. COXON. Feb. 3.

Where a cause is referred by order of Nisi Prius, either party has power to revoke the submission, and the Court cannot vacate that revocation, or compel the party revoking to pay costs to the other party, unless a power to do so is given by the order of reference.

Assumpsit on a policy of insurance on ship. Plea, the general issue. The cause came on to be tried before Bayley, J., at the York Spring assizes 1829, when a verdict was, by consent, entered for the plaintiff, subject to a reference upon special terms; one of which was, that the ship should be repaired by the underwriters. After the repairs had accordingly been commenced, the plaintiff revoked her submission. A rule nisi was afterwards obtained, calling upon the plaintiff to show cause why the revocation of the submission should not be vacated, and why she should not pay to the defendant the costs incurred by him in preparing for trial at the York assizes, and in acting upon the rule of reference by repairing the ship. Many affidavits were filed on each side respecting the grounds for revoking the submission.

The Attorney-General and Cresswell showed cause. It is unnecessary to discuss the contents of the affidavits, and to inquire whether the plaintiff was or was not justified in revoking her submission to arbitration, for the *Court that a submission to arbitration might be revoked, even after it had been made a rule of court, although the party might be thereby subjected to punishment for the contempt. It makes no difference, that some proceedings had been taken under the rule of reference, Trotter v. Moysey. (a) Then as to the costs, the Court have no power over them, inasmuch

as the rule of reference contained no provision on the subject.

F. Pollock and Alderson, control. It has never yet been decided, that a party has power to revoke a submission to arbitration made by order of Nisi Prius. The question has never before been presented to the Court, and there is a great difference between such a submission and one by the mere act of the parties. This is the act of the Court done by consent of the parties. Then as to the costs, in Aston v. George, 2 B. & A. 395, the Court allowed them under similar circumstances; and in Comber, Administratrix, v. Hardcastle, 3 B. & P. 115, the Court compelled the plaintiff, an administratrix, to pay costs, because she had misconducted herself in bringing the action. At all events, the Court may stay the proceedings until the plaintiff pays costs, as a punishment, or submits to a new reference, for she has broken the agreement to refer. [Parke, J. Then you may sue on that agreement, and recover damages for the breach of it.]

*BAYLEY, J. If the Court had power to vacate the revocation of the submission, or to grant costs to the defendant, it would be necessary to examine the affidavits and inquire into the grounds upon which the plaintiff proceeded. But, I am of opinion, that we have no power to do either the one or the other. It has never hitherto been disputed, that the authority given to an arbitrator is revocable at any time before his award is made, and I think it is too late now to contend that it is not so. Then as to the costs, the Court can have no power over them unless it is given by the submission, but that is wholly silent on the subject. The application must therefore fail as to both these matters. In the case of Comber v. Hardcastle, the plaintiff did not sue for her own benefit as administratrix, but for the benefit of a third person, to whom she had assigned a contract made by the intestate in his lifetime, and the Court on that ground thought she was not entitled to be exempt from the payment of costs.

PARKE, J. I think we have no power to vacate the revocation, or to stay the plaintiff's proceedings so as to compel her to refer again, nor does the order of Nisi Prius give us any power over the costs. The rule must therefore be discharged.

⁽a) Cited by Hullock, Serjt., in Clapham v. Higham, 1 Bing. 87.
(b) Lord TENTERDEN, C. J., and LITTLEDALE, J., were absent.

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*The KING v. SWYER.

By charter the capital burgesses and common council of a borough were authorized every year, on Monday next before Michaelmas, to elect and nominate one of the capital burgesses to be mayor for one whole year thence next ensuing; and he, hefore he were admitted to execute that office, or in any way to intermeddle in the same office, was, on Friday next after the feast of St. Michael next ensuing such nomination and election, not only to take his corporal oath well and faithfully to execute the office, but also all the oaths appointed by a mayor to be taken; and after such oath so taken, he might execute the office of a mayor of the borough for one whole year then next ensuing. It was then provided, that none who should have once borne the office of mayor should be again elected and preferred to be mayor within the space of three years next ensuing the end and determination of his office of mayoralty: Held, that the words "three years," mentioned in the prohibitory clause, imported years of office, and not calendar years; and, therefore, a person who had once served the office of mayor might be again promoted to the same office as soon as three mayoralties had intervened: Held, also, that a party became mayor, not when he was elected, but when he was sworn in; and it was sufficient if three mayoralties intervened between the time when he ceased to be mayor, and the time when he was sworn into office a second time.

By charter of King Charles II., dated the 22d of March, 1664, the borough of Shafton, otherwise Shaftesbury, in the county of Dorset, was incorporated by the description of the mayor and burgesses of the borough of Shafton, otherwise Shaftesbury, in the county of Dorset. The corporation was to consist of a mayor, recorder, and twelve capital burgesses, who were to be called the common council The clause relating to the election of a mayor was in the of the said borough. following words:-"We will moreover, and for us, our heirs and successors, do by these presents grant and confirm to the aforesaid mayor and burgesses of the borough aforesaid, and to their successors, that the capital burgesses and common council of the borough aforesaid for the time being, or the major part of them, whereof the mayor or recorder of the borough aforesaid for the time being, or the last preceding mayor of the said borough then living, we will to be one, from time to time, in perpetual times to come, may and shall have power and authority yearly and every year in the month of September, to wit, on Monday next before the feast of St. Michael the Archangel, of electing and nominating, *and that they can and may elect and nominate one of the capital burgesses of the borough aforesaid for the time being to be mayor of the borough aforesaid, for one whole year thence next ensuing, and that he who so as aforesaid shall be elected and nominated for mayor of the borough aforesaid, before he be admitted to execute that office, or in any way to intermeddle in the same office, shall not only take his corporal oath well and faithfully to execute that office, but also all the oaths by the laws and statutes of this realm appointed by a mayor to be taken, upon Friday next after the feast of St. Michael the Archangel next ensuing such nomination and election, before the steward of the court of the view of frankpledge of that borough for the time being, or his deputy; and that after such oath so taken, he can and may execute the office of a mayor of the borough aforesaid for one whole year then next ensuing." The charter then provided that none who should have once borne the office of mayor of the borough should be again elected and preferred to be mayor of the same borough within the space of three years next ensuing the end and determination of his office of mayoralty of the same borough.

Swyer was elected mayor on Monday the 26th of September, 1825, being the Monday next before Michaelmas-day. He was sworn into his office on Friday the 30th of September, 1825. On the 25th of September, 1826, being the Monday before Michaelmas-day, one Chitty was nominated mayor, and on Friday after Michaelmas-day, viz. the 6th of October, sworn into office, when Swyer delivered up the corporate seal; and on Monday the 28th of September, 1829, 8wyer was re-elected mayor. Notice having been given that he was ineligible, another person was put up, and it was *put to the vote which of the two should be elected; when there appeared seven to six for Swyer, and on

Friday the 2d of October he was duly sworn into office.

A rule had been obtained calling on the defendant to show cause why an Vol. XXI.—27

information in the nature of a quo warranto should not be exhibited against him, to show by what authority he claimed to be mayor of the borough of Shafton, otherwise Shaftesbury, in the county of Dorset, on the ground that he was elected and preferred to the said office within the space of three years next ensuing the end and determination of his former office of mayoralty in the same borough, he having continued mayor until the 6th day of October, 1826, and having been re-elected in September 1829, and sworn into office on the 2d of October, 1829.

The Attorney-General and Erle now showed cause. By the charter the election of mayor is to be on Monday before Michaelmas, and he is to be elected to be mayor for one whole year thence next ensuing, and before he executes the office he is to be sworn in on Friday next after Michaelmas, and after having taken the oaths he is to execute the office for one whole year thence next ensu-The word year(a) is frequently used to denote different periods of time; and in this clause it is used twice in the sense of mayor's year, or year of office, and not of calendar year. If it was meant as a calendar year, in some years there would be two mayors for a week; in others, no mayor for a week; the period from election to *swearing in varying for the space of seven days.

[*489]
There cannot be two mayors, because the charter expressly directs one capital burgess to be mayor. There is no reason for supposing that the word year in the prohibitory clause meant a different time from that mentioned before. It was laid down by Lord Tenterden in Rex v. Hall, 1 B. & C. 136, "that the meaning of particular words is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained." Thus, "tempus semestre" has been construed to be six calendar months in the case of lapse, Catesby case, 6 Coke, 62; verba accipienda sunt secundum subjectam materiam; and because this computation of months concerns those of the church, there is great reason that the computation should be according to the computation of the church which they best know. So, a hiring from Whitsuntide to Whitsuntide has been held to be a hiring for a year, though for 339 days only, Rex v. Newstead, Burr. S. C. 669, recognised in Rex v. Standon Massey, 10 East, 576. So though half a year contains 182 days, the odd hours being rejected, yet where half a year's notice to quit is necessary, notice on the 28th of September to quit on the 25th of March, being 179 days, has been held good as a tenant's half year, Doe dem. Harrop v. Green, 4 Esp. 198. Here it is manifest from the charter that the year was intended to designate the year of office, and not the solar year; and if that be so, then the defendant Swyer was not re-elected and promoted to the office of mayor within the space of three years next ensuing the date and determination of his office; for he *was not promoted to that office a second time until he was sworn in on the 2d of October, when three mayoralties had intervened.

Campbell and Barstow, contrd. The word years in the charter ought to be construed according to its ordinary import, unless there be something on the face of the charter to show that it was used in some other sense. There is nothing to show that any other year than a calendar year was intended by the expression three whole years. This construction may render it necessary that a fourth year of office should intervene before the same person could be re-elected; but that must be presumed to have been known to the grantor of the charter when he used the expression. It is said that the words "three years next after the determination of his office," are to be read three successive mayoralties. Assuming that the word years if it had stood by itself might have been used in that sense, it is accompanied with the word space of, which shows that it was applied to the effluxion of time, and not to the succession of events. Assuming that the words used in the prohibitory clause imported charter years, still the defendant

⁽a) In Bracton, 359, it is said, "Item annorum, alius solaris, alius lunaris, alius artificialis, alius naturalis, alius usualis." And in Dugdale, Chron. Jur. Pref. p. 2, it is said, that the year is either astronomical, ecclesiastical, or regnal, beginning on the 1st of January, or 25th of March, or the day of the king's accession.

was not duly elected in 1829. He continued mayor in virtue of his first appointment till the 6th of October, 1826, and he was re-elected on the 28th of September, 1829, before the three mayoralties were completed. He therefore was elected mayor within the space of three (charter) years next following the end and determination of his mayoralty.

Lord Tenterden, C. J. My opinion is, that the charter requires only that there shall be three intervening mayoralties between the period when an indi*491] mayor; and I think that a party becomes mayor not merely by reason of his being elected, but of being sworn into office. The present defendant, therefore, first became mayor by reason of his having been sworn in, on the 30th of September, 1825; he ceased to be mayor on the 6th of October, 1826; and, after having been re-elected, he was sworn into office on the 2d of October, 1829. There mayoralties had then intervend. He was consequently duly elected.

The rule must, therefore, be discharged.

BAYLEY, J. I am of opinion that the word year in the prohibitory clause of this charter imports not a solar, but a charter year, upon the same principle that a hiring from Whitsuntide to Whitsuntide, though in fact for 339 days only, has been held to be a hiring for a year. But then it is said that Swyer was re-elected before three mayoralties or charter years had intervened. The question depends entirely on the construction of the prohibitory clause in the charter. The words of that clause in the original charter are, "et quod nullus qui officium majoris burgi semel gesserit rursus electus et prefectus fuerit in majorem ejusdem burgi infra spatium trium annorum proxime sequentium finem et determinationem officii sui majoratus in eodem burgo." The words "infra spatium." &c., are governed by, and dependent upon, the words "electus et prefectus fuerit." To bring a party within the meaning of the prohibitory clause, he must not only be electus but prefectus within the space of three years next following the end and determination of his mayoralty. By the clause authorizing the election of a mayor, the capital burgesses are to elect and nominate one of the burgesses *492] to be mayor; and he, before he executes his office, is to *be sworn in. He becomes the head of the corporation not when he is elected and nominated, but when he is sworn in. The word electus in the prohibitory clause applies to a person who has been elected and nominated to the office of mayor by the capital burgesses; the word prefectus to a person who has become the head of the corporation by reason of his baving been sworn in. Here the defendant was not prefectus within the meaning of the prohibitory clause within the space of three charter years next ensuing the end and determination of his office of mayoralty; for he was not sworn into office till the 2d of October, 1829. and three charter years had then followed the end and determination of his former mayoralty.

LITTLEDALE, J. I am of the same opinion. The word year in the prohibitory clause means a mayor's year; and a person is not to be considered as having served a year within the meaning of this charter until another fills the place

he has left.

PARKE, J., concurred.

Rule discharged.

WRIGHT, Administratrix, v. NUTTALL, Gent., one, &c. Feb. 6.

Where the plaintiff in an action against an attorney recovers less than 40s., the Judge may certify under the statute 43 Elis. c. 6, and deprive the plaintiff of costs.

This was an action of assumpsit for work and labour done by the plaintiff's husband in his lifetime, as a sheriff's officer for the defendant. Plea, a tender of half a guinea to the plaintiff, and the general issue as to the residue.

*At the trial before Alexander, C. B., at the Summer assizes 1829, for the town of Nottingham, the plaintiff obtained a verdict, damages half [*493 a guinea, and the learned Judge certified under the statute 43 Eliz. c. 6, to deprive the plaintiff of costs. In the last term White obtained a rule nisi for taxing her, the plaintiff's costs, notwithstanding the certificate, on the ground that the defendant being an attorney of this Court, was not entitled to the benefit of a certificate to deprive the plaintiff of costs.

N. R. Clarke on a former day in this term showed cause. The second section of the statute 43 Eliz. c. 6, s. 2, is in very general terms. It provides that, "if upon any action personal to be brought in any her Majesty's Courts at West minster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the Judges of the same Court, and be so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein, in the same court, shall not amount to the sum of 40s. or above, that in every such case the judges and justices, before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretion." Although the preamble, which will probably be relied on as restraining the effect of these general terms, is narrower in its expression, yet the prevention of suits in the superior courts for trifling sums is a public benefit, and the enacting clause ought therefore to receive a liberal construction. Man v. *Canmel, Lofft. 783, is an authority to show, that although the preamble is generally the key to the construction of a statute, yet it does not always open all the parts of it, as sometimes the legislature having a particular mischief in view, which was the primary object of the statute, merely state that in the preamble, and then go on in the body of the act to provide a remedy for general mischiefs of the same nature, but of different species, neither expressed in the preamble nor perhaps then in immediate contemplation. In like manner this very section has received already this construction in Dand v. Sexton, 3 T. R. 37, and Pyeburn v. Gibson, 8 Moore, 450, where Burrough, J., says, "The object of this statute was to confine trifling suits to inferior courts; or, in other terms, to prevent the bringing of actions, which, in point of principle, ought not to be commenced at all."

White, contrd. The object of the legislature in passing this statute is best to be collected from the terms used by them in the preamble, which Lord Coke describes to be "a good mean to find out the meaning of the statute, and as it were a key to open the understanding thereof, Co. Lit. 79 a." The words of the preamble are, "for avoiding the infinite number of small and trifling suits commenced or prosecuted against sundry her majesty's good and loving subjects in her highness's courts at Westminster, (which by the due course of the laws of this realm ought to be determined in inferior courts in the country.") Now if the defendant had been sued in an inferior court for the debt recovered in this action, he might have brought his writ of privilege and stayed the *proceedings.(a) On the other hand, he could not have pleaded to this action that he was resident within an inferior jurisdiction, and that the debt sued for was recoverable there, Gardner v. Jessop, 2 Wils. 42, Wiltshire v. Lloyd, Dougl. It cannot, therefore, be said that this is a suit which ought to have been determined in an inferior court in the country. And Crespigny v. Wittencon, 4 T. R. 790, is an authority to show, that although the preamble cannot control the enacting clause, yet it may be compared with the rest of the act, in order to collect the intention of the legislature. Was it then the intention of the framers of stat. 43 Eliz. c. 6, to bring attorneys within its provisions? That it was not, the character of an attorney's privilege goes far to show. In Harper v. Tahourdin, 6 M. & S. 383, Bayley, J., calls it the privilege of the client as well as of the attorney. And in Bac. Abr. tit. Attorney, (G), it is thus spoken of, "At-

torneys have privilege not to be sued in any other courts except those in which they are sworn and admitted, because of the prejudice that may accrue to the business of those courts in which their attendance is required." Standing alone then as a question of construction on this statute, attorneys must be considered without its operation. But analogous cases have arisen on other statutes, in which the like construction has prevailed. Thus, in Armington's case, Palmer, 403, a clerk of the King's Bench was sued in an inferior court for a debt under five pounds, and had a writ of privilege allowed; for the statute 21 Jac. 1, c. 23 (the fourth section whereof *enacts, that a suit when the debt exceeds not five pounds shall not be removable), never intended to take away the privilege of attorneys. In Board, one, &c. v. Parker, 7 East, 47, attorneys plaintiffs were holden not to be compellable within the London court of conscience act, 39 & 40 G. 3, c. 104, to sue there for a debt under 5l. at the peril of costs. And although Lord Ellenborough's judgment proceeded in great measure upon the tenth section of that act, which expressly referred to attorneys defendants, and upon the maxim that expressio unius est exclusio alterius; yet a similar conclusion was come to in Johnson, one, &c. v. Bray, 2 Bro. & B. 698, on the hundred of Elloe court of requests act, which contains no such enactment in Upon authority, therefore, as well as upon principle, reference to defendants. the present defendant is not within the operation of stat. 43 Eliz. c. 6. [PARKE, J. Must not your argument go this length, that in the case of a defendant residing in one county when the cause of action has accrued in another, in which case there would not be any power to sue in the county court, it would be excluded from the operation of this statute?] There would be good grounds for supporting the argument to that length; but the present case does not require it: it is here sufficient to show that this defendant, by virtue of his privilege as an attorney, was not liable to suit in any inferior court; and the legislature must be presumed not to have intended to include him within this provision.

Cur. adv. vult.

*BAYLEY, J., now delivered the judgment of the Court. *4977

The question in this case was, Whether the Judge who tried this cause, which was an action for work and labour, was warranted in certifying under the statute of the 43 Eliz. c. 6, the damages being less than 40s. The ground of objection was, that the defendant was an attorney, and therefore liable to be sued in the Court of which he was an attorney, and that if sued in an inferior court, he might have stayed the proceedings by writ of privilege; and that the statute applied to those cases only which might be tried in inferior courts.

At the argument before my Brother PARKE and myself we intimated an opinion that the statute was general, and extended to all cases, and that if the Judge who tried the cause, and who knew the circumstances under which it was brought, came to the conclusion that the action was a frivolous one, we ought to be very well satisfied that the intention of the legislature was to exclude attorneys from the operation of the statute, or that we could not make the rule absolute.

The statute of Gloucester gave costs. They were not allowed at common law; and the statute of the 43 Eliz. c. 6, limits the right to costs given by the statute of Gloucester. That statute certainly begins thus: "For avoiding the infinite number of small and trifling suits commenced or prosecuted against sundry her majesty's subjects in her highness's courts at Westminster (which by the due course of the laws of this realm ought to be determined in inferior courts in the country), to the intolerable vexation and charge of her highness's subjects." There is then an enacting clause, imposing a penalty on any sheriff or other person for making any warrant for the summons of, or for arresting any person (not having the *original writ or process warranting the same). the enacting clause in question:--" If upon any action personal to be brought in any of her majesty's courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear," &c.

It was insisted that, notwithstanding the enacting clause was, in its language,

general, yet inasmuch as an attorney, by the privilege attached to him, is entitled to be sued in his own court, and if sued in an inferior one may bring his writ of privilege; and as the preamble of the statute expressly refers to suits which ought to be determined in inferior courts in the country, the legislature must be intended to have excepted this case from the operation of that general language. But, on looking into the authorities on this point, we think that that is not the true construction of the statute. There is the express authority of Lord Kenyon, in Dando v. Sexton, 3 T. R. 37. That was an action of trespass vi et armis for beating the plaintiff's dog, and one shilling damages having been recovered, and a certificate granted, it was moved to set the certificate aside on the ground that the statute only applied to those actions which could be brought in the county court, and that of course did not extend to an action vi et armis. Lord Kenyon there said, "It seems to me that this case comes within the statute, which extends to all personal actions, not being for any title of lands, nor for any battery. And on the maxim exceptio probat regulam, it includes all It is true, indeed, that an action vi et armis cannot other actions vi et armis. be brought in a county court; but *there are other inferior courts which by charter have a power of trying actions vi et armis." And a rule to show cause having been granted, the Court, on a subsequent day, discharged it. Therefore they must have been of opinion that all personal actions, not expressly within the exception of the enacting clause, were within the operation of the statute.

At the conclusion of the argument too, my brother PARKE put a case which appeared to me very apposite, namely, of a defendant residing in one county, where the cause of action has accrued in another, in which case there would not be any power to sue in the county court, and asked whether that case also could be contended to be excluded from the operation of the statute? And although it was answered by the counsel for the plaintiff, that for the purpose of his argument it was not necessary to go that length, but sufficient to show that an attorney defendant was not liable to suit in the county court, though residing in the same county in which the cause of action arose; I then thought, and still think, the principle of that case must govern the present.

Lord Tenterden, C. J. I entirely agree in the judgment pronounced by my brother Bayley, being of opinion that the statute in question ought to receive a liberal construction, and so as to prevent the bringing of actions in the superior courts for small sums. Where less than 40s. is recovered, the plaintiff cannot possibly derive any benefit from a suit in a superior court; and such actions can only be brought for the benefit of the professional persons employed to conduct them.

Rule discharged.

*BENNETT v. DANIEL. Feb. 6.

[*500

The fourth section of the statute 3 G. 4, c. 39, which requires the defeasance to a warrant of attorney to be written on the paper or parchment on which the instrument itself is written, applies only to such warrants of attorney as fall within the former sections of the act, viz. warrants of attorney, which in the event of not being filed within twenty-one days siter execution, are void against the assignees of a bankrupt, and consequently a warrant of attorney subject to a defeasance, not written on the same paper or parchment, is not void between the parties, but only against the assignees of a bankrupt: Held, by Lord Tenterder, C. J., Bayley, and Littledale, Js. (Parke, J., dissentiente).

A RULE nisi having been obtained for setting aside the warrant of attorney, and judgment signed and execution issued thereon, and all subsequent proceedings, it was referred to the master, with power to direct the execution to be set aside in whole or in part, and to direct what should be done by the parties. Upon attending before the master on the rule of reference, the attorney for the defendant took an objection to the warrant of attorney, on the ground that the

defeasance was not written upon the same paper or parchment before the filing of it, and alleged that it was therefore void under the statute 3 G. 4, c. 39, s. 4. The master was of that opinion, and did not enter on the discussion of the merits, but made his order upon the said rule in favour of the defendant. A rule nisi had been obtained by *Coleridge* for the master to review his report.

Follett, in last Michaelmas term, showed cause. The master has put the proper construction on the statute 3 G. 4, c. 39, s. 4. The warrant of attorney was filed within twenty-one days after its execution; it was given subject to a defeasance, but no defeasance was endorsed upon it. It is true that in Morris v. Mellin, 6 B. & C. 446, the majority of the Court were of opinion (Holroyd, J., dissentiente) that the fourth section of that statute, which requires the defeas-*501] ance to a warrant of attorney to be *written on the paper or parchment on which the instrument itself is written, applies only to such warrants of attorney, &c., as fall within the former sections of the act, vis. warrants of attorney which, in the event of not being filed within twenty-one days after execution, are void against the assignees of a bankrupt; but the true construction of the fourth section of that act of parliament is, that every warrant of attorney in a personal action, which is given subject to a defeasance, shall have the defeasance endorsed on it before the time that it is filed, and if it be filed without such a defeasance being endorsed on it, it is void to all intents and purposes. If a party to whom the warrant of attorney is given seeks to make his security binding, although the person giving it may become bankrupt, by filing it under the statute, he must file it with its true character; and if it be only a conditional warrant of attorney, subject to a defeasance, he must not file it as if it were an absolute one and subject to no defeasance. The creditors of the party giving it are entitled to have a true description of the instrument by which the debtor has bound himself It was considered in Morris v. Mellin, that the only object of the statute 3 G. 4, c. 39, was to prevent frauds upon creditors. It is clear, no doubt, from the title and preamble of the act, that that was the primary object; but it does not follow that, because that was the primary object, the legislature may not also have intended, as one of its objects, to protect the party giving the security, and from the words of the fourth section it is clear that they had also this object. The only doubt that can be raised on the construction of that section arises from the meaning given by the majority of the judges in Morris v. Mellin, to the words "such *warrant of attorney," and which were in that case considered to mean such warrants of attorney only as were, by the former sections, void against the assignees of a bankrupt; but if the different sections are properly looked at, it will be seen that those words, "such warrant of attorney," can only mean warrants of attorney in personal actions. The first section so describes the warrants of attorney to which the act is to extend; the second section, which directs that they shall be filed or be void against the assignees of a bankrupt, uses the words "such warrant of attorney," alluding to the description in the preceding section; the third section describes the cognovit actionem, to which the statute shall extend, in the same way as a cognovit actionem in a personal action, and then the fourth uses the words, "every such warrant of attorney and cognovit," which, unless a forced construction be put upon the words, must apply to the description of the instruments previously given in the former sections. This section of the statute was, in truth, meant to give a legislative sanction to what the courts had before attempted to do by their rules. There was a rule of this Court, and also of the Common Pleas, requiring that, if a warrant of attorney was given subject to a defeasance, the defeasance should be written on the same paper or parchment, and the courts did at one time act upon that rule, by setting aside the judgment on every warrant of attorney on which the defeasance was not written according to that rule. Morrell v. Dubost, 3 Taunt. 235.(a) The Courts, however, afterwards

⁽a) But see Shaw v. Evans, 14 East, 576. Sansom v. Goode, 2 B. & A. 568. Partridge v. Fraser, 7 Taunt. 307.

seem to *have thought that this was going further than they were warranted in doing by a mere rule of court, and declined to set aside the judgment and execution on such a warrant of attorney. It is more than probable, therefore, that this section was intended by the legislature to give complete effect to what the Courts had attempted to do by their rules,—to protect a distressed debtor from the creditor when he gave a security so powerful as a warrant of attorney to confess judgment. At all events the words of the section (which differ in this respect from the three preceding sections, they being in terms confined to the assignees of a bankrupt), declaring such an instrument to be null and void to all intents and purposes, are clear and decisive. No argument can be fairly raised against this construction from the provisions in the subsequent insolvent acts, because they only make the first three sections applicable to the assignees of insolvent debtors as well as the assignees of a bankrupt, and have no reference to the enactments of the fourth section, which are general, and applicable to all warrants of attorney and to a cognovit actionem in all personal actions.

Coleridge, contrd. The words of the fourth section are, "That if such warrant of attorney or cognovit shall be given, subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such warrant of attorney or cognovit actionem shall be written before the time when the same, or a copy thereof respectively, shall be filed, otherwise such warrant of attorney or cognovit actionem shall be null and void to all intents and purposes." The words "null and void to all intents and purposes," cannot apply to all warrants of attorney. The legislature could not, by reason of the defeasance *not being written on the same paper or parchment before the time when the same should be filed, mean to render void all warrants of attorney; because it is unnecessary to file warrants of attorney at all, in cases where the judgment is entered up within twenty-one days after the execution of the warrant of attorney. Such warrants of attorney, therefore, are not void by reason of the defeasance not being written on the same paper or parchment as the warrant of attorney. The words of the fourth section cannot, then, have altogether a general operation; they must be construed with some limitation, and if so, they ought to be considered as rendering void such instruments as are previously described, and in favour of the creditors mentioned in This is according to the general rule of construction; the preceding section. but the argument for the defendant seeks to enlarge the sense of an act, which is to have the effect of cutting down the operation of a solemn written instrument; and that, too, in favour of the party making it. Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. This case was brought before the Court for the purpose of having our decision in Morris v. Mellin, 6 B. & C. 446, reviewed. I am of opinion that the construction put on the statute 3 G. 4, c. 39, by the majority of the Court in that case, was the true one, and that this warrant of attorney is not void between these parties. The act is entitled "An act for preventing frauds upon creditors, by secret warrants of attorney to confess judgment." The preamble recites, that injustice is frequently *done to creditors by secret warrants of attorney to confess judgment; and the first section provides that every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and endorsements thereon, shall, within twenty-one days after the execution of such warrant of attorney, be filed. The second section provides, "That if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt; then unless such warrant of attorney shall have been filed within the space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execution issued on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be

deemed fraudulent and void against the assignees under such commission." The third section contains a similar provision as to cognovits. The fourth section, on which the question arises, enacts, "That if such warrant of attorney or cognovit shall be given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such warrant of attorney or cognovit actionem shall be written before the time when the same, or a copy thereof respectively, shall be filed; otherwise such warrant of attorney or cognovit actionem, shall be null and void to all intents and purposes." It was contended that, by reason of the generality of expression at the *506] end of that clause, all warrants of attorney were void, even as between the *parties, unless the provisoes of the act were complied with. But this section appears not to have a general operation, for it is perfectly silent as to warrants of attorney not filed nor intended to be filed. In this case, the warrant of attorney was filed, but no defeasance was written upon it; and, as the words of the fourth section clearly are not so general as to include every warrant of attorney, they must be construed with some restriction; and as the words "such warrant of attorney" are mentioned, we ought to consider the words at the end of the section as limited to such warrants of attorney as are mentioned in the preceding section, and thereby made void against the assignees of a bankrupt. My reasons for thinking that the fourth section applies only to warrants of attorney mentioned in the preceding section, I have already stated, in the case of Morris v. Mellin, and it is therefore unnecessary to restate them here. That the 3 Geo. 4, c. 39, was considered applicable to such cases only, appears by the 7 G. 4, c. 57, s. 33, whereby the provisions of the former act are made applicable to the case of insolvent debtors. I therefore think that the Master was mistaken in holding the warrant of attorney void, and the rule, requiring him to review his report, must be made absolute.

BAYLEY and LITTLEDALE, Js., concurred, and referred to the reasons given

by them respectively in Morris v. Mellin, 6 B. & C. 446.

PARKE, J. I was not present during the whole of the argument, and, there-*507] fore, I desire that my mind may not *be considered as finally made up; but my present opinion is at variance with that pronounced by my Lord. The fourth section enacts that such warrants of attorney shall be void to all intents and purposes. It is a safe rule of construction to take words in their plain and ordinary sense, unless a different intention can clearly be collected from the other parts of an act of parliament. I think that there is not sufficient in this act to authorize us in construing these words in any other than their plain and ordinary sense. There are cases undoubtedly where that may be done, as, for example, in the case of ecclesiastical leases. The statute of the 1 Eliz. c. 19, s. 5, enacts, "that all gifts, grants, &c., or estates made by any archbishop or bishop to any person or persons, whereby any estate should pass from the same archbishop or bishop other than for the term of twenty-one years, or three lives from such time as any such lease, grant, or assurance shall begin, and whereupon the old accustomed yearly rent or more shall be reserved and payable yearly during the said term of twenty-one years or three lives, shall be utterly void and of none effect to all intents, constructions, and purposes." Now under that statute, ecclesiastical leases granted for a longer term than twenty-one years or three lives, have been held to be good against the lessor, if he be a sole corporation, or so long as the dean or other head of the corporation remain, if it be a corporation aggregate of many, Co. Litt. 45 a. But there it is clear, from the other parts of the act of parliament, that the statute was made for the benefit of the successors. It is unnecessary for me to go more fully into the question: it is sufficient to say *that I agree in substance with the opinion delivered by Holroyd, J., in Morris v. Mellin, 6 B. & C. 446; but, as the majority of the Court are of a different opinion, the rule for the Master to review his report must be made absolute. Rule absolute.

BRETT v. BEALES. Feb. 8.

The repair of some streets in a town, is not a sufficient consideration to support a claim of tollthorough in all parts of the town.

Plea, the general issue. At the trial before Lord Ten-Assumpsit for tolls. terden, C. J., at the Westminster sittings after last Michaelmas term, it appeared that the plaintiff was lessee under the corporation of Cambridge, who claim a toll upon all laden carts coming into the town of Cambridge. For the plaintiff, evidence was given tending to show that, before the time of legal memory, the soil of the town was vested in the crown, and that this toll was then taken, and that the town had afterwards been granted with the toll to the corporation. It was also proved, that the corporation had always repaired certain bridges over the Cam and some of the streets, but they claimed the toll whether the carts came into the town along the bridges or streets so repaired by them, or by any other Taunton, for the plaintiff, insisted that he had a right to the toll, either as toll-traverse by reason of the ownership of the soil, or as toll-thorough, the repairs of the bridges and streets being a sufficient consideration for it. Lord Tenterden told the jury, that the repairs proved could not support the claim to toll-thorough, and left it to them to *consider, whether the right to it as toll-traverse had or had not been proved. The jury having found for the defendant.

Taunton, on a former day in this term, moved for a rule nisi for a new trial. The repairs proved were sufficient to support the claim to toll-thorough, and the jury were on that point misdirected. The consideration for a toll of this kind ought not to be very nicely weighed, and it was not necessary to prove repairs in all the streets of the town. The repairing of some parts, and of the bridges, was sufficient. The contrary was certainly decided in Truman v. Walgham, 2 Wils. 296; but that decision is inconsistent with the earlier cases of Rex v. The Corporation of Boston, Sir W. Jones, 162, Smith v. Shepherd, Cro. Eliz. 710, and Crispe v. Belwood, 3 Lev. 424. [BAYLEY, J. The latter was a claim of toll-traverse. The first was a quo warranto for claiming toll-thorough in consideration of repairing a bridge and a street, and a sea bank, and it was held that such consideration was sufficient to justify the claim; and in Smith v. Shepherd, Popham, C J., expressed an opinion to the same effect. At all events, the proof of repairs done in some parts was evidence of a general liability to repair, and the case should have been presented to the jury in that point of view. If they had found the general liability, the toll might certainly have been supported as toll-thorough.

Lord TENTERDEN, C. J. My present opinion is, that toll-thorough cannot be claimed unless in respect of the *passage over the particular road or street repaired. The point, however, is of importance, and we will consider of the propriety of granting a rule.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord Tenterden, C. J. At the trial of this case, I considered that the law was correctly laid down in Truman v. Walgham, and, therefore, did not present the claim to the jury as one which could be supported as toll-thorough; inasmuch as the corporation of Cambridge claimed the toll over the whole town, although the repairs were done in some places only. I still continue of the same opinion; and the decision in Truman v. Walgham is confirmed by Hill v. Smith, 4 Taunt. 520. That was a claim of toll by the corporation of the city of Worcester; they repaired certain streets in the city, but not all; and if repairing some of the streets had been a sufficient consideration, they would have established a right to the toll as toll-thorough. But Mansfield, C. J., says, "if claimed as toll-thorough it cannot be supported; for it is not alleged that the corn passed over any street which was repaired by the corporation." In the present case, reliance was placed on that which is reported in Cro. Eliz. 710, to have been said by Popham, J., in Cook v. Shepherd, "One may have toll-traverse by prescrip-

tion, and so he may have toll-thorough; but it ought to be for some reasonable cause which must be shown, viz. that he is to maintain a causeway, or to repair a way, or a bridge, or such like;" and it was observed, that he does not state it to be necessary that the repair should be in the particular way in respect of *511] which the toll is *claimed. But the same case is reported in Moore, p. 571; and by that report it appears to have been held, that a man may have toll-thorough in the king's highway, if he is bound to repair the way or causeway, &c. It is also laid down in 2 Roll. Abr. 172, Prerogntive, E. pl. 20, that "the king cannot charge his subjects by an imposition, unless it be for the benefit of the subjects charged, and where they have a quid pro quo." Now it cannot be for the benefit of a person passing along a street in Cambridge that the corporation are bound to repair some other street; such repair cannot, therefore, be a sufficient consideration to support a claim to toll-thorough. For these reasons we are of opinion that there was not any misdirection, and that a rule for a new trial should not be granted.

Rule refused.

The KING v. The Scriveners' Company. Feb. 9.

An act of parliament required, that before a person should be allowed to act as a public notary he should have been admitted and enrolled in the court wherein notaries had been usually admitted; and that no person should be enrolled as a public notary unless he should have been bound by contract of apprenticeship to serye for seven years to a public notary, and during that term should have continued in such service; and further, that he should during the whole time and term of service specified in such contract of apprenticeship, or during the space of seven years thereof at least, continue and be actually employed by such public notary in the proper business of a public notary: Held, that a party bound apprentice for the term of seven years, who during the whole of that term acted as a banker's clerk daily till five o'clock in the evening, and after that hour went to the notary and presented bills of exchange, and prepared protests, was not actually employed by the public notary during the whole period of seven years within the meaning of the act of parliament, and consequently that he was not entitled to act as a notary; and this Court refused a mandamus to a Scriveners' Company to admit such a party to the freedom of the company, in order that he might be admitted to practise as a notary.

A RULE nisi had been obtained for a mandamus to the incorporated Company of Scriveners of the city of London, commanding them to admit Alexander For Ridgway to the freedom of the company. The affidavits in support of the *512] rule stated that by an irdenture of *apprenticeship of the 19th of June, 1822, Ridgway had bound himself clerk or apprentice to one P. Drake. notary public, to learn the art, trade, business, profession, or mystery of a notary public and scrivener, to serve from the date of the indenture unto the full end and term of seven years; that Ridgway did, by virtue of the indenture, actually and really serve, and was employed by Drake as his clerk or apprentice for and during the whole time and term of seven years therein specified; that being desirous, on the expiration of the apprenticeship, to be sworn, admitted, and enrolled as a notary public, with a view of practising in such profession within the city of London and liberties thereof, Drake, on the 25th of June, 1829, made the affidavit of the due servitude of Ridgway under the indenture, to the purport and effect prescribed by the 41 G. 3, c. 79, entitled "An Act for the better regulation of public notaries in England;" that Ridgway, in order to enable himself to apply for a faculty as directed by that act, did, on the 29th of July, 1829, apply to the Scriveners' Company, at a meeting of the said company, to be allowed to take up the freedom of the company, as directed by the said act; but that on such occasion the company refused to admit Ridgway to the freedom of the company, without assigning any reason; and that by reason of such refusal he was prevented from applying or founding any application to the Court of Faculties, as prescriped by the said act of parliament. It appeared by the affidavits in answer to the rule, that the freemen of the science, art, or mystery of Scriveners of the city of London, and suburbs thereof, were by let-

ters patent of King James the First, bearing date the 28th of January, in the fourteenth year of his reign, incorporated by the name of the Master, Wardens, *and Assistants of the Society of Scriveners of the City of London; that by the said letters patent it was ordained that at all times thereafter there should be one master and two wardens of the said society, and twenty-four other persons of the society named assistants; that they, the master, wardens, and the rest of the assistants of the society, should make by-laws for the better government of the society. It appeared that they, the masters, wardens, and assistants, had divers ancient rules by their predecessors established, and some others by themselves, for the better government of the society, and, amongst others, the following:-"That no person thereafter should be enfranchised or admitted into the freedom or liberties of the said society to make open profession of the aforesaid science or art until such time as he should have first been duly examined touching his sufficiency and ability to use and exercise the same before the master, wardens, and assistants of the said society, or any six of them, and should have been by the said master, wardens, and assistants of the said society, or such six of them as aforesaid, upon such examination, declared and approved to be of sufficiency and ability, and should have taken an oath as was thereinafter appointed." These by-laws, and the oath thereby prescribed, were, with the other by-laws of the master, wardens, and assistants, in pursuance of an act of the 19th of Hen. 7, duly approved and allowed by the Lord Chancellor and two Chief Justices in the sixteenth year of James the First; and they remained unaltered, and had from time to time been observed; that since the passing of the 41 G. 3, c. 79, the master, wardens, and assistants had previously to the admission *of any person applying for the freedom of the society, for the purpose of obtaining a faculty to practise as a notary pub. lic, required all such persons to produce evidence before them of the actual service of all such persons respectively to notaries public for the full time and term of seven years, according to the tenor and effect, true intent and meaning At a court holden on the 29th of July then last, the indenture of the said act. of apprenticeship between Drake and Ridgway was laid before the master, wardens, and assistants by Ridgway, and he then applied to be admitted to the freedom of the said society, for the purpose of obtaining a faculty to practise as a notary public within the city of London and the liberties thereof; that being interrogated as to his service under the indenture of apprenticeship, he, in answer to questions put to him by the master, wardens, and assistants, stated that previously to and at the time of the execution of the indenture, and during the whole of the said term of seven years mentioned in the indenture, he, Ridgway, had been and then was a clerk in the service and employ of Messrs. Hopkinson, bankers in Regent Street; that the hours of business at their bankinghouse were from nine o'clock in the morning until five in the afternoon; and that he, Ridgway, had been accustomed to attend at the office of Drake to transact and be employed in the business of a notary after the hour of five o'clock in the afternoon of each day; that the master, wardens, and assistants, considering such alleged service colourable, and an evasion of and contrary to the tenor and effect and true intent and meaning of the said act of parliament of the *41 G. 3, c. 79,(a) and calculated to defeat the intention thereof, by the admission of unequalified. sion of unqualified persons to the freedom of the said society, and thereby ensbling them *to obtain faculties as notaries public, refused to admit him [*516 to the freedom of the said society.

Sect. 2 enacted, "that no person should be sworn, admitted, and enrolled as a public notary anless such person should have been bound by contract in writing, or by indenture of appren-

⁽a) Sect. 1 recited, "that it was expedient, for the better prevention of illiterate and inexperienced persons being created to act as, or admitted to the faculty of public notaries, that
the said taculty should be regulated in England," and then enacted, "that no person in England should be created to act as a public notary, or use and exercise the office of a notary, or
manner thereinafter directed, in the court wherein notaries had been accustomarily sworn,
admitted, and enrolled."

Campbell, Denman, and Platt now showed cause. This rule must be discharged, unless Ridgway has done everything required by the act of parliament to entitle him to be admitted to practise as a notary; and, secondly, assuming that he has, still the act is not imperative on the company to admit him; it vests a discretion in them. But first it is clear, that he has not done all that he ought to have done to entitle himself to practise as a notary; for although he was bound apprentice for the term of seven years to a public notary he did not continue, and was not actually employed by the notary during that time, and that is required in express terms by the seventh section of the act. The object of the legislature, as may be collected from the preamble, was to prevent inexperienced persons from acting as public notaries. Here it appears that Ridgway served a public notary only a few hours daily; at all others he was acting as a *517] banker's clerk. He therefore was not *actually employed by a notary during the term of seven years. Every person who shall be bound to serve any attorney is, by statute 22 G. 2, c. 46, s. 8, required, during the whole time and term of service, to continue and be actually employed by such attorney. A clerk to an attorney, who during the term for which he was bound held the office of surveyor of taxes, was considered not to have served his whole time and term in the proper business of an attorney within the meaning of the act, In re Taylor, 5 B. & A. 538. That case is in point. Ridgway therefore is not qualified to act as a notary, and the Court will not compel the company to admit him to the freedom.

The Attorney-General and Manning, contrd. It is not necessary to entitle a party to act as a notary, that he should have been in the actual employ of a public notary for every hour of every day during the term of his apprenticeship. It is sufficient if he was employed by the notary during those hours when he transacted his business of a notary. The business of a notary is to present, in the evening, bills of exchange, which, in the morning, the drawees have refused to accept or pay, and to prepare the protests. The whole business may be transacted after the hour of five in the evening. Here Ridgway has served during the hours of business. And if he has served the apprenticeship pursuant to the provisions of the act he is entitled, as of right, to be admitted. The act is imperative. The court of assistants have no power to examine applicants as to their fitness.

ticeship, to serve as a clerk or apprentice for and during the space of not less than seven years to a public notary, or a person using the art and mystery of a scrivener (according to the privilege and custom of the city of London, such scrivener being also a public notary), duly sworn, admitted, and enrolled, and that such person, for and during the said term of seven years, should have continued in such service."

Sect. 6 enacted, "that no public notary, or scrivener being also a public notary, should take,

have, or retain any clerk or apprentice, who should become bound as aforesaid, after such public notary, or scrivener being also a public notary, should have discontinued or left off, or during such time as he should not actually practise or carry on the business of a public notary. Sec. 7 enacted, "that every person who should become bound by contract in writing, or indenture of apprenticeship, to serve any public notary as thereby directed, should, during the whole time and term of service to be specified in such contract or indenture of apprenticeship, or during the time and energy of across them. or during the time and space of seven years thereof at least (if bound for a longer term than

or during the time and space of seven years thereof at least (if bound for a longer term than seven years), continue and be actually employed by such public notary, or scrivener being also a public notary, in the proper business, practice, or employment of a public notary."

Sect. 13 recited, "that the incorporated company of scriveners of London, by virtue of its charter, had jurisdiction over its members, being resident within the city of London, the liberties of Westminster, the borough of Southwark, or within the citrouit of three miles of the said city, and had power to make good and wholesome laws and regulations for the government and control of such members, and the said company of scriveners practising within the aforesaid limits; and it was therefore expedient that all notaries, resident within the limits of the said charter, should come into and be under the jurisdiction of the said company," and enacted, "that all persons who might thereafter apply for a faculty to become a public notary, and practise within the city of London and the liberties thereof, or within the circuit of three miles of the same city, should come into and become members, and take their freedom of the said company we within the city of London and the liberties thereol, or within the circuit of three miles of the same city, should come into and become members, and take their freedom of the said company of scriveners according to the rules and ordinances of the said company, on payment of such and the like fine and fees as were usually paid and payable upon the admission of persons to the freedom of the said company, and should, previous to the obtaining such faculty, be admitted to the freedom of the said company, and obtain a certificate of such freedom, duly signed by the clerk of the same company, for the time being; which certificate should be produced to the master of faculties, and filed in his office prior to or at the time of issuing any such faculty to such person to enable him to practise within the jurisdiction of the said company."

*Lord TENTEPDEN, C. J. I am of opinion that this rule ought to be discharged. The act of parliament cannot be understood to be peremptory on the company to admit every person who applies. The utmost effect we can give to it is to say, that it is peremptory upon them to admit every person who has duly served such an apprenticeship as the act of parliament requires. In this case it is perfectly clear that the party applying to them had not served such an apprenticeship during the seven years as the act requires. The act requires that he shall, during the whole term, be in the employ of his master as It is conceded that he was a banker's clerk during the whole time, and employed as such till five o'clock in the afternoon; that after five o'clock in the afternoon he went to some office belonging to Mr. Drake, where it seems he made some entries in a book of the bills he had to present, and then took them out and presented them; and it is suggested that the whole business of a notary is the presenting of bills of exchange, and drawing up protests. Even if that were so, it would be very difficult to make out that this young man, between five o'clock and bedtime, could draw up the protests upon the bills he had presented in that interval; but it is by no means correct to say that that is the whole business of a notary. A notary in the city of London has many more Almost all the charter parties are prepared by notaries; that appeared in a very late case in a trial before me at Guildhall. The ship's broker prepares the minutes of the contract; it is afterwards put into form by a notary. is another part of the duty of notaries, and that is, to receive the affidavits of mariners and masters of *ships, and then to draw up their protests, which is a matter which requires care, attention, and diligence. Besides that, many documents pass before notaries under their notarial seal, which gives effect to them, and renders them evidence in foreign courts, though certainly not in our courts of common law. There is a great deal, therefore, to be done by a notary perfectly independent of, and distinct from, this mere matter of presenting bills of exchange and drawing up protests.

It seem to me, that to bring a person within the terms of this act of parliament, he should be apprenticed to a notary who can employ him in that which is the proper business of a notary, and not one who is to employ him only in

going about late in the evening and presenting bills of exchange.

LITTLEDALE, J., (a) and PARKE, J., concurred.

Rule discharged.

(a) BAYLEY, J., had gone to Chambers.

*The KING v. The Inhabitants of GREAT BENTLEY. [*520

By the 6 G. 4, c. 57, which repealed the 59 G. 3, c. 50, it is enacted, that no person shall acquire a settlement by reason of settling upon any tenement, unless it shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bona fide rented by such person at the sum of 10l. a year at the least, for the term of one whole year; nor unless such house or building, or land, shall be occupied sunder such yearly hiring, and the rent for the same to the amount of 10l. actually paid for the term of one whole year at the least, &c.: Held, per totam curiam, that under that statute a pauper who rented for a year a dwelling-house and land at a rent exceeding 10l. per annum, which was actually paid, but who underlet the land, gained a settlement.

Upon appeal against an order of two justices, whereby J. Peeling, his wife and children, were removed from Little Clacton to Great Bentley, both in the county of Essex, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

J. Peeling, the pauper, hired a tenement, consisting of a separate and distinct dwelling-house, and a pasture field of two acres, in the respondent parish of Little Clacton, the hiring to commence on December 25th, 1826. He engaged to pay for this tenement the rent of 131. 10s. a year, for the term of two years;

but in the latter part of March, or the beginning of April 1827, the pauper sold the grass in the field, from that time till New Michaelmas, to John Townsend, for ten guineas, to be mowed or fed by him as he pleased, and during that time he discontinued to turn his donkey and cow into the field as he had before done, as he did not consider that he could feed the grass after he had sold it to Townsend; and having a quantity of clover, which he wished to stack in the field, he asked Townsend's leave to stack it there; and having obtained that leave, abated one shilling from a claim he had upon Townsend, for labour which he had performed for him, and which Townsend accepted as an acknowledgment for the damage done to the grass by the stack. The pauper sold the grass to Townsend *521] in the same way in the *second year, though with some variation in the The court of quarter sessions held, that during the operation of the pauper's agreements with Townsend he did not occupy the field under his yearly hiring, in the manner required by the 6 G. 4, c. 57, and, therefore, that

he had not gained a settlement by the hiring of this tenement.

Knox and Brodrick in support of the order of sessions. It will be contended, on the other side, that here was an occupation for a year by the pauper or by the sub-tenant, and that in either case the 6 G. 4, c. 57, was satisfied; and The King v. Ditcheat, 9 B. & C. 176, will be relied on. The case, however, is open to review, as one of the three learned judges, before whom it was heard, dissented from the decision, and another expressed an opinion, that the intention of the legislature might, probably, be frustrated by the view of the question that he felt himself bound to take from the language employed in the statute. But should The King v. Ditcheat be sustainable, there are facts to distinguish this There the premises consisted of a house only, part of which the pauper's husband, either actually by himself, or virtually by his family, occupied during the whole year; but here there was a house and land, either of which was capable of distinct and separate occupation; and, in fact, they were separately occupied. In the instance of a house, though apartments may be underlet to lodgers, it is admitted that it might be laid in an indictment for housebreaking *522] as the house of the person letting the lodgings, provided he reserved any part of it in his own occupation. But here the land was occupied separately by the pauper's sub-tenant; and if he had holden the house, and the pauper had retained the land, an indictment for housebreaking must have described it as the house of the sub-tenant, and not as the house of the pauper. If the latter had been rated for this land, he might have successfully a opealed on the ground that he was not the occupier; and as, if the premises had consisted of two houses, instead of the house and land, and one of them had been underlet, the pauper could not be considered the occupier of the house he had so underlet; what real difference arises from a field having been here underlet, and not a house? In either case an ejectment must have been served upon the sub-tenant. It is quite clear, therefore, that the pauper cannot be taken to have been the occupier of the land during the whole year. It is to be observed, that one of the objects of the 6 G. 4, c. 57, was to place houses on the same footing as land, and not land upon the footing upon which houses stood with respect to this point, under the 59 G. 3, c. 50, Rex v. Tonbridge, 6 B. & C. 88, Rex v. North Collingham, 1 B. & C. 578. These statutes were passed principally for the twofold purpose of diminishing litigation under this head of the poor law, and the lessening the inconvenient facility with which settlements by renting tenements had been previously acquired. If the construction contended for is to prevail, the intention of the legislature must be in a great measure defeated. It is true that the words of the two statutes vary, but the import is the same. The 59 G. 3, c. 50, required that the hiring should be for a year, and that there *523] should *be an occupation for that period by the person hiring. The 6 G. 4, c. 57, requires that there shall be a hiring for a year, and that there shall be an occupation for a year under such yearly hiring, omitting the words "by

the person hiring." But those words are necessarily to be implied. At any rate, the intention of the legislature not being doubtful, the change in the lan-

guage of the statutes is not sufficiently pointed to call for a construction that must confessedly defeat its object. By the term "yearly hiring" it is certain that the mere fact of occupation by anybody would not be sufficient; for if that had been meant, the statute would have merely required that there should be an occupation for a year, without reference to the "yearly hiring." The sub-tenant cannot be said to occupy under the original yearly hiring only; and if not, he does not, for this purpose, occupy it under it at all. The pauper alone, to whom the landlord let the premises for that period, could occupy under that letting. Thus, if the owner of the fee-simple grants a lease to A. for 1000 years, and A. underlets to B. for twenty-one, and B. to C. for one year, can it be said that C.'s occupation is under the letting for 1000 years? So here it cannot be said that the sub-tenant occupied under the yearly hiring, but under the agreement with the pauper; which constituted a letting from March to Michaelmas. What could be the object of the legislature in requiring an occupation by a person who was not to gain a settlement by such occupation? It must surely be taken that the occupation required is that of the person who would be settled in consequence of it; and that person could only be, by the other provisions of the statute, the one who hired for a year. It is clear that the transaction between *the [*524] pauper and Townsend amounted to the creation of a tenancy of the land; for though the case says "the pauper sold the grass," there are circumstances stated which show an actual demise of the land itself; such as the term from March to Michaelmas, the liberty to mow or feed the land at pleasure, and the acknowledgment paid by the panper for permission to place a stack upon the All the profits of the land passed during a certain period, for pasture land can only be mowed or fed; and therefore, according to the authorities, the land itself passed, Rex v. Stoke, 2 T. R. 451.

Mirehouse, contra. The statute 6 G. 4, c. 57, annexes four conditions to the gaining of a settlement by renting a tenement: first, it must consist of a separate and distinct dwelling-house or building, or of land, or of both; secondly, it must be rented at the sum of 10l. a year at the least, for the term of one whole year; thirdly, it must be occupied under the yearly hiring; and, fourthly, the rent to the amount of 101 must be actually paid. The first two conditions and the last have been complied with. The only question is as to the third. It is clear that the premises were occupied by the pauper or his under-tenant. The pauper was the legal tenant, and was rated, and would be liable in an action for use and occupation. An actual occupation by the pauper was not necessary. The statute 6 G. 4, c. 57, omits the words "by the person hiring the same." It does not require the payment of rent or occupation by the person hiring the same, but occupation under the yearly hiring. The words may be satisfied by an occupation by a sub-tenant during the continuance of *the term. Rex v. Wainfleet, 8 B. & C. 227, shows that forty days' residence in the parish is sufficient under the 59 G. 3, c. 50. Rex v. Kibworth Harcourt, 7 B. & C. 790, shows that payment of rent need not be by the party hiring. it is said that a decision in favour of the settlement will tend to defeat the object of the framers of the act. But it is better to abide by this consequence than to put on it a construction not warranted by the words of the act, in order to give effect to what may have been supposed to have been the intention of the legislature, Rex v. Barham, 8 B. & C. 104. Secondly, the interest of the pauper was not properly that of an under-tenant, but that of a purchaser of the grass. Suppose instead of a pasture field it had been a cabbage field, or an orchard, and the pauper had sold the produce, he would have gained a settlement.

Cur. adv. vult.

Lord Tenterden, C. J. The question in this case turned on the tenement act, 6 G. 4, c. 57. Upon consideration we are all of opinion, that all that was required to be done by that act has been done in this case, and, consequently, that the pauper gained a settlement by renting the tenement in question. That statute enacts, that "no person shall acquire a settlement in any parish or township by, or by reason of settling upon, renting, or paying parochial rates for any

tenement, not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling house or building, or of land, or of both, bona fide rented by such person in such parish or township, at and for the sum *526] of 10% a *year, at the least, for the term of one whole year." Here the tenement consisted of a separate and distinct dwelling-house and land: it was, bona fide, rented by the pauper in the parish, and at and for a rent exceeding 101. per annum for one whole year. But then the statute continues, "nor unless such house or building, or land, shall be occupied under such yearly hiring, and the rent for the same to the amount of 10% actually paid for the term of one whole year at the least." The rent for the term of one whole year has been actually paid. The only question is, whether there was an occupation of the whole of the premises hired under the yearly hiring? It was objected, that the pauper did not occupy the whole of the premises hired under the yearly hiring; that he let off the land, and that this clause of the act of parliament, therefore, was not satisfied. There is a difference between the language of the statute 6 G. 4, c. 57, s. 2, and that of the 59 G. 3, c. 50. The last-mentioned statute required that the house should be held, and the land occupied, by the person hiring the same; but those words, "by the person hiring the same," are omitted in the 6 G. 4, c. 57. The legislature, when they passed that statute, must have had in their minds the very act (59 G. 3, c. 50) which they were repealing. We cannot therefore, but consider that those words were left out by design. Then the only question is, whether the whole of the premises were occupied under the yearly hiring? It is clear that they were. That being so, every condition that was required by the terms of the act of parliament has been complied with, and the pauper has gained a settlement. We think it much the safer course to ad*5.971 here to the words of the statute construed in their *ordinary import, than to enter into any inquiry as to the supposed intention of the persons who framed it. The order of sessions must therefore be quashed.

Order of sessions quashed.

RICKARDS v. MURDOCK and Another.

A merchant resident at Sydney shipped goods for England on board the ship C., and by another ship that sailed after her, wrote to an agent in England, and desired him if he received that letter before the C. arrived, to wait for thirty days, in order to give every chance for her arrival, and then effect an insurance on the goods. The letter was received, and the agent having waited more than thirty days, employed a broker to effect an insurance, and handed the letter to him. The broker told the underwriters when the C. sailed, and when the letter ordering the insurance was written, but he did not state when it was received, nor the order to wait thirty days after the receipt of it, before the insurance was effected. The C. never arrived. In an action on the policy, no fraud was imputed to the plaintiff; but several underwriters were called for the defendant, who stated, that in their opinion the matters not communicated were material; and the jury being of opinion that a material part of the letter had been concealed, found a verdict for the defendant: Held, that the evidence of the underwriters' opinion was properly received, and that even without it the jury would have been bound to find that the part of the letter not communicated to the underwriters was material, and that, consequently, the policy was void.

Covenant on a policy of insurance on goods by the ship Cumberland, at and from Sydney to London, effected by the plaintiff as agent for one Robert Camp bell, and for his use and benefit, with the Indemnity Mutual Insurance Company, of which the two defendants were directors. The claim was for a total loss by perils of the seas. Plea, first, non est factum. Upon the second, third, and fourth pleas no question arose. The defendants pleaded, fifthly, that before the time of the making and executing of the policy of insurance, to wit, on the 28th day of May, in the year of our Lord 1827, to wit, at London, the said Robert Campbell sent from Sydney to one Harris at London a letter containing the order for effecting the said policy by a certain other ship called the Australia, which had set sail and departed from Sydney a long time, to wit, more than a month

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after the said ship called the Cumberland had set sail therefrom on her voyage in the policy mentioned; and that he, the said Robert Campbell, then and there instructed the *said Harris to deliver the said letter to one William Emmett, who had before then sailed from Sydney to London, on board the said ship called the Cumberland, on the said voyage, in case he the said William Emmett should have arrived in England when the said Harris should receive the said letter; but if the said William Emmett should not have then arrived, the said Robert Campbell then and there instructed the said Harris to retain the said letter in his possession for the space of thirty days from the time when he should receive it, and at the expiration of that time to deliver the same to the plaintiff, and certain other persons using the style and firm of Messrs. Rickards, M'Intosh, and Co., he, the said Robert Campbell, having then and there, in the said letter, intimated that he had directed the said Harris not to deliver the said letter to the said persons using the said style and firm of Messrs. Rickards, M'Intosh, and Co., until the expiration of thirty days after the arrival of the said ship called the Australia, in London aforesaid, in order to give every chance for the said William Emmett's arrival in England before the said letter containing the said order should be delivered to the said Messrs. Rickards, M'Intosh, and Co. (he, the said Robert Campbell, thereby meaning that unless he, the said William Emmett, did arrive in England before the expiration of the said space of thirty days after the arrival of the said ship Australia in London, he, the said Robert Campbell, had little hope that the said ship called the Cumberland would arrive in safety with the said William Emmett on board thereof at London aforesaid). That the said letter was dated at Sydney on the 28th May, 1827, and that it stated that the said vessel, called the Cumberland, sailed on the said voyage on the 25th day of April, in the year of our Lord 1827. That *before the making and executing of the said policy, to wit, on the 8th day of October, in the year of our Lord 1827, the said ship Australia did arrive from Sydney at London with the said letter; and that the said Harris did receive and detain the said letter so consigned to him as aforesaid, in his possession for thirty days and more after the receipt of the said letter; and at the expiration of that time, to wit, at London aforesaid, did deliver the same to the plaintiff, who, thereupon, then and there caused the said policy to be made and executed as in the declaration mentioned. That the plaintiff did not disclose. nor was it disclosed to the defendants or the said company, before or at the time of making and executing the policy, that the said letter came by the ship Australia, or that the Australia had sailed from Sydney so long after the Cumberland, or after the Cumberland, or that the said Robert Campbell had so requested the said letter containing the said order, to be so detained by the said Harris as aforesaid, or that the same had been so detained by him as aforesaid, or that the said Robert Campbell had so intimated in his said letter, the purpose for which he so directed the said letter to be so detained by the said Harris as aforesaid, or that the said Robert Campbell had so intimated that he had little hope of the safe arrival of the Cumberland at London with the said William Emmett on board thereof, in case she did not arrive within the said space of thirty days after the arrival there of the Australia as aforesaid. That the said several matters and things so concealed as above mentioned from the defendants, and the said company at the time of making and executing the said policy, and not disclosed as aforesaid, materially affected and increased the risks, touching which, the capital, stock, and funds of the said company, *were by the said policy intended to be made liable, and were thereby made liable as aforesaid; and which matters and things, if the same had been disclosed, would have materially affected and increased the premium or consideration for the said insurance, to wit, at London aforesaid, and this the defendants are ready to verify, &c. Sixth plea, the same in substance. Seventh, that the plaintiff, before and until, and at the time of making and executing the policy in the declaration mentioned, concealed from the defendants and the said company divers facts and matters, which, at the time of making and executing the said policy, materially affected

and increased the risks, touching which, the capital, stock, and funds of the said company were intended to be made liable, and were thereby made liable as aforesaid; and which facts and matters, if disclosed, would have materially affected and increased the premium or consideration for the said insurance. Replication, that the defendants at the time when, &c., of their own wrong, and without the causes by them in their said fifth and sixth pleas in that behalf alleged, committed the breach of covenant in the declaration mentioned. the seventh plea, that the plaintiff did not, before, or until, or at the time of the making and executing the said policy, conceal from the defendants and the said company any facts or matters which, at the time of the making and executing the said policy, materially affected or increased the said risks in the said seventh plea mentioned and referred to; or which, if disclosed, would have materially affected the premium or consideration for the said insurance. Issue thereon. At the trial before Lord Tenterden, C. J., at the Guildhall sittings after Hilary term 1829, the following were admitted to be the facts of the case: -Mr. Robert Campbell was the party interested in *the policy in question, and had *531] Campbell was the party interested in the policy in question. M'Intosh, and Co. In April 1827, the goods insured by the policy in question, consisting of 4175 fur seal skins, were shipped by Campbell on board the Cumberland. Mr. William Emmett was going as passenger on board the Cumberland, and the skins in question were put under his care. The ship sailed with the skins and Emmett on board from Sydney, on the 25th of April, 1827, and went from Sydney to Hobart Town, Van Dieman's Land; and after the assured, R. Campbell, received intelligence from Van Dieman's Land of the ship's being there he wrote the letter of orders, upon which the policy in question was effected. The following is a copy of the letter from Mr. Campbell ordering the insurance:-

"Sydney, New South Wales, 28th May, 1827.

"In case of the non-arrival of Mr. W. Emmett per ship Cumberland, you will herewith receive the seconds of ten sets of Treasury bills, amounting to 3000l., and the second of exchange, Elizabeth Von Bibra on Henry Powell, for 80l., making 3080l. sterling; which amount I will thank you to invest agreeable to

the accompanying indent.

"[I will also thank you to effect insurance, at market price, on forty-nine casks, containing 4175 New Zealand fur seal skins, shipped to the consignment of Mr. W. Emmett per Cumberland, or, in case of death, to your house; for which purpose I enclose you the bill of lading. The Cumberland left Port Jackson for London, via Hobart Town, on the 25th April, 1827, and by letters *532] received from Mr. Emmett was at Hobart Town *on the 10th May, 1827, and was expected to sail from thence in ten or fourteen days from that date.] Insurance to be effected on the goods shipped to my consignment, and the freight payable at New South Wales. I wish the goods to be shipped by two or three opportunities, and, if practicable, by vessels coming direct to Sydney. To give every chance to Mr. Emmett's arrival in England, I have directed my friend Mr. Harris not to deliver this until thirty days after the arrival of the Australia in London; and should Mr. Emmett arrive after you have fulfilled these instructions, you will communicate to him what you have done, it having been mutually agreed upon, previous to his leaving New South Wales, that in case of any accident to him you should be appointed agent of this concern. In confirmation of which, I annex a copy of my letter to you per Cumberland."

The foregoing letter was in a cover, on which were written the following words:—"This letter is to be delivered by Mr. Harris to Mr. Emmett, if he has arrived, and if not, to be retained in Mr. Harris's possession thirty days from the date he receives it, and then to be delivered to Messrs. Rickards, M'Intosh and Co., London."

The Australia arrived in London on the 5th of October, 1827, and on the

8th of October, 1827, the letter was delivered to Mr. Harris, who resided in London.

Mr. Harris retained the letter for thirty-six days, that is to say, until the 13th November following; and no news having up to that time been received by him of the ship Cumberland, or of Mr. Emmett, who was coming on board of her, he (Harris) then delivered the letter to Messrs. Rickards, M'Intosh, and Co.

*On the 13th November, 1827, the same day on which they received the letter, Messrs. Rickards, M'Intosh and Co., handed the letter to Towers, with directions to get effected the insurance thereby ordered. went to Lloyd's, and asked several gentlemen the premium required for the He was asked 70s. per cent. He then went to the Indemnity Insurance Company. Mr. Ellis is the gentleman who manages all the insurance business of the office, and Towers read to him the passage within brackets of the letter before set out. Towers also stated the date of the letter, and the place from whence it was written, but did not read any other part of it than that before mentioned. Ellis asked no further questions, but demanded a premium of 60s. per cent., to which Towers agreed, and the policy was accordingly effected. The Cumberland was never afterwards heard of. On the cross-examination of the plaintiff's witnesses, it appeared that two other vessels that sailed after the Australia from Sydney had arrived in England a day or two before the policy For the defendants it was contended, that the plaintiff ought to have communicated the whole of the letter, so that the defendants might know by what conveyance it came, and how long it had been in England; and they called several underwriters, who deposed that in their opinion the whole of the letter ought to have been communicated, and that the part omitted was material This evidence was objected to by the counsel for the plaintiff, but admitted by Lord Tenterden, who left the question of materiality to the jury, and they found for the defendants. The witnesses for the defendant stated, on cross-examination, that if an underwriter refuses a risk, that circumstance is never stated by the broker to those to whom the risk is *afterwards offered. In Easter term, 1829, a rule nisi for a new trial was obtained on the ground that the evidence of the opinion of the underwriters ought not to have been admitted, and that the part of the letter not read relating only to the fears of the owner, and not to any matter of fact, could not be deemed material; for that the assured were not bound to communicate anything but facts, unless questioned upon the subject by the underwriters.

Pollock and Tomlinson showed cause. The evidence given in this case on behalf of the defendants was properly admitted to show that the matter withheld from the underwriters was material. It was decided in Lindenau v. Desborough, 8 B. & C. 586, that the question of materiality is not a matter of law, but a question of fact to be decided by a jury, and the proper evidence to guide their judgment is the opinion of persons conversant with the subject matter of the inquiry, Berthon v. Loughman, 2 Stark. N. P. C. 258. In Durrell v. Bederley, Holt, N. P. C. 283, the evidence of underwriters was admitted with hesitation; but the question there asked was not whether the matter in dispute was material? but whether they, the witnesses, would have accepted the risk? Then have the jury rightly found that the letter was material; for if so, it undoubtedly ought to have been communicated. The cases of Hayward v. Rogers, 4 East, 590, and Freeland v. Glover, 7 East, 457, which were cited when this rule was obtained, are very different. In the former it was held, that a letter stating that the ship to be insured had been surveyed on account of her bad character need not be *communicated; but the reason assigned for the decision was, that the ship-owner always impliedly warrants his ship seaworthy. In Freeland v. Glover, the ship-owner had received two letters as to the state of his ship and crew. The second only was communicated to the underwriters, but it referred distinctly to the former letter; and the Court on that ground held, that as the underwriter knew the assured had received such other information, he was

bound to ask for it if he wished to have any further communication. Here the underwriter had not any means of knowing that the plaintiff had any information respecting the Cumberland, except that which he read. The plaintiff knew that Mr. Campbell had continued his own insurer for thirty days after the letter arrived, that ought to have been told without inquiry; for the underwriter had no reason to suppose that he was in possession of any information on the subject. The plaintiff also knew that neither of the two ships which arrived shortly before the insurance was effected had brought the letter; the defendants could not know that, and ought to have been informed that it had been brought by a ship which sailed after the Cumberland, and arrived thirty days before the insurance was effected. In Kirby v. Smith, 1 B. & A. 672, a ship had sailed from Elsineur on her voyage home six hours before the owner, who followed in another vessel on the same day, met with rough weather, and having arrived first, caused an insurance to be affected on his own ship; and the Court held that these circumstances should have been communicated, and that it was not sufficient to tell the underwriters that the vessel was safe on the day of her sailing. Again, in Willes v. Glover, 1 N. R. 14, the *plaintiff, as agent, received from a *536] foreign port the following letter, dated 30th November:—"I think the captain will sail to-morrow; but should he not be arrived in your port, you will be so kind as to make the insurance as low as you possibly can for my account." On the day following the receipt of the letter, the agent effected an insurance, but did not communicate the letter, and the Court held that the concealment So also, in M'Andrew v. Bell, 1 Esp. 373, the plaintiff on the was material. 24th of November recived a letter from Lisbon dated the 8th, informing him that the ship was then ready to sail. The plaintiff did not insure until the 2d of December, and after the arrival of another ship which sailed at the same time, and he did not communicate to the underwriter the letter that he had received. Lord Kenyon, C. J., held that the concealment was material; and he observed, that "it appeared that the plaintiff did not intend to insure until he believed her to be a missing ship, as he did not effect the policy for ten days after the letter arrived, and not until another ship which had sailed at the same time with his own had arrived in safety." There is no substantial difference between that case and the present. It is plain that Mr. Campbell did not intend to have this insurance effected until, in his opinion, all reasonable expectation of the safe arrival of his ship was at an end.

The Attorney-General, Campbell, and Maule, control. The broker when this policy was underwriten communicated to the underwriters all that was necessary. It is not pretended that there was any fraud or misrepresentation; nor that any question was put by the *underwriter, and not truly answered. is not even contended that the Cumberland was then a missing ship, but that the owner thought her so, and ought to have made his opinion known to the underwriters. Now the underwriter is always presumed to be acquainted with the nature of the voyage for which he insures; and it is material that he should know the time when a vessel sailed, or was expected to sail, and anything respecting the condition of the ship that varies the nature of the risk. All this, if known, must be communicated; but if the underwriter wishes for any further information to assist his judgment, he must ask for it; and any question that he proposes must be truly answered. The distinction between such matters as the assured are bound to state, and those respecting which the underwriter must inquire, if he wishes for information, is distinctly and strongly stated by Lord Ellenborough in Hayward v. Rodgers, 4 East, 590. The matter relied on here as a material concealment was the mere private opinion of an individual, who had not any better means of forming a judgment than the defendants. Besides, his opinion could not in any way vary the risk, which would of course not be greater on account of his fancying that his ship was in peril. It seems to be admitted that if the letter had not arrived until the day before the insurance was effected, it would not have been necessary to mention it. the probability of the safety of the Cumberland would not have been increased

by the circumstances of another vessel having made a slow passage; the material fact upon which the calculation of the underwriter was to be made was the date of the ship's *departure; and that was truly stated to him. The question then comes to this, Is a party about to insure bound to communi
[*538] cate all the fears which he himself entertains? Suppose the owner of this ship had been in England, and had received information of her departure from Sidney on a certain day, and having suffered her to remain uninsured for a period of thirty days, began to feel alarmed, and employed an agent to effect an insurance, stating to him the fears that he entertained, would the agent have been bound to inform the underwriter of that circumstance? and would the policy have been vitiated by the concealment of it? If so, a policy may be good or bad according to the strength or weakness of the nerves of the ship-owner, or according to his habit of expressing or concealing the opinion that he entertains respecting his property. It will hardly be denied that the opinion of an experienced underwriter is at least as important as the opinion of a ship-owner; and yet the witnesses for the defendants stated that if some underwriters refuse a risk that fact is never mentioned to those to whom it is afterwards offered. In Bell v. Bell, 2 Campb. 479, the assured had received a letter from Riga, stating that the papers of all vessels arriving there were ordered to be sent to Petersburgh, and that the order had produced a great sensation there, on account of the detention occasioned by it, and that the Rising Sun (the ship insured) must share the same fate. The broker, on effecting the insurance, mentioned the fact of the ship's papers being sent to Petersburgh, but did not show the letter; and it was contended that the policy was on that account void: *but Lord Ellenborough said, "The assured are only bound to communicate facts. The broker did communicate the fact of the ship's papers being sent to Petersburgh for examination. He was not bound to communicate the sensations and apprehensions which that fact produced at Riga;" and this was afterwards confirmed by the Court of King's Bench. In Carter v. Boehm, 3 Burr. 1905, also, it was held that the opinions or fears of a party insuring need not be stated. This latter case is also a strong authority to show that the evidence of the opinion of underwriters as to the materiality of the matter not communicated ought not to have been received. The broker who effected that insurance stated that, in his judgment, the opinion of the party insuring was material, and ought to have been communicated. But Lord Mansfield, in giving judgment, said, "We all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness." And the judgment of Gibbs, C. J., in Durrell v. Bederley, agrees with this. "I am of opinion that the evidence of the underwriters, who were called to give their opinion of the materiality of the rumours, and of the effect they could have had upon the premium, is not admissible evidence. It is not a question of science, in which scientific men will mostly think alike, but a *question of opinion, liable to be governed by fancy, and in which the diversity might be endless." Lindenau v. Desborough is not a conflicting authority; for there the opinions given did relate to a question of science. Cur. adv. vult.

The judgment of the court was now delivered by

Lord Tenterden, C. J. This was an action on a policy of insurance on goods by the ship Cumberland, at and from Sydney to London. A verdict having been found for the defendants, a rule nisi for a new trial was granted; and on the argument the main question was, whether a certain letter, which had been received by the plaintiff, ought to have been communicated to the underwriters. One part of it, stating the time when the Cumberland sailed from Sydney, and when she was expected to sail from Van Dieman's Land, was stated, but the residue was not. Now the part which was not read contained this

expression: "To give every chance for Mr. Emmett's arrival in England, I have directed my friend, Mr. Harris, not to deliver this until thirty days after the arrival of the Australia in London." The Australia did arrive, the thirty days elapsed, and Mr. Emmett, who was on board the Cumberland, did not arrive; and in the meantime two other vessels, that sailed after the Australia, arrived from Sydney. And the question was, whether this part of the letter was material, as altering the risk and the premium that the assured would have to pay? At the trial several witnesses were examined, who stated that they thought the letter material; but it has been contended, that no such evidence ought to have been received. I know not how the materiality of any matter is to be ascertained *but by the evidence of persons conversant with the subject-matter of the inquiry. If such evidence is rejected, the Court and jury must decide the point according to their own judgment unassisted by that of others. If they are to decide, all the Court agree in thinking that the letter was material and ought to have been communicated, and that a jury would have been bound to come to that conclusion. The case is somewhat peculiar. The ship was at Van Dieman's Land. The owner, who was resident at Sydney, and who would know the character of his ship, wrote to his agent here by another vessel sailing from that place at the same time that the Cumberland was expected to leave Van Dieman's Land, and directed him, after the receipt of that letter, to give his ship every chance of arriving before he effected the insurance. Surely the fact of his waiting so long a time after the arrival of the letter before the insurance was effected would have influenced the mind of the underwriter in deciding upon what terms he would accept the risk. There was another fact also not immaterial,—two ships had arrived shortly before the insurance was made, and the underwriter might naturally suppose that the letter came by one of them; he should therefore have been informed of the true time when it was received. For these reasons we are of opinion that the verdict for the defendants was right. Rule discharged.

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*SMITH v. HURRELL. Feb. 9.

A clerk in the excise office, attending the office (in the city of London), from ten till four every day (Sundays and holidays excepted), and having no other means of obtaining his livelihood, but restding with his wife and family out of London, is not a person "seeking a livelihood" within the city of London or its liberties, within the meaning of those words in the London court of requests act 39 and 40 G. 3, c. 104, and, therefore, he is liable to be sued in the superior courts for a debt under 61.

In this cause, which was commenced by latitat, directed to the sheriffs of London, the writ was served upon the defendant at the excise office in the city of London, in which office the defendant was a clerk. The situation at the excise office called for his attendance, and he did there attend every day from ten till four (Sundays and the holidays allowed at the excise office excepted), and he had no other means of obtaining his livelihood. The plaintiff having recovered a sum under 5l. by verdict, the defendant obtained a rule to show cause why a suggestion should not be entered on the roll to deprive the plaintiff of costs under the 39 & 40 G. 3, c. civ.,(a) (the London court of requests' act.) It

(a) Section 5 enacts, "that it shall be lawful for any person or persons residing within the city of London or elsewhere, who now have, or hereafter shall have, any debt or debts owing or due to, or claimed or demanded by, such person or persons, not exceeding the sum of 5t, from any person or persons whomsoever residing or inhabiting within the city of London or the liberties thereof; or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing within the same city or liberties, to cause such debtor or debtors, person or persons, from whom such debt or debts shall be owing or due, or claimed or demanded, and so resident, inhabiting, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing as aforesaid, to be warned or summoned by personal service," &c.

appeared by the affidavits in answer to the rule, that the defendant resided with

his wife and family out of London.

Clarkson showed cause. This defendant does not come within the description of persons named in the act *in question. The persons there described evidently import persons in business. The words are, "residing or inhabiting within the city of London, or the liberties thereof; or keeping any house, warehouse, shop, shed, stall, stand, or seeking a livelihood or trading, or dealing within the same city or liberties." The cases which have been decided on the act also show, that in order to deprive the plaintiff of costs, the defendant must be brought strictly within the meaning of the act. In Gray v. Cook, 8 East, 336, the defendant was a market-gardener, kept a stand with a shed in Fleet Market, at an annual rent, which he occupied three times a week on market days, until ten in the morning. In Skinner v. Davis, 2 Taunt. 196, the defendant was a porter, plying at two public-houses in the city of London, at which the plaintiff himself had addressed letters to him. In Holden v. Newman, 13 East, 161, the defendant was a clerk to Messrs. Kaye and Freshfield, attorneys, a situation, for this purpose, similar to that of the defendant. In Stephens v. Derry, 16 East, 147, also, the defendant was an attorney's clerk; and in all those cases the defendant was held not to be within the act; and in Holden v. Newman, Le Blanc, J., observed, that "the general question was of very extensive consequence, and required consideration; for, if this were seeking a livelihood in the city within the meaning of the act, it would extend to every banker's and merchant's clerk in London, who attended his master's business there in the morning, though his own residence was in another place." That is the case in the present instance.

*Barstow, control. The test by which the courts have decided all the cases upon this act has been, whether the plaintiff had the means of compelling the defendant's appearance in the London court. Wherever the affirmative of that question has appeared, the defendant has been held to be within the meaning of the act; and supposing him to have come within the words, he has

been held entitled to the advantage given by the act. There is no question made upon the point that the defendant comes within the words of the act, for he "seeks his livelihood" only by means of his situation in the excise office. Then all the cases cited on the other side went upon the test which has been already mentioned. In Gray v. Cook, the cause turned upon the words "keeping a stand;" and Lord Ellenborough there said, with reference to those words, "So that persons having demands upon them may know where to find them at all reasonable hours. After ten o'clock he is no longer to be found at the stand, and never but on particular days." In Skinner v. Davis, the Court said the defendant might change his public-house every day, and that the plaintiff's knowledge of his resort was merely a casual circumstance. Holden v. Newman was decided upon a point independent of any upon this statute; and the Court gave no opinion on the general question. In that case certainly Le Blanc, J., used the words which have been cited; but he gave no opinion of his own. He merely said the case would require consideration. In Stephens v. Derry, which was the case of an attorney's clerk, it became unnecessary to give an opinion on the general question, as it *turned out that the defendant did not seek the whole of his livelihood in London; but Lord Ellenborough [*545] there expressed a dictum which showed that the test was, whether the plaintiff could find the defendant, to serve him with process out of the London court. In the present case the nature of the defendant's employment makes him stationary within the city, where he is accessible for the service of process, and where, in point of fact, he was served. The plaintiff, therefore, is without any excuse; for if he could find the defendant to serve him with one sort of process,

directed to a London officer, no reason can be assigned why he did not serve him with process out of the London court. Nor have the courts been inclined to put so strict an interpretation on the act against defendants as has been suggested; for in Croft v. Pitman, 5 Taunt. 648, and after all the cases cited by the other

side, the Court of Common Pleas appeared to consider that a partial seeking of the defendant's livelihood in London was sufficient. There the defendant was a coal merchant; his dwelling-house and wharf were in Southwark; but he held half a counting-house in London and paid half the rent, and the Court held him

to be a person within the act.

LORD TENTERDEN, C. J. On behalf of the defendant in this case, reliance is placed on the words, "seeking a livelihood." But I think those words must be construed with reference to the preceding and subsequent words. The whole stands thus,—"keeping any house, warehouse, shop, shed, stall, stand, or seeking a livelihood, or trading or dealing, within the same city or liberties." When I see the words, "seeking a livelihood," so associated with those other words, it appears to me that "the expression must be taken to point to a person who is carrying on some business on his own account, and not in the subordinate situation of a clerk, which does not answer to the description of "keeping a shop," or "trading or dealing." I think, therefore, the defendant is not a person within the meaning of this act; and, consequently, that his rule which seeks to deprive the plaintiff of costs should be discharged.

Rule discharged.

HEUDEBOURCK v. LANGTON.

A surveyor of highways cannot maintain an action against the late surveyor for the balance remaining in his hands, until his accounts have been settled and allowed, or disallowed, in the manner pointed out by the 13 G. 3, c. 78, s. 48.

DEBT by the plaintiff against the defendant, late surveyor of the highways for Mile End Old Town, for a penalty under the 13 G. 3, c. 78, s. 48. Counts for money had and received, and on an account stated. At the trial before Lord Tenterden, C. J., at the Westminster sittings after Hilary term, 1829, it appeared that in October 1828, the defendant, on going out of office, gave in his accounts, by which a balance of 1691. 13s. 7d. appeared to be due from him. The accounts were taken before a single magistrate, who refused to examine them, and referred them to the special sessions, where they were examined, and the sum of 60l. disallowed, so that the balance due from the defendant appeared to be 2291. 13s. The defendant had offered to pay some part of the money, but no tender was pleaded, so that it became immaterial. For the defendant it was contended, that the first count could not be sustained, as it appeared that the notice of action did not correspond with the declaration, being for a larger sum than was thereby Lord Tenterden, C. J., was of that opinion, and confined the plaintiff to the other counts, as to *which it was contended, that the justices at special sessions had not any original jurisdiction to examine and settle the surveyor's accounts, but merely to examine such items of the accounts as the single justice upon an examination of them did not think fit to allow. Lord Tenterden was of that opinion, and directed a nonsuit; but gave the plaintiff leave to move to enter a verdict for 229l., or 169l., or 60l., as the Court might think fit. A rule nisi for that purpose was accordingly granted in last Easter term, but the Court confirmed his Lordship's decision as to the first count.

The Attorney-General, Campbell, J. L. Adolphus, and Kelly, now showed cause. The statute gives a specific remedy, viz. a penalty which may be recovered by information, and in that case is to be applied to the repair of the highways, (a) if the late surveyor does not pay over the balance due from him; and, therefore, no action for money had and received lies. Secondly, if a surveyor is authorized to maintain such or any action, he must at all events sue in his character of surveyor. But if those difficulties were removed, still no action can be maintained before the late surveyor's accounts have been settled in the manuer pointed

out by the act; for until then he is not bound to pay over the balance. Rex v.

Justices of the North Riding of Yorkshire, 6 B. & C. 152.

Brougham and Denman, contrd. If a statute says that A. shall pay money to B., B. has a right to it, and may recover it, although the statute may also provide a punishment for A. in case he refuses or neglects to pay. The right of B. is not merged in the punishment. Then, as to the objection that the plaintiff should have sued as *surveyor; if the statute gives him a right to the money, the common law gives him a right to sue for it. The necessity of showing himself entitled to the office in order to prove his title to the money was a mere matter of evidence: he was not bound to describe himself by his office in the declaration. The legislature cannot more distinctly give a right of action than by saying, that one man shall be responsible to another for money received.

Lord TENTERDEN, C. J. I am of opinion that the nonsuit was right. The plaintiff was a surveyor of highways, a public officer. Between him and the defendant there was no personal privity, it was merely official, and the rights of each party must depend on the statute 13 G. 3, c. 78. Now that statute, by section 48, provides that a surveyor of highways, before he goes out of office, shall do certain things as to his accounts, and whenever the said accounts shall be settled in the manner therein appointed, the surveyor shall forthwith deliver a duplicate of the account, together with all such sums of money as shall remain in his hands, to the succeeding surveyor. The time, therefore, at which the surveyor, going out of office, is to deliver over the money, is when the accounts shall have been settled and allowed, or disallowed, in the manner directed by the act. Here that has never been done. The action was therefore premature; and as this ground is sufficient to sustain the nonsuit, it is unnecessary to give any opinion on the other questions that have been raised.

The rest of the Court concurring, the rule for entering a verdict was discharged.

Rule discharged.

*BERNASCONI and Others v. FAREBROTHER, WINCHESTER, and WILTON.

A commission of bankrupt was issued against A. and B. describing them as "bankers, being traders according to the provisions of the statute 6 G. 4, entitled, &c." A. and B. had ceased to be bankers before that act passed; but it was held that the word bankers might be treated as a description of the persons of the bankrupts, and that the commission might be supported by evidence of another trading.

A trader does not commit an act of bankruptcy by absenting himself, unless he absent himself from his place of abode, or place of business, or from some particular creditor.

TRESPASS for breaking and entering the house and lands of the plaintiffs, and taking away their goods and chattels. Pleas by Farebrother and Winchester; first, not guilty; secondly, as to breaking and entering, &c., a justification as sheriff of Middlesex, under a fi. fa. against Abraham Henry Chambers, the elder, at the suit of defendant Wilton, that they entered the dwelling-house in the declaration mentioned, the door being open, in order to seize the goods of A. H. Chambers then being therein, and did seize and take them away. Replication, de injuria. Pleas by defendant Wilton: first, not guilty; secondly, that in Easter term, 8 G. 4, he obtained judgment against A. H. Chambers for 1828l. debt and 7l. costs, whereupon he issued a fi. fa. directed to the sheriff of Middlesex, which was delivered to the defendants Farebrother and Winchester, then being such sheriff, to be executed; and that he (Wilton) as their servant and by their command, entered the dwelling-house, the door being open, and seized certain goods of A. H. Chambers then being therein. Replication, de injuriâ. At the trial before Lord Tenterden, C. J., at the Westminster sittings after Hilary term 1829, the following appeared to be the facts of the case:-The goods and chattels in question were formerly the property of A. H. Chambers

the elder, who, in partnership with his son (A. H. Chambers the younger), car-*550] ried on the business of a banker until 1824, when they stopped payment.
*On the 19th of November, 1825, a commission of bankrupt issued against them, under which the plaintiffs were chosen assignees, and an assignment to them was executed on the 2d of February, 1826; but they did not declare as assignees of the bankrupts. After the assignment, the defendant Wilton brought an action against Chambers the elder for an alleged debt of 1828l., in which judgment was suffered by default, and a writ of fi. fa. afterwards issued, under which the other defendants, then being sheriff of Middlesex, seized the goods and The plaintiffs, in order to prove their title, produced the chattels in question. commission of bankrupt, which described Messrs. Chambers as bankers, being traders according to the provisions of the act 6 G. 4, entitled, &c.; whereupon it was objected for the defendants, that Messrs. Chambers had never carried on the business of bankers after the passing of the statute 6 G. 4, c. 16, and that it was necessary to show a trading after that act passed, and that, consequently, a commission against them as bankers could not be supported. To this it was answered, that the commission need not describe the trading, and that the word bankers was a description of the persons of the bankrupts, and not of their trade, and that the plaintiffs might give evidence of another trading to support the commission. Lord Tenterden was of that opinion, and evidence was then given that Messrs. Chambers, after the passing of the 6 G. 4, c. 16, had carried on the business of pozzalani manufacturers. An act of bankruptcy by Chambers the elder was then clearly proved; and as to Chambers the younger, it was proved, that, after they had stopped payment as bankers in 1824, a committee of their creditors was appointed to wind up the affairs of the concern, who met and *carried on the investigation of the affairs at a house taken by them *551] and carried on the investigants. A letter of license was given to Messrs. Chambers to secure them from arrest, and they undertook to attend at South Molton Street, and assist in winding up the affairs whenever the committee should require them to do so. This committee continued to act until the 9th of November, 1825, and up to that time Chambers, jun., always attended when On that day the arrangement under which the committee required to do so. acted was determined, and the letter of license revoked; and after that Chambers, jun., never went to South Molton Street. Between that time and the 19th of November, he was frequently sought for there by a sheriff's officer who had a writ against him, but without success; and it appeared that during this time he resided in a house in Alfred Place, which he had occupied for two years, but the place of his residence was not known to the officer. It was contended for the defendants, that this was not evidence of an act of bankruptcy; but Lord Tenterden thought there was some evidence of an absenting himself, which ought to be left to the jury. A question was also made as to the right of Chambers, sen., to dispute the validity of the commission, in consequence of his having done some act to recognise it; and it was said that Wilton was acting in collusion with him, and was, therefore, in like manner estopped: but this ultimately became immaterial, for the Court held, that even if Wilton were estopped, the other defendants were not. The question as to Chambers, jun., having been left to the jury, they found a verdict for the plantiffs. In Easter term 1829, a rule nisi for a new trial was obtained on *the objections before stated to the commission, and *552] the proof of an act of bankruptcy by Chambers, jun.

The Attorney-General, F. Pollock, and Hutchinson, showed cause. As to the first point, the plaintiffs were at liberty to support the commission by proving that Messrs. Chambers were traders as pozzalani manufacturers. The commission described them as bankers, being traders within the meaning of the statute 6 G. 4, c. 16. Now the second section of that statute enumerates various descriptions of persons who shall be deemed traders, and it was sufficient to show that Messrs. Chambers came within one or other of those descriptions: the word "bankers" was mere addition. If the commission had described them as being traders as bankers, the argument would have been stronger against the plaintiffs.

In Hale v. Small, 8 Taunt. 730, the party was described as "E. H., of, &c., dealer in cattle, using and exercising the trade of merchandise by way of bargaining, exchange, bartering, and chevisance, seeking his trade of living by buy-At the trial, evidence of a trading in hops was admitted, and ing and selling. the Court, although they granted a new trial on the ground of surprise, did not decide that such evidence was not admissible; and on the second trial, evidence of the trading in hops was again received, and the Court refused a new trial, and held, that the words "dealer in cattle" might be treated as a description of the person, and that under the general words evidence of other trading was properly received, 2 B. & B. 25. In Bernasconi v. Lord Gengall, 1 M. & R. 382, Lord Tenterden, C. J., appears to have *been of opinion that the word "bankers" was mere addition; and in Ex parte Herbert, 2 V. & B. 399, it was held to be sufficient for the commission to state that the party obtained his living by buying and selling. Then, as to the second point, it was clear that Chambers, jun., had absented himself from South Molton Street, and it was for the

jury to say with what intent he had done so.

Gurney, Campbell, and F. Kelly, contrd. The power of the Lord Chancellor to issue commissions of bankrupt is confined to those cases which are described in the act of parliament. He is therefore bound to show on the face of the commission that it is a case to which his jurisdiction extends. An arbitrator is bound to show his authority on the face of his award, and a magistrate on the face of his warrant. Now the Lord Chancellor can have no jurisdiction unless the party against whom it is issued is liable to the bankrupt laws; that liability, therefore, should appear by the commission itself. In 1806 Lord Eldon made an order, that no commission should be issued, the bankrupt being described only as farmer, grazier, drover, underwriter; but when no other description is added in the bond and affidavit, the words "dealer and chapman" are to be added in the petition and commission; which must have been to obviate objections on account of his jurisdiction not being shown. In the case of Hale v. Small, a new trial was granted on the ground of evidence having been received to prove a trading different from that described in the commission. And there the commission contained, independently of the special description, general words sufficient to show the jurisdiction of the Lord *Chancellor; so also did the commission in Ex parte Herbert. Here, if the word "bankers" be struck out, nothing remains to show that Messrs. Chambers were such traders as the act applies to. If, therefore, the word "bankers" can be treated as an addition only, the commission is bad for not showing the jurisdiction to issue it. But there is no case to justify the treating of that as an addition only. In Bernasconi v. Lord Gengall the point was never raised, and the dictum quoted was altogether extra-judicial. Then, as to the second point, there was no evidence from which the jury could with propriety infer, that Chambers, jun., absented himself from his creditors; it ought not, therefore, to have been left to their consideration. The only evidence was, that after a certain time he could not be found in South Molton Street; but it was distinctly proved that he attended there as long as the committee for winding up the affairs continued to act; and when they ceased to do so, there was no reason for his going there. It was neither his residence nor his place of business. His absence, therefore, was not evidence of an absenting himself to avoid his creditors. Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J. In this case an application was made for a new trial, on two grounds; one depending on the form of the commission, which described the parties as "bankers, being traders according to the statute." It was contended that, "being traders according to the statute" was connected with the word "bankers;" for that otherwise no description of trade was mentioned, and that as *Chambers and Son had ceased to trade as bankers before [*555] the statute 6 G. 4 passed, of course the commission must fail. We think, however, that the word "bankers," as there used, may be considered only as a description of the persons; and we think also, that it is not necessary that

the particular species of trading should be set forth in the commission; that the commission would have been good, if, instead of calling them bankers, they had been described as esquires or gentlemen. We are therefore of opinion, that the first objection ought not to be allowed to prevail, and consequently, that as far

as that objection goes, the rule ought to be discharged.

Another objection which was made was, that there was not such evidence of an act of bankruptcy by the younger Chambers as could have justified me in leaving it to the jury to say, whether he had or had not committed an act of bankruptcy. One answer given to the whole of these objections was, that Wilton, who was one of the defendants, was, in consequence of his connexion with the elder Chambers, to be so considered as in collusion with him, and estopped from disputing the validity of the commission, inasmuch as the elder Chambers himself would be; and it was contended that Wilton, being estopped from disputing the validity of the commission as far as related to the elder Chambers, he was equally estopped as far as related to the younger Chambers; but, however it may be with respect to the defendant Wilton, there are other defendants who are not thus estopped, and, therefore, they have a right to say that the plaintiffs must prove a valid commission, which can be done only by showing an act of bankruptcy committed by both the persons named in the *commission. The only ground upon which I think it can be contended that an act of bankruptcy was committed by the younger Chambers, was that of absenting himself; there was no proof at all that he kept house, so as to come within that provision. If he committed any act of bankruptcy, it must have been by absenting himself. But, according to the decisions, absenting himself has hitherto been confined to the case of a party absenting himself from his own regular place of business, at which a man would be expected to be, or from one or more particular creditors at some other place; for instance, the Royal Exchange, where he expected to meet persons to whom he was indebted; going behind the scenes at the theatre, and so on. Now there was, at the time at which this act of bankruptcy is supposed to have been committed, really no place of business properly so called, to which the younger Chambers could have occasion to resort; the business of the banking-house had a considerable time before been placed under the control and management of trustees, and so long as the trustees or committee continued to act, so long the younger Chambers attended upon them at their meetings whenever they wanted him. The committee, under a clause in this deed, put an end to the trust: they revoked the deed, the consequence of which was, certainly, that the books and all the concern would return and devolve again on the two Chambers'. But it does not appear that there was any business for either of them to transact at this place in South Molton Street. It is true, their names were over the door, but there does not appear to have been anything that they could have done, or had occasion to do, by attending at that Inquiries were made for the younger Chambers there, *and it. house. appears that no person there could say where he was. Inquiries were made also for him at his father's, but there no information could be obtained respecting him. There is no proof, however, that he directed any person to either of these places, but that they inquired there in consequence of not being aware what was the place of his abode. It appears that, after some time, a person came to the house in South Molton Street, and fetched away any letters which had in the interval been left for Chambers and Son at that house; but what was his authority for so doing does not appear, or whether it was at all under the direction of the younger Chambers. It further appears, that long before the time at which he is supposed to have committed an act of bankruptcy by absenting himself, he had a house in one of the crescents in the neighbourhood of Tottenham Court Road; he had been seen repeatedly in that house for some period previously to that. One sheriff's officer had known where to find him, and had arrested him there some time before; and other sheriff's officers, in whose hands writs were placed (for there were many writs out against both the father and the son), not being aware that he lived at that place, knew not where

to look for him; and it appears further, that as soon as the commission issued he made his appearance, and took the benefit of it. Still we cannot permit the verdict to stand, if this evidence was not sufficient to justify the jury in coming to the conclusion that this party had committed an act of bankruptey within the meaning of the statute; and he not having absented himself, as far as we can judge from the evidence, from any place in which, in the ordinary course of his life and business, he would be expected to be present, namely, his place *of abode, or any place in which he had any business to transact, we think that the second objection ought to prevail, and that upon that objection there must be a new trial.

BURROUGH v. MOSS, Gent., &c.

Where a promissory note is given to a married woman, the husband may sue on it in his own name only, and then a debt due to the maker from the wife, dum sola, cannot be set off. The endorsee of an overdue promissory note is liable, in an action against the maker, to all equities arising out of the note transaction itself, but not to a set-off in respect of a debt due from the endorser to the maker of the note, arising out of collateral matters.

Assumpsit on a promissory note dated the 5th of February, 1826, made by the defendant, whereby he promised to pay John Fearn, by the name of Mrs. Rachel Fearn, or order, 150l., with interest, nine months after notice in writing; and endorsed by J. Fearn to the plaintiff. Plea, the general issue. At the trial before Burrough, J., at the Spring assizes for Derby, 1829, it appeared in evidence that the defendant had been employed as an attorney by Mrs. Rachel Harrison, and had lent 2001. of her money at interest to one Birch, who gave Mrs. Harrison a promissory note for it. In July 1825, Mrs. R. Harrison intermarried with John Fearn, who in February 1826 requested the defendant to obtain payment of the 200l. from The defendant said, Birch was a client of his, and that he did not wish him to be pressed for the money; and, in order to prevent Fearn from suing Birch, he (Moss) paid 50l. on account of the note, and gave his own note for 150l., and made it payable to Mrs. R. Fearn nine months after notice. 21st of April, 1826, J. Fearn gave the defendant a written notice to pay off the note at the expiration of nine months from that time. Moss, at the expiration of the time, paid *501. and the interest then due, but no more; and in March 1827, J. Fearn and his wife both endorsed the note to the plaintiff, who advanced 100l. on it, and commenced this action against Moss. defendant claimed a right to set off a sum of 511. alleged to have been due to him from Mrs. Fearn before her marriage, 28% for business transacted for Fearn since the marriage, and 151. said to have been paid on account of the note, besides the 50l. and interest before mentioned; but the jury found that this sum of 151. was not paid on account of the note. The learned Judge directed the jury to find a verdict for the plaintiff for the amount due on the note, and gave the defendant leave to move to reduce the damages, if the Court should think that either of the sums of 51l., 28l., or 15l., ought to be allowed. A rule nisi was obtained for that purpose in Easter term, 1829, and at the sittings in Banc before this term.

Balguy and N. R. Clarke showed cause. The defendant had no right to set off either of the sums of 51l. or 28l. The sum of 15l. was disposed of by the jury. The 51l. was a debt due from the wife dum sola. The note, although in form given to Mrs. Fearn, was in law given to her husband, and enured to his benefit. The defendant was indebted to him on the note, and if he (Fearn) had sued, the debt due from the wife before marriage could not have been set off. Then, as to the sum of 28l. If the action had been brought by Fearn, no doubt it might have been set off; but the right of the defendant to avail himself of that claim in this action rests on the supposed applicability of the rule of law, that the endorsee of a bill or note, when over due, takes it subject

But that is inapplicable, for two *reasons: first, there to all its equities. was nothing on the face of the note to show that it was over due at the time when the plaintiff became endorsee; and, secondly, the right of set-off in this case between Fearn and the defendant was wholly collateral to and independent of the note transaction, and the rule applies only where the right of setoff or other equity arises out of the note transaction itself. None of the decisions, Brown v. Davis, 3 T. R. 80, Boehm v. Sterling, 7 T. R. 423, Charles v. Marsden, 1 Taunt. 224, warrant a broader rule than that; and although, in Brown v. Davis, Buller, J., stated, that he had ruled at N. P., in a case of Banks v. Colwell, that the maker of a promissory note being sued by a person who became endorsee after it was due was entitled to set up the same defence that he might have done against the original payee, the defence then in question arose out of the very transaction in which the note was given, and went to the consideration for the note. The right of set-off now insisted on depends on the statute of set-off, and that only applies between the parties who have mutual demands. It would be very hard to involve the plaintiff in the investigation of accounts between third persons. [BAYLEY, J. In Collenridge v. Farquharson, 1 Stark. N. P. C. 259, the state of such accounts was examined.] That is true, but it was in order to see what sum the bill was originally intended to secure.

Adams, Serjt., contrd. This is an attempt to evade the statute of set-off, which will never be available against the holder of a note if he can, by endorsing it when over due, give the endorsee a right independent of the set-off. In this case the demands for 51l. and 28l. might *have been set off if Fearn had sued on the note. The sums due on the note on the one hand, and for those demands on the other, were mutual debts. If Mrs. Fearn had survived her husband, she might have sued on the note, and then it is clear that the debt due from her before marriage might have been set off. So also if Fearn and his wife had joined in bringing an action on the note, the debt due from her before marriage might have been set off; and as the money received would enure to the benefit of the husband, the debt due from him might also have been set off. But the endorsee of this note taking it when overdue, stands in the same situation, for the endorsement was by both husband and wife. [BAYLEY, J. That, in legal effect, was the endorsement of the husband only.] Philliskirk v. Pluckwell, 2 M. & S. 392, shows that husband and wife may join in an action on a note given to the wife during her coverture; and if so, a debt due from her before marriage ought to be allowed to be set off.

BAYLEY, J. On behalf of the defendant it has been insisted, that the defendant is entitled to set off two sums, one of which, 511., was due to him from Mrs. Fearn before her marriage. As to that, I am of opinion that he has not a right of set-off. The action was brought on a note given to Mrs. Fearn during her coverture, not by a person who was her debtor before her marriage, but by a party who came in aid of the debtor. The form of the security gave the husband a right to treat it as joint property or as several; and if he chose to treat *562] it as several, he might deal with it as *his own, and the consequence of his so treating it would be, to let in by way of set-off to any claim by him, any debts due from him. If, on the other hand, he elected to treat it as a joint property of himself and his wife, in her right, he might let in debts due from her in her own right, but it is clear that both classes of debts could not be let in. It appears that in the present case he elected to treat the note as his separate property, for he endorsed it over to the plaintiff. That mode of dealing with it leads to the same consequences as if the note had been given to him alone; and, consequently, the debt due from his wife before her marriage cannot be set off. As to the other sum of 28l. due from Fearn alone, I should wish to consider the case further before I give my opinion; for, although it might have been set off had Fearn sued on the note, yet the cases have not yet gone the length of establishing that such a set-off, not arising out of the bill or note transaction, can be made available against an endorsee, even when the bill or note is overdue at the time of the endorsement.

LITTLEDALE, J. Supposing the statute of set-off to apply to this case (which I think it does not), it is clear that the debt due from Fearn can alone be set off; for nothing beyond that could have been set off, had he brought an action on the note. If he had sued jointly with his wife, I do not think it by any means clear that the debt due from her dum sola could have been set off.

Parke, J. When the question as to the set-off was first mentioned, I thought that it must be allowed. But I now entertain doubts, for no decision has yet gone to that extent. If there is an agreement, either express or *implied, 1*563 affecting the note, that is an equity which attaches upon it, and is available against any person who takes it when overdue; but it does not thence follow, that a right depending entirely on the statute of set-off is applicable to such a state of things. The result of the contract entered into by the maker of this note is, that the husband might, if he thought fit, give his wife an interest; or he might, as was the fact, dissent, and make the note his own. If, therefore, any set-off is to be allowed, it must be confined to the debt of 281. contracted by him after the marriage.

Cur. adv. vult.

The judgment of the Court was now delivered by

BAYLEY, J. This was an action on a promissory note made by the defendant, payable to one Fearn, and by him endorsed to the plaintiff after it became due. For the defendant it was insisted, that he had a right to set off against the plaintiff's claim a debt due to him from Fearn, who held the note at the time when it became due. On the other hand it was contended, that this right of set-off, which rested on the statute of set-off, did not apply. The impression on my mind was, that the defendant was entitled to the set-off; but, on discussion of the matter with my Lord TENTERDEN and my learned Brothers, I agree with them in thinking, that the endorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters. The consequence is, that the rule for reducing the damages in this case must be discharged.

Rule discharged.

*COCKERELL and Another v. CHOLMELEY.

Γ*564

(In Error.)

An estate, comprising a manor and tenements, with the appurtenances, was demised to trustees to the use of the eldest son of Sir H. E. for life, without impeachment of waste, with remainders to trustees to preserve contingent remainders, with remainder to the first and other sons of his eldest son in tail male, &c., with a power to the trustees, at the request of the person, who for the time being should be in possession of or entitled to the rents and profits of the said manor and tenements, with the appurtenances, by virtue of the limitations therein contained, by any deed or writing, to make sale and dispose of the same or of any part or parts of the manor and tenements aforesaid with the appurtenances, to any person, either together or in parcels; and to that end the trustees were also empowered, by any deed or deeds, writing or writings, to revoke, determine, or make void all and every or any of the use and uses, trusts, estates, powers, provisoes, and limitations thereinbefore limited, created, provided, and declared of and concerning the manor and tenements aforesaid; with the appurtenances, sold, to be sold, disposed of, or exchanged; and by the same or any other deed or deeds, writing or writings, to limit and appoint the manor and tenements aforesaid, with the appurtenances, whereof the uses should be so revoked, unto the purchaser.

The trustee sold the estate, exclusive of the timber growing upon it, for 13,400?, and the tenant for life by the same deed sold the timber, wood, and underwood for 2,448. Held, that the

power was not well executed.

Where, after demurrer to a replication in formedon, the demandant obtained judgment, and upon the trial of soveral issues in fact a verdict being found in favour of the demandant, the latter had judgment that he recover his seisin against the tenant; and upon writ of error brought, the common errors being assigned, the judgment was affirmed: Held, that the demandant was entitled to double costs under the statute 13 Car. 2, stat. 2, c. 2, s. 10.

FORMEDON. The demandant, in his count, set out so much of the will of Sir Henry Englefield as showed that an estate, comprising certain manors and tenements with the appurtenances therein mentioned, was devised by him to Lord Cadogan and Sir Charles Buck, in trust for the eldest son of Sir H. Englefield for life, without impeachment of waste, with remainder to trustees, to preserve contingent remainders; with remainder to the first and other sons of his eldest son in tail male; remainder to his second son for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of his second son in succession in tail male; remainder to the demandant's mother for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in succession in tail male. The count then showed *the death of testator and his wife (for whose benefit a term was created, which by her death was determined), the death of the testator's two sons without issue, the death of the demandant's mother, and that the demandant was her eldest son,

in which right he claimed the estate.

The tenants in their eighth plea, on which the question wholly turned, stated that the testator by his will declared that it should be lawful for the trustees and the survivors of them, at the request and by the direction and appointment of the person who for the time being should be in possession of, or entitled to, the rents and profits of the manor and tenements aforesaid, with the appurtenances above demanded, by virtue of the limitations therein contained, signified by any deed or writing under his or her hand and seal, attested by two or more witnesses, to make sale, and dispose of, or to convey in exchange for other manors, lands, tenements, and hereditaments, any part or parts of the manor and tenements aforesaid, with the appurtenances above demanded, to any person or persons whomsoever, either together or in parcels, for such price and prices in money or any other equivalent, as to them the trustees, or the survivor of them, or the heirs of such survivor, should seem just and reasonable, and to that end for the said trustees or the survivor of them, or the heirs of such survivor, by any deed or deeds, writing or writings, under their hands and seals, sealed and delivered in the presence of two or more witnesses, to revoke, determine, or make void, all and every or any of the use and uses, trusts, estates, powers, provisoes, and limitations thereinbefore limited, created, provided, and declared, of and concerning the manor *and tenements aforesaid, with the appurtenances above demanded, to be sold, disposed of, or exchanged, and by the same or any other deed or deeds, writing or writings, to be sealed and attested as aforesaid, to limit and appoint the manor and tenements aforesaid, with the appurtenances above demanded, whereof the uses should be so revoked, either unto such purchaser or purchasers, or to the person or persons making such exchange, and his, her, or their heirs or otherwise, and to limit, direct, or appoint such new or other use or uses, trust or trusts, of or concerning the manor and tenements aforesaid, with the appurtenances above demanded, as should be requisite and necessary for the executing and effecting such sales, dispositions, or exchanges; and upon payment and receipt of the money arising on the sale of the said premises, or any part or parts thereof, which should be absolutely sold as aforesaid, to give and sign proper receipts for the money for which the same should be so sold." The plea then stated, that in pursuance of this power, Lord Cadogan, after the decease of Sir C. Buck, at the request of Sir H. C. Englefield, the first tenant for life, sold the estate to Byam Martin for 13,400l., which Lord Cadegan judged to be a reasonable price for the same, and then set out so much of the deed to Byam Martin, as revoked the former uses of the will, and conveyed the estate to a person in trust for Byam Martin, in fee for the price of 13,40**0**7. The plea next deduced the title from Byam Martin and his trustee to Profert was made of the deed of conveyance from Lord Cadogan to Byam Martin. In the replication, over was demanded of that deed. *567] was then set out which recited the power, and that Lord Cadogan *had contracted to sell the estate, exclusive of the timber growing upon it, for 13,4001., and that Sir H. C. Englefield had contracted to sell the timber, wood, and underwood to Byam Martin for 24481. Lord Cadogan then conveyed the estate, exclusive of the timber, &c., which timber, &c., Sir H. C. Englefield, by Vol. XXI.—31

the same deed, conveyed to Byam Martin and his heirs, and the receipt of which 2448l. Sir H. C. Englefield acknowledged, in the body of the deed, and also by a receipt on the back of it. The replication also stated the will of Sir H. C. Englefield, and showed from that will that the power was what it was stated to be in the eighth plea, and brought under the view of the Court the supposed imperfections in the execution of the power by the trustees selling only the land, and allowing the tenant for life to sell the timber on it, and to receive the price thereof. To this replication there was a general demurrer and joinder. The case was argued in C. P., in Michaelmas term, 1825, 3 Bing. 207, and judgment given for the demandant. There were other pleas on which issues were joined, and on them the demandant proceeded to trial and obtained a verdict. The record was removed by writ of error into this Court, and the case was now

argued by

Peake, Serjt., for the plaintiff in error. Sir Henry Charles Englefield being tenant for life without impeachment of waste, was entitled to cut down the tim-ber, and if he waived his right to do so, and permitted the trustees to sell the estate with the timber standing thereon, it was lawful for them to permit him to receive such part *of the consideration money as was the actual value of the timber. This, like any other power, must be construed according to the intention of the testator. His first and primary object was to keep the estate in his family, giving the tenant for life the timber; but in the event of its being found more beneficial to the family to substitute another property for it, the trustees were empowered to sell the estate at the request of any person in possession as tenant for life. Now the tenant for life would never make such a request, unless he was to have at least the same advantage as he would have had if the estate remained unsold. While it remained unsold, he might at any time have cut down timber, and applied the produce of it to his own use. would not only have lessened the value of the estate to the amount of the money for which the timber was sold, but also have taken from it that ideal and fancied value which always accompanies a place upon which old and beautiful timber is standing. It was therefore beneficial for all parties that the timber should stand; and if the tenant for life consented to that, why should he not be allowed the money which was the price of that timber? In Lady Plymouth v. Lady Archer, 1 Br. Ch. Rep. 159, the tenant for life was to be without impeachment of waste in the lands purchased, but he had no interest in the lands to be sold; they were given to the trustees in the first instance. But, secondly, supposing that the tenant for life had no right to the value of the timber, the power was nevertheless well executed, so far as it revokes the uses of the will. By the express terms of the power, the old uses may be revoked by one deed, and the land conveyed *and new uses created by another. Now if the uses have been revoked, although there may have been no complete sale, the plaintiff cannot sue in formedon, for his estate is thereby divested. Court of Common Pleas, it was said that this case must be governed by Doe r. Martin, 4 T. R. 39. That case was determined principally upon the ground of fraud; but Lord Kenyon there said, "that the revocation and conveyance were necessarily one act, and must be done by one and the same deed." Here the laying out of the money produced by the sale, is an act to be done after the land shall have been sold. There is nothing to show that the misapplication of a part of the purchase-money by the trustees shall affect the purchaser. contrary, the payment to the trustees is made a discharge for so much money as is paid, and, at most, the remainder-man can only have a lien in equity for so much of the money as was improperly paid to the tenant for life, Roper v. Halifax. 8 Taunt. 845. In Doe v. Martin it was a condition precedent to the revocation, that the money should be paid to the trustees, and laid out by them; and, in fact, the trustees never received the money, but it was fraudulently disposed of by others.

Cross, Serjt., contrd, was stopped by the Court.

Lord TENTERDEN, C. J. I am of opinion that the judgment of the Court of

Common Pleas in this case ought to be affirmed. I do not treat this as a case of fraud, but as a case of failure of compliance with that condition on which alone the uses mentioned in the testator's will could be revoked, and the estate be applied *to other uses. It has been contended that the revocation may be good under the power, although there has not been a good and valid sale according to the power. The argument as to that point is founded principally on the observation, that the old uses may be revoked by one deed and the land conveyed, and new uses created by another, which certainly may be according to the language of the will. But looking at the whole of the language of the power contained in the testator's will, it appears to me to be per-fectly clear, that there can be no valid revocation of the uses mentioned in the will, unless that revocation is made to the end that a conveyance may be made of the land. That must be the object of the revocation. We must then see, looking at the whole of this deed, whether the object of the revocation was a conveyance of the land. Now it appears by the contract previous to the revocation, and also by the deed of conveyance, that the trustees contracted to sell the land for a certain specific sum of money; and the tenant for life, by the same instrument and contract, contracted to sell the timber, fruit, and other trees, wood, and underwood growing; and when the contract was executed by the deed of revocation and conveyance, the trustees conveyed the land in consideration of one sum of money, and the tenant for life conveyed the timber-trees, wood, and underwoods in consideration of another sum of money paid to him. that this might be lawfully done, because the tenant for life without impeachment of waste might, at law, have cut down all the timber-trees and underwood. It is not material for us to consider, whether he could by law have cut down trees to the extent of those which he has sold, because my opinion is, that ac-*571] cording to the terms of the *testator's will, if the tenant for life thought fit to consent that the estate should be sold, he was bound to suffer it to be sold in the state in which it was at that time, and not to sever from it the timber or other trees, but let the whole go together. There would then be one entire sum to be received for the whole, which would be applied to the interest of the tenant for life as to part, and the person taking the remainder after him would be entitled to the residue. It is said, that this mode of dealing with the estate was beneficial for the family; because, if the tenant for life had cut down the timber first, the estate to be sold afterwards would have fetched much less money. That probably might be so. But I think the testator clearly meant, that if the tenant for life consented to the sale, he should allow the estate to be sold with all that was on it as it then stood. That is the ordinary sense and meaning of the words "sale of an estate." Though in estimating the price, the land and timber are sometimes valued separately, yet the whole sum is paid at once, and is considered as one price. I think that is what the testator intended. The intention of the testator not having been complied with, the power given by the testator's will has not been well executed; the uses have not been revoked, and, consequently, the demandant is entitled to recover. We may regret that a transaction which, as far as we can judge of it, appears to have been fairly intended, should fail in its effect; but whatever regret we may feel, we are bound to decide according to law. I think, therefore, we are bound to say, that the power has not been well executed; that the demandant is entitled to recover, and, consequently, the judgment of the Court of Common Pleas must be affirmed. *BAYLEY, J. I have no doubt the deed was not a good execution of the power. The power is to sell the estate. The estate, at the time when the sale took place, consisted of land, timber-trees, fruit and other trees, and wood and underwood growing upon it. The trustees were to sell it in the condition in which it was at that time. As the timber-trees were part and parcel of the estate at that period of time, the trustees were not at liberty to divide one part from the other. It is said, the tenant for life might, if he had thought fit, have severed the trees and the underwood from the land, and he would thereby have acquired a distinct interest in himself. As to that, it is sufficient to say,

that the tenant had not made himself such a distinct interest; and if he had not made himself a distinct interest, but suffered the timber-trees and the wood to continue parcel of the estate at the time when the power was executed, the whole of the purchase-money of that estate, consisting of the land, trees, and under-

wood, must go to the person in whom the estate was vested.

As to the revocation, Doe v. Martin, 4 T. R. 39, if an authority were wanted on the subject, is in point. There it was held, that the power to revoke was a conditional power, viz. to revoke and to sell, and to substitute other land, and, therefore, there could be no revocation, unless there was a sale and substitution, as part of the same transaction. Now, in this case, it has been said that the trustees might have revoked by one instrument and sold by another. That may be done; but if they revoke by an instrument which shows that the particular sale which they meant to effect will be in its nature a *defective sale, and not a valid execution of the power, then it follows that that revocation cannot be supported. Here they had a right to revoke, to the end that they might sell pursuant to the power. But a sale pursuant to the power would put into the possession of those persons who are remainder-men, the whole of the money which is to result from the sale. Now, here, before they revoke, they state, by way of recital in the deed, that there had been a bargain, by which the land was to be sold for 13,000l., and the timber-trees, wood, and underwood for 24481., the purchase-money of the timber to be applied, not for the benefit of the remainder-man, but for that of the tenant for life. That, therefore, is a revocation, not in order to make a valid sale, but in order to make a sale which the power does not authorize. I am therefore of opinion, that the judgment of the Court of Common Pleas was right.

The power is given to the trustees to sell and dispose of the LITTLEDALE, J. That means to sell and dispose of the estate with everything on it as it stood at the time. They had no power to make a distinction between the land and the timber growing upon it. It was not a good execution of the power, therefore, for them to sell the land, and then for the tenant for life to sell the timber. But it is said they have revoked the uses in the will at all events. It appears to me that a good revocation could only be made to the end that they might make such a conveyance as they were authorized to contract to make by way of sale or exchange. If they contracted to make a conveyance, and have actually carried that intention into effect, by making one which they were not authorized to make, the revocation fails. For *although they might do it by separate deeds, it must be all considered as one act. If they made the revocation to-day, they might make the conveyance to-morrow; still it would be all part of the same transaction, and as the conveyance contracted for in this

case cannot be carried into effect, the revocation fails.

PARKE, J. I am of the same opinion. As to the second point made, that the revocation had taken place, and, therefore, that the plaintiff's estate had been displaced, it appears to me that the answer to that is, that the power of revocation is given by the will to the end that such a sale or exchange as is permitted by the power shall be made; a revocation made for any other purpose is therefore void. Then that brings the case back to the first question, whether the sale made in this case was a sale authorized by the power? It appears to me to be clear, looking at the terms of the power, that the trustees were not authorized to sell the estate without the timber,—they must sell both together. In this case thay have sold the estate without the timber; that, therefore, is not such a sale as is authorized by the power, and the revocation, having been executed for the purpose of making a sale not warranted by the power, is void.

Judgment affirmed. The entry upon the record was as follows: - "And hereupon all and singular the premises whereof the said parties have put themselves upon the judgment of the Court, being seen and by the justices here fully understood, and mature deliberation thereupon had, it appears to the said justices here that the replication

*of the said Francis Cholmeley, the demandant, to the said plea of the said Sir William, Sir Charles Cockerell, and Henry Trail, the said tenants, by them eighthly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, is sufficient in law for the said demandant to have and maintain his aforesaid action against them; but because it is unknown to the justices here, whether or not the said Sir William, Sir Charles Cockerell, and Henry Trail, the said tenants, will be convicted on the trial of the said issues above joined between the parties aforesaid, to be tried by the country; therefore, let the giving of the judgment in this behalf be stayed until the trial of the last-mentioned issues." Then after stating the venire facias, &c., and that on the trial of the issues in the county of Berks, in July 1826, the jury found the several issues joined, in favour of the demandant, several continuances were entered, and lastly to the morrow of the Holy Trinity, at which day come here the parties last aforesaid by their respective attorneys aforesaid, and hereupon all and singular the premises been seen, and by the said justices here fully understood, and mature deliberation being thereupon had, it is considered by the said justices that the said Francis Cholmeley do recover his seisin against the said (a) Sir Charles Cockerell and Henry Trail, of the manor and tenements aforesaid, with the appurtenances above demanded. And the said Charles Cockerell and Henry Trail in mercy, &c." There was the common assignment of errors, alleging among other matters, that the declaration of the demandant and the *matters therein contained were not sufficient in law for him to maintain his aforesaid action against the tenants, and that the judgment aforesaid, in form aforesaid, was given for the said demandant against the said tenants, whereas, by the law of the land, the judgment ought to have been given for them the tenants against the demandant.

Cross, Serjt., obtained a rule for the plaintiffs in error to show cause why the defendant in error should not recover his damages and costs against the plaintiffs

in error, pursuant to the statutes in that case made and provided.

Peake, Serjt., in Easter term, showed cause. This application is founded on the statute 3 H. 7, c. 10 (confirmed by 19 H. 7, c. 20) and 13 C. 2, stat. 2, c. 10, s. 2. The first statute directs the justice (that is the Court,) before whom a writ of error is served, to give damages and costs for the delay and wrongful vexation according to his discretion. The Courts have doubted at different times whether this statute extends to cases where no damages are recoverable in the original action. In one of the earliest cases which is to be found on the subject, (b) it was held, that costs were recoverable in a writ of error in quare impedit, though no costs were recoverable in the original writ, and other decisions have been accordingly. In Graves v. Short, Cro. Eliz. 616, costs were also allowed in formedon, but Smith v. Smith, Cro. Car. 425, is directly contrary to the last case, *and in Wynne v. Lloyd, 1 Lev. 146, costs were also refused on a writ of error to reverse a recovery; but in Ferguson v. Rawlinson, 2 Stra. 1084, the Court decided that the plaintiff, in a qui tam action, was entitled to costs; and it must be admitted that since that case the statute has been considered as applying to all cases, so that, perhaps, it cannot now be successfully contended, that the defendant is not entitled to costs under the first statute. But the defendant in error contends that he is entitled to double costs under the statute of 13 C. 2, st. 2, c. 10, s. 2. This statute only extends to writs of error after a verdict, which must mean to writs of error on a judgment founded on a verdict; whereas this writ of error is not on the judgment founded on the verdict of the jury, but brought simply on the judgment founded on the facts admitted by the demurrer to the eighth plea. It is, therefore, not within the meaning of the act of parliament "after verdict," that statute being directed only against vexatious writs of error, to delay the execution of a judgment after the jury have decided a disputed fact, and not to a case like the present, where a serious question was raised.

⁽a) Sir W. Paxton died while the suit was pending.
(b) Henslow v. Bishop of Salisbury, Dyer, 76.

Cross, Serjt., said the statute was general, and applied to all writs of error after verdict, in which case the writ of error must be deemed a vexatious proceeding. Here the writ of error appears, by the record, to have been after the verdict found upon the issues in fact.

Cur. adv. rult.

Lord TENTERDEN, C. J. We have examined the assignment of errors in this case, and find that the first *is, that the count or declaration is insufficient, and on that ground, had it been well founded, the judgment might [*578 have been reversed notwithstanding the verdict. The writ of error was therefore brought for the reversal of a judgment after verdict within the meaning of the 13 Car. 2, c. 10, s. 2, and is not as if the writ had been brought merely to reverse the judgment on the demurrer to the replication. Rule absolute.

PRICE v. ISAAC EDMUNDS.

In an action by the payee against the maker of a promissory note, the plaintiff proved a joint and several note made by the defendant and another person. The defendant then proved that he was a mere surety, having become a party to the note at the request of the other person, who was indebted to the plaintiff, and that the note not having been paid when it became due, the plaintiff, in Hilary term 1828, brought an action against the principal, which being about to be tried at the Spring assizes 1828, the plaintiff took a cognovit for the debt, payable by three instalments, the first on the 28th of April, the others in May and June, but if the defendant failed in payment of any of these instalments, the plaintiff was to be at liberty immediately to enter up judgment, and issue execution for the whole sum. The first instalment was not duly paid: Held, that as the plaintiff, if he had proceeded in the action, could not have obtained judgment and issued execution before the 28th of April, which was the fifth day of Easter term, the plaintiff did not, by taking the cognovit, give any time to the principal debtor.

Quære, Whether evidence was admissible to show that the defendant was a surety, inasmuch

he appeared by the terms of the promissory note to be a principal.

Declaration charged the defendant, as the maker of two promissory notes, each for 150l., bearing date the 3d of July, 1827, payable to the plaintiff three months after date. Plea, non assumpsit. At the trial before Sir J. A. Park, J., at the Spring assizes for the county of Gloucester 1829, the plaintiff produced in evidence the two notes, whereby the defendant and Abraham Edmunds jointly and severally promised to pay the sums therein mentioned. The defendant then proved that Abraham Edmunds being indebted to the plaintiff in a sum exceeding 300l., the defendant, his *brother, became a party to the two notes in question. After the notes became due, the plaintiff brought an action against Abraham Edmunds, and that action was depending for trial at the Gloucester Spring assizes 1828. The plaintiff, on the 28th of March in that year, accepted from Abraham Edmunds a cognovit for 211l. 17s. 6d., the sum then remaining due to him, payable by three instalments at one, two, and three months, viz. 70l. on the 28th of April, 70l. on the 28th of May, and 71l. 17s. 6d. on the 28th of June; and upon default in payment of any of those instalments on the day appointed, the plaintiff was to be at liberty immediately to enter up judgment, and sue out execution for 2111. 17s. 6d. The first instalment was not paid on the 28th of April, but was afterwards paid on the month of May 1828. The learned Judge upon this evidence was of opinion, that the defendant was not discharged from his liability upon the note, and directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that upon the facts proved the defendant was not liable. A verdict was found for the plaintiff, and a rule nisi having been obtained for entering a nonsuit,

Campbell now showed cause. There was no time given to the principal, because, on default of payment of any or either instalment, the plaintiff was at liberty to enter up judgment for the whole sum mentioned in the cognovit, and to sue out execution for 211%. 17s. 6d. The plaintiff, if he had proceeded in the

action, could not have had execution till Tuesday, the 29th day of April. Wednesday the 23d of April was the first day of Easter term. Assuming that a rule *580] for judgment was given *on that day, the four days allowed by that rule would not expire till Monday. Execution could not issue till Tuesday The first instalment was payable on the 28th day of April; that was Monday, the fifth day of Easter term. Secondly, even if time had been given, it is no answer to the action. The defendant was maker of a promissory note, whereby he promised absolutely to pay a sum of money. He is a principal by the terms of his contract, and not a surety. Laxton v. Peat, 2 Campb. 185, There the bill was accepted for the mere accomwill be cited on the other side. modation of the drawer; the holder who took it, knowing of that circumstance, gave time to the drawer, and Lord Ellenborough held, that the acceptor was a mere surety, and time having been given to the principal, was discharged. The authority of that case was doubted by Mansfield, C. J., in Raggett v. Axmore, 4 Taunt. 730, and by Gibbs, C. J., in Kerrison v. Cooke, 3 Campb. 362, and finally overruled in Fentum v. Pocock, 5 Taunt. 192. There Mansfield, C. J., says, "He who accepts a bill, whether for value or to serve a friend, makes himself in all events liable, as acceptor, and nothing can discharge him but payment or release."

Russell, Serjt., and Busby, contrd. The cognovit was an express agreement by the plaintiff to give time to the principal debtor for a part at least of the debt until the 28th of June. In construing that instrument, the Court will look at the intention of the parties at the time when it was executed. It must be assumed that the giving of the cognovit was injurious to the surety. If it had not been taken, the principal might have paid the debt, and thereby have released the *defendant before the 28th of April. On the other hand, if the defendant had elected to pay the debt before that day, might he not have sued the principal? If he might, the cognovit was contrary to the intention of the parties, and an inoperative instrument. If he could not sue the principal, then his (the surety's rights) were suspended by the act of the plaintiff without his consent. Besides, here the plaintiff received the 70l. after the first default was made, and he could not then issue execution before the next instalment became due. Then, assuming that time has been given, it is quite clear that a creditor, by giving time to a principal debtor, discharges the surety both in law and equity, because the creditor cannot call on the other parties without an injury to the person to whom he has given time, Laxton v. Peat, English v. Darley, 2 Bos. & Pul. 61, Collott v. Haigh, 3 Camp. 281.(a) [BAYLEY, Does not a party by signing a note as joint maker render himself subject to all the liabilities of joint maker? PARKE, J. Can a contract between the payee and maker of a note be shown, by extrinsic evidence, to be different from that which it purports to be on the face of the note itself? Here, on the face of the note, the contract purports to be an absolute contract by the defendant for the payment of a sum of money. The effect of the parol evidence was to show that it was conditional.] It is competent to a party sued as acceptor of an accommodation bill to show, that there was no consideration between him and That fact is somewhat at variance with the contract expressed in the instrument; for that *imports prima facie that the bill was accepted for value. If the effect of the parol evidence be to contradict the written contract, it is undoubtedly not admissible; but the legal liability resulting from the written instrument is joint; it creates an obligation by two to pay the money. Now, it is perfectly consistent with the contract of the two, that one of them should be liable as principal, and the other as surety. [LITTLEDALE, J. In Davy v. Prendergrass, 5 B. & A. 187, it was held, that it was no defence to an action on a bond, against a surety, that by a parol agreement, time had been given to the principal. And in Rees v. Berrington, 2 Ves. jun. 540, Lord Loughborough says, "that where two are bound jointly and severally, the surety

⁽a) See Ex parte Gifford, 6 Ves. 805. Boulton v. Stubbs, 18 Ves. 21.

cannot aver by pleading that he is bound as surety." PARKE, J. Garrett v. Jull, Selwyn, N. P. 393, is to the same effect. Cur. adv. vult.

BAYLEY, J. The first question raised in this case is, whether a party, who has in the ordinary mode joined in making a promissory note, is at liberty afterwards to insist that he became a party to it as surety only, and not as principal. The defendant insists that he may do so; and, secondly, that he has been discharged from his liability in consequence of time having been given to the principal debtor. If it were incumbent on us to decide that question, we should have to reconsider the cases of Laxton v. Peat, Collott v. Haigh, and the cases that are at variance with them; (a) but here, the foundation of the argument upon which the defendant must *rely, entirely fails. He contends that time was given to the principal debtor. Now it appears that an action against the principal was about to be tried at the Spring assizes 1828, and shortly before the assizes a cognovit was given, upon which the question of time depends. According to that cognovit 70l. was to be paid on the 28th of April, 70l. in May, and the residue in June; and there was a proviso, that the plaintiff should be at liberty to issue execution for the whole sum, if any one of the instalments were not duly paid. Time was, at all events, to be given until the 28th of April, a. l if the first payment was then duly made, further indulgence was to be given. It turns out that, in fact, the first instalment was not paid on the 28th of April, so that the then defendant had not, by virtue of the cognovit, any further indulgence, but was then liable to an execution for the whole sum due. The case then stands thus, in March a bargain was made, that proceedings should be stayed until the 28th of April, but, according to the regular course of practice, the then defendant had power to keep the plaintiff out of his money until the 29th or 30th of that month, so that, in reality, he did not obtain any indulgence by the cognovit. This transaction clearly would not be within the rule as to giving time so as to discharge bail; for it is a well established rule that a cognovit by the principal, without notice to the bail, does not discharge them, unless time be given to the former beyond that in which the plaintiff would have been entitled to judgment and execution, had he gone to trial in the original cause. sent defendant, therefore, could not take advantage of it, even if the first point made by him were sustainable; the rule for entering a nonsuit must therefore be discharged.

*LITTLEDALE, J., concurred.

PARKE, J. I cannot distinguish this as to the second point from the [*584] case of bail, and they are not discharged by the acceptance of a cognovit from the defendant, unless time is in fact given. As to the other point, I think that the decision in Fentum v. Pococke, where it was held, that the acceptor of an accommodation bill was not discharged by giving time to the drawer, was good sense and good law. Rule discharged.

(a) See Kerrison v. Cooke, 3 Campb. 362. Fentum v. Pococke, 5 Taunt. 192.

GULLY and Others, v. The Bishop of EXETER and Another.

In quare impedit by a party claiming to present in the fourth turn in the right of one of four coparceners, it is sufficient to allege in the declaration a presentation by the ancestor, under whom all the coparceners claimed. Declaration alleged that the advowson had descended to the four coparceners, and they not agreeing to present jointly on the first vacancy, the elder sister presented, and afterwards on two subsequent vacancies that A. B. and C. D. presented in right of the second and third sisters respectively: Held, that it was to be presumed that those presentations were by right and not by usurpation, and therefore did not turn the estate of the coparceners into a mere right; and that quare impedit was maintainable by a rantee of the fourth coparcener:

Held, that it was not necessary for the plaintiff claiming to present in the fourth turn in right of the youngest sister, to show that the presentations in the turns of the other sisters were

made by right.

A conveyance of the interest of the fourth sister, at a time when the church was full of the clerk presented by the eldest, in consideration of twenty shillings, of true and faithful services done, and for good and valuable consideration, is not, on the face of it, fraudulent against a subsequent purchaser, and is not to be so deemed after a verdict found for the plaintiff on an issue joined on a plea alleging such fraud.

A court of error will not inquire into the propriety of rules made by the court below for amending

the declaration, striking out pleas, or a new trial.

QUARE IMPEDIT. The declaration stated that Richard Roberts, on the 23d of May, 1603, was seised of the advowson of the rectory and parish church of Barrynarber, in gross by itself, as of fee and of right, and being so seised on the said 23d May, 1603, presented to the said church (being vacant by the *5051 death of the then *last incumbent thereof) one William Herle his clerk, who was afterwards, on the day and year last aforesaid, admitted, instituted, and inducted; that on Richard Robert's death intestate, on the 25th December, 1622, the advowson descended to his four daughters, Mary the wife of Thomas Westcott, Jane the wife of William Squire, Prudence the wife of John Amory, and Grace the wife of Francis Isaac ; whereupon the said Thomas Westcott and Mary his wife, in right of the said Mary, William Squire and Jane his wife, in right of the said Jane, John Amory and Prudence his wife, in right of the said Prudence, and Francis Isaac and Grace his wife, in right of the said Grace, became and were seised of the said advowson, in gross by itself, and being so seised, the church, on the 17th of January, 1630, became vacant by the death of the said William Herle, the then last incumbent, whereupon it belonged to the said T. Westcott and Mary his wife, in right of the said Mary, the said W. Squire and Jane his wife, in right of the said Jane, the said J. Amory and Prudence his wife, in right of the said Prudence, and the said F. Isaac and Grace his wife, in right of the said Grace, to present a fit and proper person to the said church so then being vacant; but, because they did not agree among themselves jointly to present, it belonged to T. Westcott and Mary his wife, in right of the said Mary as eldest daughter of the said Richard Roberts, to present a fit person to the said Church, so being vacant, for that turn, being the next and first avoidance after the death of the said Richard Roberts, whereupon the said T. Westcott, the husband of the eldest daughter Mary, and his wife, presented in the first turn one George Westcott, who was admitted, instituted, and inducted; that *Francis Isaac and Grace his wife, on the 1st of November, 1660, died seised of the same one-fourth part of the said Grace of and in the said advowson, after whose death the same purparty or fourth part of the said advowson descended to Robert Isaac, her son and heir, whereupon he, Robert Isaac, became seised of the same one-fourth part of the said advowson; that on the 10th of July, 1674, the said church became vacant by the death of the said George Westcott; that thereupon one Grace Westcott, afterwards, as in the said second turn which was of the said Jane Squire, on the 11th July, 1674, presented to the said church, so being vacant one Thomas Westcott, who was instituted, admitted, and inducted; that on the 10th of September, 1674, the church became vacant by the death of the said Thomas Westcott, and thereupon one Edmond Gibbon and Frances his wife, as in the third turn which was of the said Prudence Amory, afterwards on the 24th of September, 1674, presented to the said church so being vacant one Henry Chichester, who was thereupon instituted, admitted, and inducted; that the said Robert Isaac being so seised of and in the said purparty or fourth part, which was of his said late mother Grace Isaac, the fourth daughter of the said Richard Roberts, of and in the said advowson, afterwards on the 29th day of April, 1672, by deed-poll, in consideration of the sum twenty shillings unto him Robert Isaac by Lewis Stevings, and for true and faithful ervice done unto him Robert Isaac by said L. Stevings, as also for divers other good and valuable causes and considerations him thereunto moving, did freely and clearly give and grant unto the said Lewis Stevings, the same purparty or fourth part of and in the said advowson of the church aforesaid, to *hold to him Lewis Stevings, his heirs and assigns for ever, whereby the said Lewis Stevings became seised as of fee and of right, of and in the Vol. XXI.—32

same purparty or fourth part formerly belonging to the said Grace, the wife of the said Francis Isaac, and fourth daughter of the said Richard Roberts, of and in the said advowson; and being so seised he, L. Stevings, died, leaving John Stevings, his eldest son and heir, to whom the same purparty thereupon descended, who became seised of the same purparty or fourth part; and the said John Stevings, being so seised, on the fifth of January, 1699, the said church being then filled by one Henry Chichester, the then incumbent, by a certain indenture bearing date 5th day of January, 1699, made between the said John Stevings, of the one part, and Henry Chichester of the other part, granted to the said Henry Chichester, his executors, &c., the advowson, &c., of the said church for the first and next avoidance thereof, by means of which said indenture the said Henry Chichester became possessed of the right of presentation, for the next turn only, of the advowson of the said church, the reversion of the said last-mentioned purparty or fourth part of the said advowson of the said church belonging to the same John Stevings, and the same reversion so belonging afterwards, on the 1st of November, 1714, the said church became vacant by the death of the said Henry Chichester the then last incumbent, thereof and thereupon one Sir Nicholas Hooper afterwards, on the 8th of November, 1719, as in the fourth turn which was of the said Grace Isaac as aforesaid, presented to the said church so being vacant one Edward Chichester, as his the said Sir Nicholas Hooper's clerk, who upon such presentation was admitted, instituted, and inducted into *the same; that John Stevings, on the first of January, 1719, died seised of the said last-mentioned purparty or fourth part, having first devised the same purparty or fourth part to his brother Richard Stevings, if he should be living at the time of his, testator's, death, otherwise to his, Richard Stevings's, children, as tenants in common. The title to the purparty or fourth part of the advowson was then deduced from those children to Joseph Davie. The declaration then stated that on the 5th of May, 1731, the church became vacant by the death of Edward Chichester, the then last incumbent, and thereupon one Richard Hill, as in the said first turn which was of the said Mary Westcott, presented one Robert Bluett, his clerk, who was admitted, instituted, and inducted; that afterwards, on the 27th of February, 1749, the said church again became vacant by the death of the said Robert Bluett the then last incumbent thereof, whereupon one James Pearce and Mary his wife afterwards on the same day and year last aforesaid, as in the second turn which was of the said Jane Squire, presented one John Seddon as their clerk, who upon the presentation of the said James Pearce and Mary his wife was admitted, instituted, and inducted; and that afterwards, on the 4th of February, 1780, the said church again became vacant by the death of the said John Seddon, whereupon one Thomas Edwards afterwards, as in the third turn which was of the above-mentioned Prudence Amory, presented one Powell Edwards his clerk, who was admitted, instituted, and inducted; that afterwards the said Joseph Davie being so seised as aforesaid, afterwards, on the 6th of July, 1814, by a certain other indenture, for the considerations therein mentioned, granted unto the said W. S. *Gully, his executors, &c., the first and next advowson or avoidance when the same should be first and next after the date thereof happen to become void by the death, resignation, &c., of the said Powell Edwards the then incumbent thereof, or by any other ways or means whatsoever, by means whereof W. S. Gully became entitled to and was possessed of the then next avoidance and right of presentation to the said church upon the death, resignation, &c., of the said Powell Edwards the then incumbent, and being so possessed, W. S. Gully, on the 5th of March, 1816, devised it to the plaintiffs; that W. 8. Gully died on the 16th of November, 1816; that the said church in the lifetime of the said Joseph Davie, on the 30th of October, 1825, again became vacant by the death of the said Powell Edwards, and yet is void, which same avoidance was the first and next avoidance of the church aforesaid after the grant to W. S. Gully, and after the devise by W. S. Gully to the plaintiffs, and thereby it belonged to the plaintiffs as such devisees to present a fit person to

the said church so being vacant as last aforesaid, as in the said turn which was of the said Grace Isaac as aforesaid. But the said defendants unjustly hindered

them the plaintiffs.

Plea by the Bishop of Exeter, that the rectory is within his diocese, but that he had nothing, nor did he claim anything, in the rectory or in the advowson or presentation except as ordinary. Plea by George Pyke Dowling, clerk, after craving over of the deed-poll of the 29th of April, 1672, mentioned in the declaration (which was set out in the same words), that the said Robert Isaac did not give or grant unto the said Lewis Stevings the purparty or fourth part of the advowson of the said church in manner and form; secondly, that *the said supposed deed-poll was had and made to defraud and deceive such person or persons as had purchased, or should thereafter purchase the said purparty or fourth part of the said advowson of the said church, whereby, and by means of the premises, the deed-poll became void as against him, the defendant, G. P. Dowling. The plea then stated, that Robert Isaac being seised of one purparty or fourth part of the advowson in gross by itself as of fee and of right, that is to say, to present to the said church in every fourth turn, vacancy, or avoidance thereof after the death of the said Richard Roberts, to wit, on the 4th April, 1692, by a certain indenture made between Robert Isaac of the first part, R. Peard, A. Ellis, and E. Doddrige of the second part, and Elizabeth Skiffe of the third part, in consideration of a marriage then intended to be had and solemnized between him, Robert Isaac, and Elizabeth Skiffe; and for other considerations, granted unto G. Ley, R. Peard, A. Ellis, and E. Doddrige, their heirs and assigns (amongst other things), the purparty or fourth part of him, the said Robert Isaac, in the said advowson, to hold to them, G. Ley, R. Peard, A. Ellis, and E. Doddrige, their heirs and assigns, to the use of the first and other sons of the said Robert Isaac on the body of said Elizabeth Skiffe to be begotten; and in default of such issue, to the daughters. It then stated that the marriage was had between Robert Isaac and Elizabeth Skiffe, and that they died without having had any son, but leaving a daughter, Elizabeth Isaac, surviving them; that she thereby became seised of the said last-mentioned purparty or fourth part of the said advowson in gross as of fee tail, and continued so seised until her death; that on the 8th of November, 1824, the said church became vacant by the death of the said Henry Chichester the *then last incumbent thereof, and that Elizabeth Isaac being so seised, one Sir Nicholas Hooper in right and title of the said Elizabeth Isaac and of the said Robert Isaac, accruing after the making of the said fraudulent deedpoll, duly presented to the said church one Edward Chichester, in the fourth turn, vacancy, or avoidance thereof, who was duly admitted, instituted, and inducted. It then stated that Elizabeth Isaac afterwards intermarried with one Humphrey Pyke, and that they died, leaving Robert Isaac Pyke the eldest son and heir of the said Elizabeth Pyke; that Robert Isaac Pyke afterwards intermarried with one Rebecca Sovering; and that Robert Isaac Pyke and Rebecca died, leaving Elizabeth, the wife of one John Dowling, their eldest daughter, and Rebecca their second daughter, the wife of one John Crang, whereupon the said John Dowling and Elizabeth his wife, in right of the said Elizabeth, and John Crang and Rebecca his wife, in right of the said Rebecca, became seised of the said last-mentioned property or fourth part of the said advowson as of fee tail; that the said Elizabeth, the wife of John Dowling, afterwards died, leaving the defendant, G. P. Dowling, the eldest son and heir of the said Elizabeth by the said John Dowling; and that afterwards the said John Crang died, leaving the said Rebecca him surviving, whereupon the said G. P. Dowling and the said Rebecca Crang became seised of the said last-mentioned purparty, or fourth part of the said advowson as of fee tail; and that, on the 6th of May, 1731, the church became vacant by the death of the said Edward Chichester the last incumbent, whereupon Richard Hill, as in the fifth turn, presented Robert Bluett as his clerk, who was instituted, admitted, and inducted; that afterwards, on the 27th of February, 1749, the said church again became vacant by the

death of the said Robert Bluett, whereupon *J. Pearse and Mary his wife, as in the sixth turn, presented one John Seddon. The plea then stated that the church again became vacant, and in the seventh turn, another presentation, and an eighth vacancy, and that thereupon it belonged to the defendant G. P. Dowling and the said Rebecca Crang to present a fit person to the said church, being the eighth turn or avoidance after the death of the said Richard Roberts, and because they could not agree jointly to present to the church, it belonged to G. P. Dowling to present; for which reason he, G. P. Dowling, hindered the plaintiffs from presenting to the said church, so being vacant in the fourth turn. Replication, as to the first plea, joined issue; to the last plea, that the deed-poll of the 29th April 1672 was not had and made to defraud or deceive such person or persons as had purchased, or should thereafter purchase the said purparty or fourth part of the said advowson, in manner as the defendant G. P. Dowling had alleged, and they put themselves upon the country. The record then stated the venire, that the jury found both issues in favour of the plaintiffs; and that the church was not full, and that it became void on the 25th of October, 1825, and that judgment was given for the plaintiffs below on the 19th November, 1828. The defendant then having sued out a writ of error, assigned for error that the plaintiffs had not merely stated defectively their title to present, but had shown a defective title to any separate purparty or fourth part of the advowson, and no title or right in themselves; and that by the record it appeared, that the deed-poll was fraudulent and void in law as against purchasers, as stated in the plea of the defendant G. P. Dowling. It further assigned for error, that before the making of the said count or declaration in the form contained in the said record, in *Easter term 7 G. 4, the said original plaintiffs counted and declared against the said original defendant on the same writ in the plea aforesaid in another and different form, stating another and different title to present to the said church, from the form or title set forth in the count or declaration contained in the record now before the Court, as appeared by the Court Rolls of that term now remaining in the Court of the Bench, to which said count or declaration, contained in the said Court Rolls, other and different pleas were pleaded than those contained in the record now before the Court; and that such other proceedings were had on the said pleas so pleaded to the first count or declaration in the Court of Common Pleas; that afterwards, in Hilary term, various issues, in fact, to be tried by the county and by the record respectively, and also an issue in law on a demurrer to the replication to one of the said lastmentioned pleas were joined, as appeared by the issue rolls of that term, remaining of record in the Court of Common Pleas. It then stated, that to try the said last-mentioned issues a venire issued, that a record of Nisi Prius was made in the same suit in order to try the said last-mentioned issues; and that afterwards, on the 21st day of March at Exeter, a jury were sworn to try the said last-mentioned issues, but before they had given their verdict the original plaintiffs being solemnly called, came not, and were nonsuited, which nonsuit was duly entered, as will appear by the postea and entry of such nonsuit; and although a nonsuit is by law in quare impedit final, yet by a certain rule of the said last-mentioned Court of Common Pleas, it was erroneously ordered by that Court that the defendants should show cause why the nonsuit entered on the trial of the said *cause should not be set aside and a new trial had between the parties.

And afterwards, in Trinity term 8 G. 4, by a certain other rule of the said Court of Common Pleas, on reading the former rule and hearing counsel, it was erroneously ordered by the same Court that the nonsuit should be set aside and a new trial had between the parties; that the said rules did not appear to have been granted on the ground of any irregularity, misconduct, or mistake, or on any affidavit, but on reading the said record of Nisi Prius, and hearing counsel only, as will appear by the said rules when certified to the Court here It further assigned for error, that after it had been so ordered by the said court that a new trial should be had between the parties, by a certain other rule of

the said Court of Common Pleas made on the 22d day of November, in Michaelmas term 8 G. 4, it was ordered that the defendants should on the second day of Hilary term next, show cause why all the pleas in the record should not be struck out, except those which referred to the deed of the 29th April, 1672, or why the plaintiffs should not be at liberty to amend their declaration in the said cause. It then stated that that rule was enlarged, and that it was erroneously ordered by the Court of the Bench, that the rule for pleading several matters obtained in Michaelmas term, 7 G. 4, should be vacated, or that the plaintiff should be at liberty to amend the declaration as the Court should direct (see 4 Bingh. 525). It then stated that the defendants obtained a rule to plead to the amended declaration the several matters in the rule specified (see 5 Bingh. 42); and that the Court of the Bench erroneously ordered that the defendant should, within three days, elect whether he would plead to the amended *declaration, that the deed of the 29th of April, 1672, was fraudulent against subsequent purchasers, and a plea of non concessit as to that deed only, or to plead one single plea to the amended declaration; and that he should, within three days, plead either the one or the other, and the said rule, as to all the other pleas therein specified, was discharged; that the defendant, in order to prevent judgment being signed, was compelled to plead, and did plead, the two

pleas contained in the record before the Court.

E. Lawes, Serjt., for the plaintiff in error. Quare impedit is a possessory That appears from the statute of Westminster, 2, 13 Ed. 1, c. 5, which recites that of advowsons of churches there be but three original writs, one writ of right, and two of possession, which be darrein presentment and quare impedit. In quare impedit the plaintiff can only recover the first presentment, yet the plaintiff is bound to show a title to the advowson, or that turn of the advowson which he claims.(a) And where, as in this case, the plaintiff declares on a right to present by turns to an advowson in gross, he must show a presentment in the turn claimed, where that is possible; and also in this case the conveyances, &c. constituting the title to present in the other turns. This appears from the language of Lord Hobart in Digby v. Fitzherbert, Hob. 101, Lord Chief Justice Vaughan in Tufton v. Temple, Vaugh. 7 & 8, Lord Loughborough in Thrale v. The Bishop of London, 1 Hen. Bl. 409, and Watson's Clergyman's law, 267. This declaration is bad in substance, because it sets out a defective title. title is *equally defective, whether on the face of the declaration the inheritance be taken to be divided or not, by the non-agreement of the coparceners in the first turn. For assuming, for the purpose of the argument, that the non-agreement between the four coparceners severed the estate in coparcenary, and that the grant by Robert Isaac to John Stevings is unobjectionable, the declaration is insufficient, because it does not allege any presentation by right by the plaintiff in the fourth turn, in which he claims; nor, secondly, any conveyance or descent under which any of the six previous presentations were made. The case of Shireburne v. Hitch, 1 Bro. Parl. Ca. 110, is precisely in point on both these objections. There the plaintiff claimed the second turn to a living, but in his declaration did not lay any presentation made by him or any of his predecessors in the second turn. He also acknowledged a title in the defendant to the first turn, but did not set out the conveyances by which it was derived down to him. This declaration was held to be insufficient to maintain the plaintiff's action, and judgment was given for the defendant. [PARKE, J. case is distinguishable from the present on two grounds. In the first place, no presentation by the ancestor was there alleged. In the second place, there was no presentation by any person who claimed title to the advowson in such a way as that the Court could take notice of it. The declaration averred a presentation by a person whose title was not set out. There was no allegation of his seisin by actual presentation. Now in this case both these circumstances concur, for the person who had the advowson originally, before the descent to the coparceners, is

*averred to have presented, which is analogous to seisin by taking the esplees in a real action, and the first coparcener on non-agreement also presented.] The advowson in that case was appendant to the manor, and here it is an advowson in gross, and the mere seisin of an advowson appendant to a manor is equivalent to a presentation. An advowson appendant may be gained by seisin of the manor; but an advowson in gross cannot be acquired without that which is in actual seisin, viz. presentation, per Lord Hardwicke in Rex v. The Bishop of Landaff, Str. 1012. In Hargrave's note to Co. Litt. 15 b, it is said that seisin of a manor is a good seisin of an advowson, common, &c., appendant or appurtenant; and the year-book, 18 Hen. 6, and Hale's MSS., are referred to; and in Watson, 130, it is said that it may be regained after usurpation by re-entry, if appendant. In Shireburne v. Hitch, although no presentation was alleged to the whole advowson, it was stated that R. N. and wife were seised of the manor and advowson to which, &c.; and that was equivalent to the statement of R. Roberts's presentation in this case. Secondly, in that case partition was alleged. The advowson then became an advowson in gross, but it was held not sufficient to divide the inheritance. Thirdly, the presentation in the first turn (the plaintiff claiming the second) was alleged, and by right. There is no such allegation in this case. Non constat, that in that case there had been any opportunity to present in the second turn. But here there was an opportunity to present in the fourth turn. If Shireburne v. Hitch had never been decided, this declaration would have been bad for *want of an allegation in seisin; for a presentation, in a case of an advowson in gross, is as essential to maintain this action as possession is in trespass, for there can be no possession in the case of an advowson in gross, except by presentation. Rex v. The Bishop of Landaff is conclusive to show that the want of alleging a presentation to an advowson is error after verdict, unless it be on the seisin of the crown. Here the presentments alleged, conclusively negative any presentation by right of the plaintiff in the fourth turn, and show that J. Stevings and those claiming under him could gain no seisin. The statute 7 Ann. c. 18, was passed to obviate the inconvenience of requiring an allegation of title, and is the strongest legislative recognition of the weight and authority of the case of Shireburne v. Hitch; and it enacts, "that no usurpation upon any avoidance in any church shall displace the estate of any person entitled to the advowson or patronage thereof, or turn it to a right, but he or she that would have had a right, if no usurpation had been, may present or maintain his or her quare impedit upon the next or any other avoidance, if disturbed, notwithstanding such usurpation; and if coparceners, or joint tenants, or tenants in common, be seised of any estate of inheritance in the advowson of any church, &c., or other ecclesiastical promotion, and a partition is or shall be made between them to present by turns, that thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson, to present in his or her turn; as if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn, the other of the other moiety, to present in the *second turn; in like manner, if there be three, four, or more, every one shall be said to be seised of his or her part, and to present in his or her turn." The effect of R. Roberts's presentation ceased on the death of his clerk John Stevings, or his grantee might have presented in the fourth turn, and the plaintiff might have claimed the title by it, Countess of Northumberland's case, 5 Coke, 98. Not having done so, John Stevings had no actual seisin but a mere right. He could not therefore devise it to his brother's children; for a mere right cannot be the subject of conveyance, or pass by the will; but it descends, and the title is made under the heir at law, per Lord Eldon in the Attorney-General v. the Bishop of Lichfield, 5 Ves. 831.

The second objection to the declaration is, that it does not state the conveyances (if any) by which any one of the presentations, after that of the eldest coparcener and her husband in the first turn, was made, or even that such presentations were made by title at all. The declaration does not proceed on the statute of Anne, because it would in that case be necessary to show that the This form of pleading has been held to be bad on demurrer, plaintiff was seised. Birch v. The Bishop of Lichfield, 3 Bos. & Pul. 444. The plaintiff may undoubtedly declare as at common law, but then he must comply with all its rules. All the precedents show title and conveyance to each turn, Tufton v. Temple, Vaugh. 7 & 8, Thrale v. The Bishop of London, 1 H. Bl. 376, Barker v. Loman, 1 H. Bl. 412, Birch v. The Bishop of Lichfield. On principle it is necessary, first, because the plaintiffs are privy in estate, and claim as tenants in common with the other persons (whosoever they may be) who are entitled in the first three turns, and it was *necessary to negative usurpation before the statute 7 Anne; secondly, because they claim in the second set of turns, and have not declared in the form given by the statute, but have shown two such usurpations, and no restitution by subsequent presentation; and, thirdly, because presentment alone without title is militant and indifferent, as it may be in such a title as will prove that the avoidance in question is the defendant's; and, therefore, you must lay the case so as, by the title stated, to make the presentation past joined with it, prove that this presentation is yours, Mallory, 200, citing Hob. 102. See also Vaughan, 57, S. P.

Admitting, for argument's sake, that mere non-agreement to present jointly is equivalent to express agreement or composition to present by turns; the third objection to the declaration is, that the presentments in the second and third turns were usurpations, and all the parceners were thereby put out of possession. It is like showing possession in another in trespass, Anonymous, 2 Vent. 39. Watson, 124, Degge, 19, same point. Now composition would not have severed the estate, Fitz. Abr. 54 a, pl. 196, tit. Darrein Presentment, 286 b, pl. 11. A usurpation by a stranger on a grantee of the first of two avoidances is a usurpation on the second, and reduces it to a right of action, Ellis v. Taylor, 2 Rolle's Abr. 373, pl. 11; and on tenants in common turns their right to an action, Co. Litt. 198 a. At common law usurpation was stronger than disseisin on land. The statute of 7 Ann. c. 18, is not retrospective, Duke of Dorset v. Sir Thomas Wilson. (a) These usurpations prevented any subsequent title being acquired by purchase from J. Stevings. Watson, 129.

*The fourth objection is, that the declaration does not allege any non-agreement to present jointly, when the first vacancy occurred in the second set of turns between the parceners in the first set of turns; and presentment by the eldest sister in the first turn of that set could not affect the second set, or sever the inheritance, especially as the coparceners were not sui juris. The allegation that Francis Isaac and Grace his wife died so seised of the same one fourth part of the said Grace of the advowson, is bad even after verdict. Keilway, 49, if cited, is a dictum since disputed, Co. Litt. 166, n. 2, and only positive with reference to past presentments. An advowson is an entire inheritance, Co. Litt. 164 b. On this point he cited Co. Litt. 169 a, Mirror, 107, 2 Roll. Abr. 255 b, 1, 2 Inst. 365, Corbet's case, 1 Co. 87, Harris v. Nichols, 1 And. 63, Cro. Eliz. 19.

Then, as to the principal question: the deed, on the face of it, is a voluntary deed; and upon this plea, as it is framed, fraud and covin was a question of law only; White v. Hussey, Prec. in Ch. 14, Ottley v. Manning, 9 East, 59, Pulvertoft v. Pulvertoft, 18 Ves. 84, Doe v. Rutlege, Cowp. 705, Hill v. The Bishop of Exeter, 2 Taunt. 69. [Bayley, J. In the last-mentioned case the deed stated that it was given in consideration of natural love and affection, and it was admitted on the pleadings that there was no other consideration except those which were on the face of the deed, and that was a good but not a valuable consideration; but here the jury have found that there was a valuable consideration. Besides, here the deed states the consideration to be for services performed.]

*602] To make such services a valuable *consideration, they must be such as the party was bound to pay for.

Then as to the errors dehors the record. Here collateral records are especially assigned for error, and the defendant, instead of denying those records by pleading nul tiel record, pleads in nullo est erratum; he has thereby admitted the existence of those records as pleaded, and put it to the judgment of the Court of error, whether the existence of those records makes the principal record erroneous, Rex v. Andrews, Yelv. 57. If that be so, it then becomes a question of law, whether the Court below had authority, either by common law or by statute, to amend the declaration, or strike out the pleas after verdict, or to grant At common law they could only amend the same matters during a new trial. the same term. And although the Court has a right to grant or refuse leave to plead particular pleas, yet where they had granted such leave, and issue had been joined on those pleas, and great expense incurred by the trial, they had no power to vacate that rule. Besides, in quare impedit, they had no power to grant a new trial; a nonsuit is peremptory by the statute. [Lord TENTERDEN, C. J. So it is while it stands, and the party can bring no other action. but it So it is while it stands, and the party can bring no other action; but it does not follow that the Court may not, in furtherance of justice, set aside the nonsuit, and grant a new trial.

Manning, contrà, was stopped by the Court.

Lord TENTERDEN, C. J. I am of opinion that the judgment of the Court of Common Pleas ought to be affirmed. I believe that this is the first case in which a *court of error has been called upon to reverse a judgment by reason of the court below having made some rule which it ought not to have made. It is competent for every superior court to make a rule for a new We cannot here inquire whether that was made on sufficient grounds or We must assume that it was. The same observation applies to the rule to amend the declaration, and to the rule to vacate the rule to plead several matters, and restrain the defendant from pleading more than two pleas. As to that, I was glad to find it had been done. It appears to me, that the Court exercised a most wholesome authority in preventing the great abuse of the privilege given by the statute. There were two parties claiming under the same person; the question between them was, Whether the first or second conveyance made by him was valid; and numerous pleas were put on the record, raising points quite beside that question. The Court did perfectly right in saying they would not allow those pleas to stand, which would be putting the parties to a great expense. Then, as to the objections to the declaration. It is said that the plaintiff has

not shown a title to present in the turn which is now claimed, for that he ought to have shown a presentation in that turn by himself; and the case of Shireburne v. Hitch was cited. But in that case there was no allegation of any presentation by any person under whom the then plaintiff claimed; whereas on this record there is a distinct allegation that Roberts, under whom all parties claimed, was seised, and did present. I am of opinion, that the presentation by him was quite sufficient. It would be impossible, where an advowner and descends in coparcenary among four parties, that the person claiming the second or third turn should show a presentation by himself at the first turn. That, from the nature of the thing, cannot take place. I can see no reason why he should be called on to do it when he comes to claim his second turn. All that is necessary for him to do is to show the seisin and presentation in that party under whom he claims.

Another objection was, that there having been no separation of the interests by these parceners, but it appearing only that they did not agree to present on the first vacancy, wherefore the elder sister presented between that turn and when it was the turn of the younger sister (who is represented by the present plaintiff), there had been two usurpations, which converted the estate of the party who claimed to present on the fourth turn into a mere right, and therefore a possessory action was no longer maintainable. It is not necessary on the present occasion to inquire whether a usurpation would, under these circumstances, have that effect; for here it does not appear that there were presentations by usurpation. We are not to presume a wrong, but rather that that which

has been done has been rightfully done. The averment is, that one Grace Westcott, as in the second turn, which was of the said Jane Squire, on the 11th of July, 1674, presented to the church one Thomas Westcott, her clerk, who upon such presentation was admitted, instituted, inducted, &c. We are now called upon to decide that that presentation was by usurpation. If that was so, and if the effect of that usurpation was as it is contended to be, it was for the *605] defendant to prove the usurpation. *The presentation in the third turn is alleged in the same words. Then we come to the first presentation, which takes place in the fourth turn, and that is after the conveyance by Robert Isaac, the person under whom the plaintiff claims. There it is alleged, that Sir Nicholas Hooper on the 8th of November, 1714, as in the fourth turn, which was of the said Grace Isaac, presented to the church, so being vacant, one E. Chichester, who was admitted, instituted, and inducted, &c. Now, assuming that to have been a presentation by usurpation, yet that being after the statute of Anne, it would be wholly immaterial. The plea alleges, if we are to look at that, that the presentation by Sir N. Hooper was in right of the person under whom the defendant claims. Then that brings it to the question, which of the two conveyances is valid.

Another objection is, that the plaintiff has not shown the presentation of the other sisters, on the first and second set of turns, to have been made by persons having a right to make them. If that objection were to prevail, it would come to this,—that a party claiming the fourth turn, could not recover unless those persons who presented in the second and third turns presented by good title. Of their title it is not to be supposed that he can have any knowledge whatever; and therefore to require him to show their title, which according to all numan probability, I had almost said possibility, he would not be able to do, would be

most unreasonable.

Another, and the main point in the case is, as to the operation of the two deeds. Now, the conveyance by Robert Isaac to Lewis Stevings is in consideration of the sum of 20s. by Lewis Stevings paid, and for true and faithful services *606] done unto him the said Robert Isaac, *and also for divers other good and valuable causes and considerations. Then there are two pleas: one is, that Robert Isaac did not grant, &c. The second is, that twenty years afterwards, Robert Isaac being about to marry, executed a settlement, by which he conveyed the fourth turn for the benefit of his wife and children. And the plea alleges, that the conveyance by Robert Isaac to Lewis Stevings was a fraudulent conveyance, and void. Issues were joined on both these pleas, and the jury found on both against the defendant. But it is said, that the jury have only found that there was no fraud in fact; and that, on the face of the conveyance, there is a fraud in law; that the Court, looking at the terms of the conveyance and the considerations therein mentioned, must see that it was a voluntary con. veyance, and consequently void; that is, we must of necessity come to the conclusion, that the conveyance made in the year 1672 of a fourth part of the advowson, the turn of presentation not being to take effect until after the death of the then incumbent, and after the presentations of two other persons having prior turns, was void; that the sum of 20s. and the services performed, could not be a sufficient valuable consideration, and that there could be no other valuable consideration. The distinction between good and valuable consideration is this,—that a good consideration makes the instrument good as between the parties; but a valuable consideration makes the conveyance good against a subsequent purchaser. For my own judgment, without relying on the words, "other good and valuable causes," I am not prepared to say that the sum of 20s. and the services performed were not in themselves a sufficient valuable consideration *607] for a right such as this is; which, according to the probable *duration of human life, could not come to be exercised for more than half a cen-That being so, and the jury having found that the deed was not fraudulent, I think we cannot say that it is so.

BAYLEY, J. A quare impedit is undoubtedly a possessory action, and a pre-Vol. XXI.—38 x 2

sentation must be shown. But in this case there were two presentations on which the present plaintiff is entitled to rely, viz. the presentation by Roberts, who is the ancestor of the four children under one of whom the plaintiff claims; and I am disposed to think also, that it would have been sufficient to have stated the presentation to have been made by the eldest of the four coparceners, because if Roberts was seised in fee, but had not possession, and it had descended from him to the four coparceners, the presentation by the eldest of those four coparceners would have been a presentation which would have vested the right in all, and that distinguishes this case from Shireburne v. Hitch, 1 Bro. P. C. 110. It has been insisted, that the right of presentation was destroyed, or its continuity interrupted by two usurpations, which took place in 1674. Now, in the first place, it cannot fairly be said that either of those was an usurpation. When coparceners jointly present, they all concur in that act; but if they present separately, then that gives to each a separate right in her own respective turn, and they become inter se strangers. The fourth coparcener may not know who it is, or under what right it is, that a person presents to the second or any other turn. She knows it is not her turn, but that it is the turn of one of the other coparceners; and whether *the person presenting has a right from that coparcener to make the presentation, is a matter with reference to which she who has the fourth turn has no concern; it cannot affect her.

I agree that the statute of the 7 Ann. c. 18, is not retrospective; but, in order to see whether the presentation in 1674 was a usurpation (and it ought to have been so alleged if it was) that would displace the other coparceners, I must look to the authorities. Now in 2d Instit. 305, Lord Coke says, "By the common law, if an advowson descend to divers coparceners, if they cannot agree to present, the eldest shall have the first turn, and the second the next, et sic de cæteris; every one in turn according to seniority; and this privilege not only extends to them and their heirs, but to the several assignees, whether by conveyance or by act in law, as tenant by the curtesy. And if any stranger usurp on the turn of any one of them, this does not put the other out of possession; and this law doth extend to usurpations as well before partition as after." That same point is considered as being the rule of law in the case of Barker v. The Bishop of London, Willes, 695, I H. Bl. 412, S. C. Then there was nothing prior to 1709, the period at which the statute of 7 Ann. c. 18, began to operate, which can in any way affect the right of the fourth coparcener. The fourth coparcener's vacancy did not occur till 1714, and then the statute of Anne was in full operation. Now, looking at the language of that statute, it seems clearly to apply in full force to the present case; it says, "that no usurpation upon any avoidance in any church, &c., shall displace the estate *or interest of any person entitled to the advowson or patronage thereof, or turn it to a right; but he or she that would have had a right if no usurpation had been, may present of maintain his or her quare impedit upon the next or any other avoidance, if disturbed, notwithstanding such usurpation; and if coparceners, or joint tenants, or tenants in common, be seised of any estate of inheritance in the advowson of any church, and a partition is or shall be made between them to present by turns, that thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson to present in his or her turn." Then if at the fourth turn, when a vacancy occurred, there was an usurpation on the turn which the present plaintiff claims, that would not displace the estate or interest, but would leave it as it was, except with reference to that turn; and when a fourth turn again occurred, the party entitled to it might exercise his right of presenta-Now the period at which that fourth turn again occurs, has arrived. The plaintiff, therefore, has shown a possession by presentation in that person under whom he claims; for he has shown that, although there has been one usurpation upon her turn, yet her right as to future turns was protected by the statute

Then another point has been made, that the deed of 1672 is a deed which, as matter of law, we are bound to consider fraudulent and void. Now it imports to be a grant in consideration of 20s., and of faithful services performed, and of

divers other good and valuable causes and considerations;" and it has been decided, that in such a case a party is entitled to show, as matter of fact, there are other considerations besides those *which are expressed in the deed. The defendant has pleaded, that this was a fraudulent deed; and if there was no consideration for it, if the 20s. were not paid, and if there were no other services rendered, and no other considerations of a valuable nature, the deed would have been fraudulent; but the jury having said by their verdict that the deed was not fraudulent, it is impossible for us to say, as matter of law, that it is.

was not fraudulent, it is impossible for us to say, as matter of law, that it is.

LITTLEDALE, J. I am of the same opinion. The plaintiff has clearly shown himself entitled by the course of descent to the undivided fourth part of this advowson; and the question is, if he be the owner of that undivided fourth part, is he entitled to maintain this quare impedit? The first objection is, that it is not alleged that there was any presentation by that sister in her fourth turn, under whom the present plaintiff claims; but I apprehend it is quite sufficient to allege a presentation in the owner of the entire advowson. In Comyn's Digest, tit. Pleader (3 I 5), it is laid down that "the plaintiff in quare impedit ought always to allege a presentment by himself or his ancestor, or some other under whom he claims;" and afterwards, "and regularly a presentment ought to be alleged to have been by him who has the inheritance;" and the Countess of Northumberland's case, 5 Co. 98, is cited. There the plaintiffs declared as co-heiresses of Lord Latimer, and it was moved that the declaration was insufficient: it alleged that Lord Latimer was seised of the advowson in fee, and granted the next avoidance to Dean Carew, and that, the church being void, Dean Carew presented. Now it would undoubtedly have been sufficient to *allege that Lord Latimer had presented; but the allegation of the presentation was held to be sufficient, because he did it in the right and title of the grantor. Now supposing this had been a first turn in the fourth coparcener, and the quare impedit had not been brought by the present plaintiff, but had been brought in 1714, after the third presentation; I doubt in that case whether it could have been alleged in any other way than in the person who once had the entirety in It is quite clear that it would have been sufficient for the then owner of the fourth part to show that the owner of the fee had presented, and that the other three coparceners had presented in their turns. Now how does that differ from the present case? But it is said that there have been several usurpations, and that the plaintiff, therefore, has now a mere right. With regard to the second and third presentations in 1674, it does not appear that they were usurpations, that they were not by the persons who were regularly entitled as coparceners; and although it might not be by them, it might be by some person claiming under them; and if the defendant had meant to insist that the persons who made the second and third presentations had no right, he ought to have shown The plaintiff might have taken issue upon that fact. It seems to me quite clear upon this record that they cannot be treated as usurpations; and with reference to the fourth turn, that was after the statute of Anne. I think, therefore, there was no usurpation.

The question, then is, whether the deed of 1672 can be considered fraudulent and void as against purchasers? Now the deed purports to be in consideration *612] of a nominal sum of money, and also in consideration of *services and other valuable considerations. The defendant did not demur on that ground, but the matter was submitted to a jury, and they found that it was for a good and valuable consideration. That being so, it cannot now be disputed. I think, therefore, the judgment of the Court of Common Pleas ought to be affirmed.

PARKE, J. I am of the same opinion. This is a very clear case. Numerous objections have been taken to the form of the declaration, which resolve themselves ultimately into very few. The first is, that there is no allegation that any one presented in right of that fourth turn, the title to which the plaintiff has deduced in his declaration; and much reliance was placed on Shireburne v. Hitch, 1 Bro. Parl. Ca. 110, from the marginal abstract of which it would appear that

some such proposition was laid down. But that case is distinguishable from the present upon two grounds. There there was no allegation at all that any person had been seised of the entire advowson, or of any right or interest in the advowson, so as to have that seisin which the law requires, and which is analogous to the taking of esplees in other actions by taking actual possession. No person who had the advowson originally had made any presentation to it. In this case there are two averments: first, that the person seised in fee of the advowson presented; another, that the first coparcener also on non-agreement presented.

The next argument against the judgment of the Court of Common Pleas is founded on the supposition that the second and third presentations were *presentations by usurpation, and many authorities were cited to show the effect of such presentations. It is sufficient to say that the foundation of the objection fails, for upon this record we cannot take it that either of those presentations were by usurpation. It is said the fourth turn must be so taken, because the plea alleges it to be so, and that the allegation not having been traversed by the plaintiff, must be taken to be admitted. But assuming that to be so, that usurpation was after the statute of Anne, and, therefore, has no effect whatever in displacing the possessory title to the advowson.

servation disposes of the first two objections.

The next is, that although the effect of the non-agreement of the coparceners may operate as a partition of the advowson for the number of turns equal to the number of coparceners, yet it cannot have that effect afterwards; and that there ought to have been an averment that, after the fourth turn, the coparceners again disagreed. No authority has been cited for that proposition, and the effect of a disagreement by the coparceners, as stated in the 2d Instit. 365, is precisely the same as if they had made a partition of the advowson, and the effect of that, according to the 1st Inst. 18 a, would be to give them an interest in the undivided portions of the advowson, and it must continue until all the parties entitled alter it by some fresh deed or agreement among themselves, and nothing of that sort appearing on this record, the advowson which was originally parted, must be taken to be continued to be parted down to the present time, and each coparcener entitled to an undivided portion of that advowson.

The next objection is founded entirely on a matter *disposed of by the jury; they have found that the deed of 1672, which imported on the face of it to be for money, and for services performed which may be a valuable consideration, and for other valuable considerations besides, was a deed made for valuable considerations. We cannot upon a writ of error say that that finding

of the jury was wrong.

The other objections related entirely to collateral matters which were disposed of in the Court of Common Pleas. It is the first time, and probably it will be the last, that any objection arising out of collateral matters has been taken on a writ of error. I think that the judgment of the Court of Common Pleas was right, and ought to be affirmed. Judgment affirmed.

WENDOVER v. COOPER.

In a bailable action, the plaintiff may deliver a declaration conditionally, any time before the bail are perfected.

THE writ was returnable the first return of Hilary term. On the 27th of January the defendant put in bail. On the 28th the plaintiff delivered a declaration conditionally until special bail was perfected, with notice to plead in eight days, and at the same time gave notice of exception to the bail. A rule nist had been obtained for setting aside the declaration, and all subsequent proceedings, for irregularity, on the ground that after the time for the defendant's putting in bail had expired a declaration de bene esse could not be delivered.

Thesiger now showed cause. Although in the case of common bail, a decla*615] ration de bene esse cannot be *delivered after the eight days limited for
the defendant's appearance, according to Smith v. Painter, 2 T. R. 719,
and Baker v. Cooper, 6 T. R. 548, yet in the case of bailable process the defendant is not completely in court till his bail are perfected; and the imperfect
appearance by merely putting in bail, does not prevent the delivery of a declaration conditionally.

Richards, contrd. The case of Turner v. Portall, 2 N. R. 231, shows that

the rule applies to bailable as well as non-bailable process.

Lord TENTERDEN, C. J. The defendant is not completely in court until his bail are perfected, and therefore till that is done, it is competent to the plaintiff to deliver his declaration de bene esse. The rule must be discharged, but, as the point is somewhat new, without costs.

Rule discharged without costs.

DOE dem. MASTERS v. GRAY.

In an ejectment the Court will compel the real defendant to pay the costs, although he is not a party on the record.

EJECTMENT. The premises sought to be recovered in this ejectment were claimed by the parish officers and inhabitants of the township of Norton in the county of Hereford as parish property. The defendant, a pauper of that parish, had been put into possession of the premises by the parish officers. Upon the ejectment being brought, an order of vestry was made that the action should be defended by and at the expense of the inhabitants of the township of Norton.

*616] The action *was accordingly defended by an attorney employed and paid by them. The lessor of the plaintiff obtained a verdict; and the costs having been taxed at 87l., the plaintiff applied to the parish officers of Norton, for the payment of those costs, and they having refused, a rule was obtained calling upon them to show cause why they should not pay the costs.

Russell, Serjt., showed cause. The court have no power to compel the parish officers to pay the costs. They were neither parties to the suit nor officers of the Court. They had a right to defend the possession of their tenant. There is no authority to show that a person who defends a title in the name of another

is liable to the payment of costs.

Lord TENTERDEN, C. J. In ejectment we can make the real party to the suit pay the costs, Thrustout v. Shenton, 10 B. & C. 110. Here the parish officers put a mere pauper into possession, and the lessor of the plaintiff was bound to bring the ejectment against him. The parish officers, therefore, ought to pay the costs.

Rule absolute.

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*MERCER v. DAVIS.(a)

Where a borough town was incorporated by charter, and certain members of the corporation were made justices (but without power to try felonies), and the charter contained a general non intromittant clause, wholly preventing the interference of the county justices within the town: Held, that a rate in the nature of a county rate, might be imposed by the justices of the town, under the authority given by the 55 G. 3, c. 51.

TRESPASS against the defendant, who was the high constable of the king's town and parish of Maidstone, in the county of Kent, for distraining the goods of the plaintiff, who was one of the overseers of the poor of the said parish of Maidstone, for the sum of 157l. 16s. 1d., the amount of a rate of 1½d. in the pound made on all the rateable property within the said town and parish, as a town stock or rate, in the nature of a county rate. Plea, the general issue. At the trial at the Maidstone Spring assizes 1828, a verdict for nominal damages was taken, by consent, for the plaintiff, subject to the opinion of this Court on the following case:—

The town of Maidstone is a corporate town, and was first incorporated by a charter in the third year of the reign of King Edward VI., in the year 1549, and has been so continued to the present time by five other charters, viz. in the 2d of Elizabeth, in 1559; 2d James I., in 1604; 17th James I., 1620; 34th Charles II., 1682; and the 21st George II., 1747; which last-mentioned charter was duly accepted by the inhabitants of the said town and parish; and after therein reciting that the town and parish was an ancient and populous town, and had enjoyed divers liberties, &c., by virtue of certain charters of former kings or queens of England, by the name of the mayor, jurats, and commonalty of the town *and parish of Maidstone, in the county of Kent, it was granted and ordained that the said town and parish should be a body corporate in deed and name, by the name of the mayor, jurate, and commonalty of the king's town and parish of Maidstone, in the county of Kent. And for the better preserving and keeping the town and parish in peace and good government, it was ordained that the mayor and recorder of the town and three senior jurats should be justices to preserve the peace within the town and parish, and to do and execute all and singular matters and things which belong to the office of a justice of the peace, in as ample manner as other justices of the peace of the county of Kent had been accustomed to do and execute. And that no justice of the peace of the said county of Kent should in any wise intermeddle within the said town and parish to do anything which there belongeth or appertaineth to the office of a justice of the peace. That the said mayor, recorder, and justices of the said town and parish, or any three of them, of whom the mayor and recorder should be two, should from thenceforth for ever have full power and authority to inquire of, hear and determine all trespasses and misdemeanors whatsoever arising within the town and parish, as justices of the peace of the county, or any two or more of them might or could do or perform, as well in as out of their sessions, by virtue of the commission to them made for that purpose; so as that, nevertheless, they did in no wise proceed to the determining of any treason or felony, or any other offence touching the loss of life, or members, without the special mandate of his majesty in that behalf. And that the said mayor, jurats, and commonalty might take and receive to their own use, all fines, *forfeitures, and issues of jurors for their non-appearance; and also fines and forfeitures for trespasses and other misdemeanours and contempts before the said mayor, recorder, and three jurats, justices, from time to time happening, growing, or arising within the town and parish aforesaid; that the mayor for the time being should be the coroner for the said town and parish; that the said mayor and commonalty should take and enjoy to their own use wharfage, and anchorage of all ships and other vessels coming to the said town

⁽a) The Judges of this Court sat, as on former occasions, from Monday, the 19th day of April, until Monday, the 26th day of April inclusive, when this and the following cases were argued and determined.

and parish; that the said mayor, jurats, and commonalty, or the major part of them, for the better support of the charges of the said town and parish, and for ther reasonable causes or respects, or for the public good and benefit of the said town and parish, and of the inhabitants thereof, should, and might equally from time to time, make, impose, and assess reasonable taxes and assessments upon themselves and every inhabitant there, and might take and levy the same by distress, or in any other legal manner, as they had theretofore been used and accustomed," &c. The case then stated, that the paving, watering, and lighting of the town, &c., are conducted by the commissioners under certain acts of parliament of G. 3, and paid for by rates made by virtue of those acts; and that these commissioners have erected a watch-house in the town; that up to the year 1804, the town gaol consisted of two rooms at the top of the town-hall, and with the town-hall were maintained by the mayor, jurats, and commonalty out of the corporation funds; but in that year the trustees of the poor erected, and defrayed the expenses of such erection from the poor-rates, a certain building within the walls of the workhouse premises, and appropriated the upper *part of it to the purposes of a town gaol, and the lower part to the use of the poor; and that, from that time, the gaol at the top of the town-hall was deserted. In the year 1824, this last-erected prison being found to be insufficient for the purposes of the town as well as insecure, the mayor and justices, under the powers and authority of the act of the 5 G. 4, c. 85, entered into a contract with the justices of the county of Kent for the maintenance of the town prisoners in the county gaol and house of correction, from the time of commitment till the time of trial and conviction, or the discharge of the prisoners; and the sums payable under such contract have been paid by the trustees out of the poor rates; and such maintenance, upon an average of the last three years, has amounted to the sum of 1701. a year. And upon this contract being entered into, the abovementioned building was deserted as a prison, and the whole of it appropriated to the use of the poor; and no other prison is now made use of than the abovementioned watch-house. The expenses of prosecutions of prisoners and of the witnesses in cases of felony at the assizes and at the quarter sessions of the county of Kent, for offences committed within the jurisdiction of the mayor and justices of the town, which is co-extensive with the parish, were formerly, and till the year 1820, always paid by the treasurer of the county of Kent out of the county rate; but about that period, the justices of the county alleging that the county was not liable to those expenses, and that they had been paying them in error, refused to defray them any longer, and from that time those expenses have been, and still continue to be paid by the trustees of the poor from the *621] poor-rates, upon the orders of the judges of assize *and justices of the county quarter sessions. At a general quarter sessions of the peace, duly holden in and for the said town and parish of Maidstone on the 26th October, 1825, before the mayor, recorder, and the three justices of the said town and parish, the said mayor, recorder, and three justices did order a rate and assessment to be made upon all the rateable property within the said town and parish, as a town stock, or rate in the nature of a county rate, to be applied and disposed of in such manner, and for such purposes, as such rate was then or might thereafter be made applicable to by law, and all and everything done and executed by the said justices and the defendant touching the said rate or assessment, and levy, was done and performed properly and legally, provided the said justices had power to make the rate in question. Before this action was commenced, a demand in writing of a perusal and copy of the warrant under which the defendant acted, signed by the plaintiff, was made on the defendant, and the same was refused and neglected to be given by the defendant, for the space of six days, or at any time before this action was commenced. This action was commenced against the defendant within three months from the time of his making such distress and levy as aforesaid. The inhabitants of the said town and parish of Maidstone never contributed to the rates of the said county of Kent, and until the rate in question was made in the year 1825 upon the said parish of Maidstone, in the nature of a county rate, no such rate was ever made within the said town and parish. The mayor, jurats, and commonalty have never taken any wharfage or anchorage for ships or other vessels coming to the said town; [*622 *nor has the clause in their charter for making rates and assessments upon the mayor, jurats, and commonalty, and other inhabitants of the town, ever been

acted upon.

Manning for the plaintiff. This case must be governed by the decision to which this Court came in Rex v. Clarke, 5 B. & A. 665. It was there held, that the inhabitants of the City of Bath were liable to be assessed to the county rate, although they had a magistracy of their own. The rate in question was imposed under the authority of the 55 G. 3, c. 51, s. 24, but that is applicable only where the place is not subject to the jurisdiction of the commission of the peace for the county at large. Now, in Rex v. Clarke, the city justices had no jurisdiction in cases of felony, and, therefore, in such cases, the jurisdiction of the county justices was held not to have been taken away by the charter, and on that ground Bath was held liable to the general county rate. So here the justices of Maidstone have no jurisdiction to try felonies. The county justices may, therefore, try them; and the town remains liable to the county rate. The case of Rex v. Clarke only decided that a particular place [BAYLEY, J. was not wholly exempt from the county rate, unless the separate jurisdiction of its magistrates extended to all matters to which the county rate is applicable.] The particular district cannot be exempt from part of the county rate; it must be so altogether, or altogether liable; and if liable to the general county rate, it cannot be subject to a rate for the district in the nature of a *county [*623 rate. In the case of Bates v. Winstanley, 4 M. & S. 429, which was decided on the statute 13 G. 2, c. 18, s. 7, the Court come to the same conclusion as in Rex v. Clarke. [PARKE, J. This case is very different from that of Rex v. Clarke. The Maidstone charter contains an absolute unqualified non intromittant clause, and the county justices, therefore, cannot make a county rate to affect Maidstone. BAYLEY, J. In Rex v. Miers, which was a prosecution of the county treasurer for Lincolnshire, for not obeying an order to pay the expense of a prosecution for an offence committed in the borough of Stamford, it appeared that Stamford had justices, with an exclusive jurisdiction, and the Court held, that the order should have been made on the treasurer for Stamford. In like manner, here the expense of prosecutions at the assizes, for felonies committed in Maidstone, may be ordered to be paid out of the town rate.] The Bath case proceeded on the want of jurisdiction in the city justices, in cases of felony, and there is the same omission in the power given to the Maidstone justices.

Campbell, contrd, was stopped by the Court.

BAYLEY, J. The case of Weatherhead v. Drury, 11 East, 169, establishes the position that where a district has an exclusive jurisdiction of the peace, it is liable to a rate in the nature of a county rate. That, therefore, is an authority to show that the Maidstone charter having a general non-intromittant clause as to the county justices, the borough justices have power to make a rate in the *nature of a county rate. The county justices are altogether excluded, and cannot in any wise interfere in any single act in their character of justices of the peace. We have been pressed with the decision in Rex v. Clarke; and if that were applicable to this case, we should have to decide another question; viz. whether the borough of Maidstone can raise its own rate for some purposes, and be liable to the general county rate for others. But the case of Rex v. Clarke is very different; for there the city justices had jurisdiction as to some matters only, and the county justices retained their power and jurisdiction as to others; and the only point decided there was, that the city ought to contribute to the county rate. Here the county justices have no jurisdiction, and the borough justices are not county justices for any purpose. They can only commit to their own gaol, and have no power to commit to the county gaol, as in the Liverpool case, Rex v. Houghton, 5 M. & S. 300. Then, according to Rex v. Miers, the expenses of prosecutions at the assizes for felonies committed in Maidstone are not to be paid out of the general county rate. For these reasons, I am of opinion that the rate in question was properly made, and that our judgment must be for the defendant.

LITTLEDALE, J. I am of the same opinion. It was decided in James v. Green, 6 T. R. 230, that at Nottingham, which was in modern times made a county of itself, a rate might be made in the nature of a county rate; and in Weatherhead v. Drewry the same was decided as to a borough town, although not a county of itself, but *having an exclusive commission of the peace. Here there is a general non-intromittant clause; the county justices therefore have no jurisdiction in cases of felony committed within Maidstone,

which distinguishes the case from Rex v. Clarke.

PARKE, J. The question turns entirely on the construction to be put on the 55 G. 3, c. 51, s. 24, viz., whether Maidstone is within the description there given, of places where a rate, in the nature of a county rate, may be imposed. The enactment is, that "where any cities, towns, or other places, within that part of Great Britain called England, have commissioners of the peace within themselves, and are not subject to the jurisdiction of the commissioners of the peace for the counties at large, in which such liberties or franchises do lie, and do not nor did before the passing of this act, contribute to pay to the several rates made for the said counties at large, it shall and may be lawful, &c.," for the justices of such separate jurisdiction to make a rate, &c. Now it is clear that Maidstone has a commission of the peace within itself, nor is it subject to the commission of the peace for the county at large, for the words of the charter are, "No justice of the peace of the said county of Kent shall, in any wise, intermeddle within the said town and parish, to do anything which there belongeth or appertaineth to the office of a justice of the peace." The first two conditions of the 55 G. 3, c. 51, s. 24, are therefore clearly complied with; and so also is the third, for the case states, that until the rate in question was imposed, the inhabitants of Maidstone never contributed to the county rates for Kent. In the *626] report of Rex v. Clarke, expressions are *to be found which tend to support the argument now urged for the plaintiff, but the case itself was very different. The second condition mentioned in the act of parliament was not complied with; for, in Bath, the county justices had, as to some matters, concurrent jurisdiction with the city justices, and in others they might act on default of the city justices. Here they cannot interfere under any circumstances.

Postea to the defendant.

DOE dem. MANN, Clerk, v. WALTERS.

Semble, that where a notice to quit is given by an agent of the landlord, the agent ought to have authority to give it at the time when it begins to operate; and that a subsequent recognition of the authority of the agent will not make the notice good.

Assuming that a subsequent recognition of the authority of an agent can in any case be sufficient, the bringing of an ejectment is not a sufficient recognition of such authority to entitle the lessor of the plaintiff to recover, because the recognition ought at all events to be before the day of the demise laid in the declaration.

EJECTMENT. Plea, not guilty. At the trial before Burrough, J., at the Summer assizes for the county of Cornwall, 1829, the only question was, as to the validity of a notice to quit. It appeared that the defendant was a yearly tenant of certain glebe land to the lessor of the plaintiff, who had left England five years before the commencement of the action, and had since resided in Italy. The notice to quit purported to be signed by one Grylls as the agent of the lessor of the plaintiff, and was delivered to the defendant's wife on the 22d day of June, 1827, and required the defendant to quit on the 25th day of December then next following, or at the expiration of the current year of his tenancy. The declaration was entitled of Hilary term, 1829, and the day of demise was the 1st Ja-

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nuary in that year. Grylls was called as a witness. He stated, that he was a banker as well as an attorney, and managed Mr. Mann's affairs in his absence; that he had not let the *land to the defendant, but had received rent from him; that Mr. Mann, when in England, kept the glebe land in his own hands. It was objected by the counsel for the defendant that the notice was insufficient, because it did not appear that Grylls had any authority from Mr. Mann to give it. The learned Judge thought that as Grylls managed Mr. Mann's affairs and received his rents, he had an implied authority to give the notice to quit, and directed the jury to find a verdict for the lessor of the plaintiff; but reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that he had no such authority. A rule nisi having been obtained by Follett for entering a nonsuit, on the ground that a mere receiver of rent had not, as such, authority to determine the estate of a tenant from year to year by giving a notice to quit; Doe v. Read, 12 East, 57, Right v. Cuthell, 5 East, 491, and Goodtitle v. Woodward, 3 B. & A. 688, were cited,

and the authority of the last-mentioned case was called in question.

Coleridge now showed cause. Doe v. Read shows that a receiver appointed by the Court of Chancery, with a general authority to let lands to tenants from year to year, has also authority to determine such tenancies by notice to quit. In Right v. Cuthell notice was given by two executors out of three, on behalf of themselves and the third: it was given under a proviso in the lease which required it to be in writing under their respective hands. This was a proviso to defeat a larger estate, and required to be literally complied with; if the evidence of authority had been ever so complete, this defect would *not have been mended. Secondly, supposing that difficulty out of the way, it seems to have been conceded that if the act of determining the lease were manifestly or necessarily a benefit to the third joint-tenant, then as the act of the two would have bound him, the notice would have been good, so that it seems it was a question of evidence of authority. Goodtitle v. Woodward, 3 B. & A. 689, shows, that if the notice be given by an agent, a subsequent recognition of his authority is sufficient to make the notice valid, according to the maxim-omnis ratihibitio retrotrahitur et mandato æquiparatur. If that case be law, this rule must be discharged; for the present case, assuming the objection to be grounded in fact, is within it, and is not within Right v. Cuthell. It is good law, without having recourse to the maxim of ratification, upon the distinction between the two cases; in the one, the act professed to be done by the principals, and was defective on its face; in the other, the act professed to be done by an agent, and was on its face sufficient. Wherever an act is done by an agent, it is done in some measure at the peril of the party towards whom it is done. If he doubts the authority, he should make inquiry. In the case of sales to, or purchases made from agents, the seller or the buyer must prove the agency. So, if one act on a license given to him by an agent. There is not, therefore, the inconvenience suggested by Lawrence, J., in Right v. Cuthell, where the notice is regular on the face of it, and purports to be from a sufficient agent. If the tenant acquiesces in the authority at the time, he must act upon it then as valid. In fact, this is done in numberless cases, where notices are *given by attorneys, stewards, and agents. All the reasoning in Right v. Cuthell against the effect of subsequent ratification goes upon this,if the notice upon the face of it discloses a defect contingent upon ratification, the party is left in doubt; whereas if the notice be perfect on the face of it, the party has the same assurance, whether it purports to be signed by an agent, or by the party himself and served by an agent. This is evidently what Lord Tenterden meant in Goodtitle v. Woodward, 3 B. & A. 689, though it is very shortly expressed in the report. But, secondly, the ratification is evidence of the previous authority, just as it may be inferred from previous acts acquiesced in by the principal. Agents commonly act under authority conceived in very general terms; the principal's acts, either before or after the authority given, must limit it. In this way, nothing can be stronger than bringing the action; it shows not only subsequent adoption, but a previous authority. In Roe v.

Pierce, 2 Campb. 96, the steward of a corporation gave a verbal notice to quit; it was objected, that the notice should have been under the common seal, or that the agent should have been authorized by letter of attorney under seal; but it was ruled, that by bringing the ejectment, the corporation showed that they authorized the act. [PARKE, J. The notice ought to be such as the tenant could act upon with security at the time when it was given. What assurance had the tenant that the landlord would accept possession at the end of the half year? LITTLEDALE, J. The agent ought, at the time when he gave the notice, to have had authority to determine the estate of the tenant; for the notice is valid only by reason of its being the notice of the *landlord. landlord, therefore, gave authority to the agent after the six months mentioned in the notice began to run, the tenant would not have six months' notice.] It is not necessary that the validity of the notice must be demonstrated at the time of the service. It is sufficient if the notice be so framed as to convey a reasonable assurance, that the party may safely act on it. If it were necessary that the validity of the notice should be demonstrated at the time it is given, the consequences would be very inconvenient; because, as no man can be bound to act on an insufficient notice, nor lose anything by declining so to do, a tenant would not be bound to quit where the notice was by an agent, not proved to be such at the time, even although that agent was fully authorized. Or suppose the notice to have been signed by the lessor of the plaintiff, and served by some person who could not prove his handwriting, and knew nothing of his having desired it to be sent, could the tenant defend himself by saying, that neither he nor the person serving the notice knew the handwriting, and, therefore, he was not assured that he could act safely upon it at the time he received it? The same principle applies to distresses made by bailiffs, demands in trover, and demands of possession to make a man a trespasser. Wherever a man acts by an agent, the person on whom he acts disputes or acquiesces in the authority at his peril. If he disputes it, and it turns out to be valid, he is bound by it; if he acquiesces in it, and it was invalid, he is bound by it; the other party is not. There is a manifest distinction between the notice itself and the authority to serve it. Of the notice the tenant has a right to judge at the time; he must see it, *631] or hear it. The authority he cannot compel the production or *proof of.

He must inquire, if he has any doubt, and may have recourse to the principal; but he cannot go further. The same principle applies to demands in trover, distresses in replevin, and entries on lands. In all these cases the question is, Was the act done by the principal at a certain time? The evidence is, that another person, a stranger, did them; but that, subsequently, the principal made them his own acts by assenting to them, adopting them, and acting upon them. No greater inconvenience results to the other party in the case of a notice to quit, than in these cases. At all events, the rule cannot be made absolute for a nousuit, but for a new trial only; for there was some evidence to go to the jury that Grylls had authority. For the tenant received a notice, good on the face of it, which purported to be given by Grylls as agent to Mr. Mann. The tenant never repudiated that notice, for it was received without objection, and never returned. He must be taken to have assented to it.

Follett, contra, was stopped by the Court.

BAYLEY, J. I think that it was a question for the jury upon the evidence, whether Grylls had authority from the lessor of the plaintiff to give the notice to quit, and that the rule therefore ought to be made absolute for a new trial, but not for a nonsuit. There was evidence that Grylls, who was a hanker as well as an attorney, was the manager of the affairs of the lessor of the plaintiff, and it would be a question for the jury, whether he had authority to do the act in question? The jury, from the fact of Grylls having managed the affairs of the lessor of the plaintiff, and received the rent for him, may or may not notice to quit. The fact of such authority having been given is one peculiarly within the knowledge of the lessor of the plaintiff, and he cannot

complain that he is hardly dealt with, if the jury will not, from the facts proved, draw the inference that Grylls had authority. If any express authority was given, Grylls might have proved it, but he only proved that he managed the affairs of the lessor of the plaintiff, and received rent from the defendant. There was no evidence of any express authority to give the notice, but then there was some, though slight evidence, of an implied authority. As to the subsequent recognition, the case of Goodtitle v. Woodward, 3 B. & A. 689, is not in point. There the recognition was certainly before the ejectment was brought, and probably before the day of the demise in the declaration; in this case, there was no recognition of the authority of the agent before the day of the demise laid in the declaration.

LITTLEDALE, J. I also think that this rule should be made absolute for a new trial. But if I had been upon the jury, and this evidence had been given, I should have thought that Grylls had no authority to give the notice. Mr. Mann, when he left this country, may have made Grylls manager of his affairs and receiver of his rents, without intending to authorize him to determine tenan-Suppose Mann had lent money upon mortgage, would it follow that, as manager of his affairs, Grylls would have had authority to determine the loan? Clearly not. Nor does it follow, from his being manager of Mann's affairs, that he had authority to determine the estate of the tenants. As to the notice to quit, I am of opinion that, if Grylls had not authority to give *such notice at the time when it was given, or at least when the half-year mentioned in it began to run, no subsequent recognition of his authority would make it valid. I think that the ratification of the act on the day after the notice was given, or after the half-year began to run, would not be sufficient; because, in that case, the tenant would not have six months' notice, the notice being valid

only from the time when it becomes the notice of the landlord.

PARKE, J. The notice to quit contains an implied assertion that Grylls was the agent of Mann for the purpose of giving that notice, and it was argued that the fact of the defendant having received the notice and kept it without making any objection, was evidence, as against him, to go to the jury that Grylls had authority to give it. It was not shown that the defendant had read the paper and assented to it; for it was delivered to the defendant's wife, and there was no evidence to show that he had ever read it, unless that is to be presumed from the fact of his having kept it. But even if such a presumption be made, still it would be very slight evidence that Grylls was the agent of the lessor of the plaintiff; for whether he had authority or not, was a fact not within the knowledge of the tenant. There is no distinct proof that Grylls had any express authority to manage the affairs of the lessor of the plaintiff. The evidence is that he did manage his affairs, and that he received the rent of the premises in question. But a mere receiver of rents, as such, has no authority to determine a tenancy. I think very little reliance, therefore, can be placed on the form of the notice to quit, or on the fact that Grylls received the rent.

*The next ground on which it is said that Grylls was authorized to give the notice is, that the lessor of the plaintiff, by bringing the ejectment, has recognised the authority of Grylls, and, therefore, according to Goodtitle v. Woodward, 3 B. & A. 689, has rendered the notice to quit valid from the time when it was given. I cannot say that I am satisfied with the reasons given for the decision in that case. But assuming that a subsequent recognition of the authority of an agent can in any case be sufficient, it ought, at all events, in this case, to have been before the day of the demise laid in the declaration, for the plaintiff must show a right to the possession on that day. The bringing of an ejectment, therefore, is not, in this case, a sufficient recognition of the authority of the agent. In Right v. Cuthell, 5 East, 491, it was held by Lord Ellenborough, C. J., and Lawrence, J., that the ratification by a joint tenant of a notice to quit given by his companion would not make it good, on the ground that the notice must be such an one on which the tenant can rely and act with certainty at the moment of receiving it. Now if Grylls had not authority to give the notice at the time when it began to operate as a notice, it seems to me that it was insufficient, and that the lessor of the plaintiff would not be entitled to recover. But inasmuch as there was some evidence, though very slight, from which the jury might infer that Grylls had a previous authority, I think that the rule should be made absolute, not for a nonsuit but for a new trial.

Rule absolute for a new trial.

*635] *GEORGE WARD, Esquire, v. FRANCIS CONST, Esquire.

Where the owner of a house, in consideration of a premium, demised it at one-third of its annual value, and afterwards redeemed the land-tax: Held, that he was entitled to receive from the tenant an annual payment equal to two-thirds of the land-tax so redeemed.

This was an action of debt brought by the plaintiff to recover from the defendant the sum of 311. 5s. for five quarters' rent due and in arrear on the 25th of March, 1828, for the premises demised by the indenture of lease hereinafter mentioned, and the further sum of 151. claimed by the plaintiff to be due and in arrear to him from the defendant on the said 25th of March, 1828, for two years then elapsed of the yearly sum of 7l. 10s. alleged to be issuing out of the demised premises; such yearly sum being equal in amount to the land-tax formerly assessed and charged on the said premises, and which land-tax was redeemed by the plaintiff at the time and under the circumstances hereinafter The declaration contained a count for the rent reserved, being 25l. per annum; also a count for 15l., being for the whole of the said sum of 7l. 10s. for two years; also a count for 101., being the proportion of the said sum of 71. 10s. for two years, which it was alleged the defendant ought to pay, the annual value of the premises being alleged in that count to be 751. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Michaelmas term 1828, it appeared that the defendant had previously paid into court the amount due for rent, and the only question at issue on the trial was as to the plaintiff's right to recover in respect of the land-tax redeemed by him, as to which his Lordship nonsuited the plaintiff, reserving leave to him to move this Court *that a verdict should be entered in his favour for such sum as the Court should On motion made accordingly in Hilary term 1829, the Court directed that the whole facts should be stated in a case for the opinion of the Court. facts were as follows:-

The plaintiff, at the time of making the indenture of lease hereinafter mentioned, was seised in fee simple in possession of the premises in question, and thereby demised; and being so seised, by indenture made the 29th of September, 1799, between the plaintiff, of the one part, and the Rev. Joseph Jefferson, A. M., of the other part, it was witnessed that, as well for and in consideration of the sum of 5201. to the said plaintiff paid by the said Joseph Jefferson at and before the sealing and delivery of the said indenture, the receipt whereof the plaintiff did thereby acknowledge, as also for and in consideration of the costs and charges which Jefferson would be at in the repairing and finishing the premises, and for and in consideration of the rents and covenants thereinafter reserved and contained on the part of Jefferson, his executors, administrators, and assigns, to be paid, kept, and performed, he, the plaintiff, leased, set, and to farm let to Jefferson, his executors, administrators, and assigns, all that piece or parcel of ground, together with the messuages or tenements thereon built (at the time of the redemption of the land-tax, and now constituting one messuage), situate, lying, and being in a certain square commonly called Soho Square, in the parish of St. Anne, within the liberty of Westminster, in the county of Middlesex, and in the said indenture of lease more particularly described; to hold the said premises, with the appurtenances, to Jefferson, his executors,

administrators, and assigns, from the day of the *date of the indenture, for the term of ninety-nine years, at the yearly rent of 25L, payable upon the four several quarterly days therein mentioned; that is to say, upon the 25th day of December, the 25th day of March, the 24th day of June, and the 29th day of September, by even and equal portions. And Jefferson, for himself, his heirs, executors, administrators, and assigns, did, by the said indenture of lease, covenant, promise, and agree to and with the plaintiff, his heirs and assigns, that he, Jefferson, his executors, administrators, or assigns, should and would well and truly pay or cause to be paid unto the plaintiff, his heirs and assigns, the said yearly rent or sum of 25L, according to the reservations aforesaid, and the true intent and meaning of the said indenture. But the said indenture of lease contained no covenant, condition, or stipulation whatever, either on the part of the plaintiff or of Jefferson, respecting taxes or rates of any description. The indenture also contained the usual covenants to repair and deliver up in repair at the end of the term.

At the time of the date and execution of the indenture of lease, the demised premises were assessed to the land-tax in the yearly sum of 10*l*., being 2s. in the pound on an estimated annual value of 100*l*.; but in the year 1800 they were assessed to the land-tax on an estimated annual value of 90*l*., down to and at the time of the redemption hereinafter stated, and at that time the annual charge or assessment to the land-tax upon the said demised premises was 7*l*. 10s., being

1s. 8d. in the pound on the said estimated annual value of 90l.

By deed-poll dated the 21st of February 1804 (and duly registered the 28th of May, 1804), under the hands and seals of William Hinfield and David Nichols, two of *the commissioners appointed for the purposes of the act 42 G. 3, c. 116, for the city of Westminster and the liberties thereof, did thereby certify that they had contracted and agreed with George Ward of Soho Square in the parish of St. Anne, Westminster, Esq., the plaintiff, for the redemption by him of 7l. 10s. land-tax, being the land-tax charged upon his estate thereinafter described, viz., one messuage, with the appurtenances, situate in Soho Square aforesaid, being the premises described by the said indenture of lease, which said premises were rated to the land-tax in the assessment made for the said parish of St. Anne for the year 1803 as follows: -viz. G. Ward, Esq., proprietor, Rev. J. Jefferson, occupier, 7l. 10s., sum assessed. The consideration was declared to be 2751. capital stock in the 3 per cent. Consolidated and Reduced Bank Annuities, or one of them, to be transferred to the commissioners for the reduction of the national debt at the Bank of England, on or before the 1st day of May, 1804.

The consideration for the redemption of the said land-tax was duly transferred by the plaintiff within the time by the said contract limited for the transfer of the same. It was proved at the trial that the said Joseph Jefferson, in the year 1819, and in the years 1822 and 1823, paid to the plaintiff the annual sum of 71. 10s. in addition to the rent reserved by the said indenture of lease, and that after his death, in 1824, his executrix until her death, and her executor afterwards, continued to pay the same in like manner, until the sale of the lease to the defendant. After the death of Mr. Jefferson's executrix, the said demised premises were sold to the defendant for the residue of the term granted to Jefferson; and they were duly assigned to the defendant by Richard Eaton, to *whom they were bequeathed by the will of Mary Jefferson, deceased, [*639 who was the universal legatee and sole executrix of the last will and testament of Jefferson. Since the purchase by and assignment to the defendant of the said premises for the residue of the said term, the defendant has not paid to the plaintiff the said annual sum of 71. 10s. or any part thereof, or any other sum whatever for or in respect of the redemption of the land-tax by the plaintiff. The annual value of the premises at a rack-rent, when Jefferson took them. was 1201., and they are not now of greater annual value, if anything be payable from the defendant to the plaintiff in respect of his having redeemed the said The amount of such payment was in arrear for two years on the 25th of March, 1828. The question for the opinion of the Court was, Whether the plaintiff was entitled to maintain this action to recover from the defendant all

or any part of the said sum of 15l.

Patteson for the plaintiff. The question in this case depends on the construction to be put on several acts of parliament, which are not very clear, nor very consistent with each other. But upon the whole, it will appear that the plaintiff is entitled, at least, to two thirds of the annual amount charged on the premises for land-tax at the time when the redemption took place. It is material to consider the old land-tax act, 4 W. & M. c. 1, s. 5, which, after reciting that many manors, lands, &c., charged with the rate of 4s. in the pound thereby imposed, were subject to rent-charges, fee farm-rents, &c., by reason whereof the true owners of such manors, &c., did not receive to their own use the true yearly value thereof; it was enacted, "that it should and *might be lawful to and for the landlords, owners, and proprietors of such manors, &c., to abate and deduct, and to retain and keep in his or their hands 4s. in the pound for every fee farm-rent or other annual rent or payment charged upon or issuing out of the premises, or any part thereof, or thereupon reserved." This shows that each person beneficially interested in lands was to bear a part of the tax in proportion to such interest. Then the 38 G. 3, c. 5, which is the last annual land-tax, shows that it was the object of the legislature that the landlord should pay the tax upon that sum only which he actually receives. Then the 38 G. 3, c. 60, the first land-tax redemption act, in sections 17 and 37, gives a power of redemption, and that gives to landlords the option of redeeming and extinguishing the tax, or to have it continued as a charge upon the land. In the 42 G. 3. c. 116, the statute more particularly in question, no such option is given; but there is another clause under which the plaintiff is entitled to recover. The terms of the lease granted by the plaintiff are material. He thereby grants a lease for ninety-nine years, "in consideration of the sum of 520l. and the costs and charges which the lessee would be at in the repairing and finishing the premises, and the annual rent of 25l." The improvements to be made were no doubt a principal cause for the small amount of the rent reserved; and where premises are so improved, the landlord is held liable only for so much of the land-tax as would have been payable for the premises in the state in which they were demised; Yeo v. Leman, 2 Str. 1191, 1 Wils. 21, Hyde v. Hill, 3 T. R. 377, Whitfield v. Brandwood, 2 Stark. N. P. C. 440, *Watson v. Home, 7 B. & C. 285. It may be urged, that the premium paid for the lease is to be considered as rent; but that is not correct; it is rather the purchase-money paid for an interest in respect of which the purchaser may be assessed. stamp-act requires an ad valorem stamp on a lease granted in consideration of a premium, as if it were a purchase; and, therefore, before the redemption took place, the tenant being entitled to deduct from the rent, a part only of the landtax in the proportion that his rent bore to the value of the premises, was entitled to deduct in the proportion of 251., the rent paid, to 751., the sum at which the premises are valued. [LITTLEDALE, J. Can you contend that the landlord is not to pay land-tax in respect of the premium?] Yes; for that is not rent, and the 42 G. 3. c. 116, confirms that view of the case; for it treats a tenant for a long term of years granted on a fine as interested in the redemption of the landtax, which he would not be, if the landlord were bound to pay the whole. Under sect. 10, the present defendant might have contracted to redeem the landtax; and sect. 19 shows the same thing; and then sect. 51 enacts, "that for the purpose of redeeming any land-tax charged on any manors, messuages, lands, &c., belonging to any person or persons (not being bodies politic or corporate, &c.), it shall be lawful for all and every such person or persons, who are or shall be, for the time being, seised or possessed, or entitled beneficially in possession to the rents and profits of, but who shall not have the absolute estate or interest in any manors, messuages, lands, &c., or any heriots, services, emoluments, or advantages *issuing or payable from or in respect of any freehold or copyhold, or customary messuages, lands, &c., or incident thereto

or accruing therefrom (other than and except tenants at rack rent for any term of years, or from year to year, or at will, and tenants holding under the crown any lands, &c., within the Duchy of Lancaster), but nevertheless under the restrictions thereinafter mentioned, absolutely to sell and dispose of, &c., by public sale or private contract, and by deed indented, &c., to convey any such manors, messuages, lands, &c., whereof such persons shall be in the actual possession, or entitled beneficially to the rents and profits as shall be eligible and necessary."

And section 57 enacts, that "nothing therein contained shall be construed to extend to enable any tenant for lives, or for years determinable on lives, or for years absolute, though not at rack rent, to sell any part of the tenement demised, in case of a demise for which any fine or premium was paid, without consent of the persons entitled to the estate in reversion upon such demise;" and this again shows, that tenant for years on a fine is interested in the redemption of the land-tax. Then by section 123,(a) the plaintiff is entitled as a *person in [*643 remainder, to a sum equal to the land-tax issuing out of the land. And section 126 (b) is material, for it contemplates cases where tenants at rack rents have contracted to pay the land-tax, and provides, that in such case, if the land-lord redeems, the tenant shall pay the amount to him; and by section 158,(c) if *tenant at rack rent, not having made such contract, purchases the [*644 land-tax, he may retain the amount out of his rent.

Follett, control. The plaintiff has no right of action under the 42 G. 3, c. 116, and if not under that statute, he clearly has it not under any other. Be-

(a) Section 123. And be it further enacted, that where any person or persons having any estate or interest, other than an estate of inheritance in any manors, messuages, lands, tenements, or hereditaments, shall redeem the land-tax charged thereon by or out of his, her, or their own absolute property, such manors, messuages, lands, tenements, or hereditaments shall be and become chargeable for the benefit of such person or persons, his, her, or their executors, administrators, or assigns, with the amount of the 3 per cent. bank annuities which shall have been transferred, or with the amount of the moneys paid as the consideration for the redemption of such land-tax, as the case may be, and with the payment of a yearly sum or sums of money by way of interest thereon, equal in amount to the land-tax redeemed; provided always, that no person or persons in remainder, reversion, or expectancy, or having any future interest in such manors, messuages, lands, tenements, or hereditaments as aforesaid, who shall afterwards, in order of succession, come into the actual possession or be beneficially entitled to the rents and profits of any such manors, messuages, lands, tenements, or hereditaments shall be liable to the payment of any yearly sum or sums of money by way of interest as aforesaid, save only from the time they shall respectively come into possession or be beneficially entitled as aforesaid: provided also, that where the land-tax charged on any manors, messuages, lands, tenements, or hereditaments shall be redeemed by any bodies politic or corporate, or companies, or any feoffees or trustees for charitable or other public purposes, or other person or persons in remainder, reversion, or expectancy, or bening substitute heirs of entail entitled in their order to succeed thereto, such bodies politic or corporate, or companies or feoffees, or trustees for charitable or other public purposes, or other person or persons in remainder, reversion, or expectancy, or being substitute heirs of entail as aforesaid, shall in

(b) Section 126. And be it further enacted, that where any tenant or lessee at a rack rent for any term or number of years, or at will, of any manors, messuages, lands, tenements, or hereditaments, shall be bound by agreement to pay the land-tax charged thereon during the continuance of any demise, and such land-tax shall have been or shall be redeemed by or on the behalf of the bodies politic or corporate, or companies, or other person or persons beneficially entitled to the rent reserved or made payable on such lease or demise, the amount of the land-tax so redeemed shall, during the continuance of such lease or demise, be considered as rest reserved or made payable thereon, and the same shall be payable on the same days, and the same powers shall be had, used, and enjoyed for the recovery thereof, as for the recovery of such rent when in arrear.

(c) Section 158. And be it further enacted, that where the land-tax charged on any manors, messuages, lands, &c., which are or shall be leased or demised at a rack-rent for any term or number of years, or from year to year, or at will, shall be purchased by any tenant or lesses thereof who shall not be bound by any covenant or agreement to pay the land-tax during the continuance of the demise, it shall be lawful for such tenant or lesses to retain out of the rent reserved or made payable on such lease or demise, during the continuance thereof, the amount of land-tax so purchased, and the payment or tender of the residue of such rent shall be as valid and effectual to discharge such tenant or lessee as the payment or tender of the whole rent reserved on such lease would have been in case such land-tax had not been purchased.

fore the redemption the tenant was not bound to pay any part of the land-tax, and the landlord cannot, by redeeming, cast any new burden upon him. It is clear from the earlier land-tax acts, that it was a tax on the landlord. But the 42 G. 3, c. 116, s. 123, is relied on, to show that the plaintiff is entitled to maintain this action. That section provides, "that where any person or persons having any estate or interest (other than an estate of inheritance), in any manors, messuages, lands, &c., shall redeem the land-tax charged thereon, by or out of his, her, or their own absolute property, such manors, messuages, lands, &c., shall be and become chargeable for the benefit of such person or persons, his, her, or their executors, &c., with the amount of the 3l. per cent. bank annuities which shall have been transferred, or with the amount of moneys paid as the consideration for the redemption of such land-tax, as the case may be, and with the payment of a yearly sum of money by way of interest thereon, equal in amount to the land-tax redeemed."

*Now, that applies to redemption by tenants of particular estates, because the relief is perpetual, although their interest is partial only. Then follows at the latter part of the clause this proviso, "that where the landtax charged on any manors, &c., shall be redeemed by any bodies politic or corporate, &c., or other persons having any estate or interest in remainder, reversion, or expectancy therein, or being substitute heirs of entail entitled in succession thereto, such bodies politic, &c., or other persons in remainder, reversion, or expectancy shall, in the mean time, until their respective estates and interests vest in possession by reason of the determination of the preceding estate, be entitled to have a yearly sum issuing out of such manors, messuages, lands, &c., equal in amount to the land-tax redeemed," which manifestly applies to persons in remainder expectant on the determination of the particular estate, and not to persons in the actual and immediate receipt of the rents and profits. If it did so apply, the effect of the argument on the other side would be to throw the whole burden on the tenant, whether he paid a fine or not, and whether he had or had not contracted to pay the land-tax. To serve the plaintiff he must make out that the provision, in cases of leases granted on fines, is to charge the land with so much as the tenant ought to have paid before the redemption; but, according to this statute, if the plaintiff is entitled to anything, he is entitled to the whole sum, which is so unjust, that it never could have been the intention of the legislature. [BAYLEY, J. As far as the rent of 251. the defendant may be tenant, but as to the residue of the interest, the relation between him and the plaintiff may be different.] Assuming that to be so, and that the tenant can be considered as having *a particular estate within the meaning of the first division of this clause, still the effect of it would be, to give the landlord [PARKE, J. The redemption can be considered as made by the whole sum. the plaintiff in the character of reversioner as to that part only which the defendant might have redeemed.] The act will not bear that construction, unless it be assumed that the fine was paid for a particular and distinct portion of the property, which is contrary to the fact. It is clear, then, that neither the 123d nor the 125th section applies to the case of redemption by a person entitled to receive rent. Thus the case would stand if the tenant had been bound before the redemption to pay a part of the land-tax, but the tenant was not so bound. The 4 W. & M. c. 1, s. 4, shows that the charge was laid on the owner of the land, and the only instance to the contrary is, where the tenant having increased the value of the premises after the lease was granted, the tax was increased and imposed upon a value beyond the value of the premises to the landlord. Graham v. Wade, 16 East, 29, Hyde v. Hill, 3 T. R. 377, and Watson v. Home, 7 B. & C. 285, were all instances in which such improvements had been made. Here there was no proof that the value of the premises had increased.

Cur. adv. vult.

BAYLEY, J. There are two questions in this case:—First, In what condition did the lessee stand with reference to the land-tax as soon as the lease was executed? And if he was then liable to bear any part of it, then, secondly, Vol. XXI.—35

Whether, after the redemption by the landlord, he has a right to call upon the tenant to pay *that proportion which he was before liable to bear? The situation of the lessee before the redemption, depends on the landtax act which was in operation at the time when the lease was granted, viz. the 38 G. 3, c. 5, which, by sect. 4, directed, that all lands and all persons having or holding lands, should be charged with as much equality and indifference as possible, by a pound rate. It was contended for the defendant, that the charge was on the landlord, but that is not the language of the legislature; the tax is imposed on the lands, and the persons having and holding such lands. We must inquire, therefore, who are the persons having and holding lands, &c., within the meaning of this statute. The words apply to persons receiving the rents and profits; and where a party receives the whole of the profits, he is to be charged with the whole. But where one person receives the profits to a limited extent only, and another receives the residue, the words having and holding embrace both. Here, then, inasmuch as the lessee, immediately after the lease was granted, paid annually 251. for that which was worth 1201., the landlord is to be considered as having and holding to the extent of the 25l., and the tenant as to the residue; and the first land-tax act, 4 W. & M. c. 1, s. 4, is to the same Under that the land was charged, and the person receiving the rents and profits was to be the hand to pay. The argument is the same whether the rent reserved be merely a nominal rent, or one lower than the real value; the difference is in degree only and not in principle. The case, however, does not rest merely on the words "having and holding," but is clearly explained by sect. 17, which applies to the case of landlord and tenant. By that section the sect. 17, which applies to the case of fall are required and authorized to several and *respective tenants of the land are required and authorized to [*648] do two things. Now, the word required applies to one of them, and the word authorized to the other. They are required to pay the land-tax, and authorized to deduct from their rent, not the whole amount, but so much as the landlord, in respect of the rent, ought to bear. Put the case of the lord, mesne, and tenant, the lord receiving a rent of 201., the mosne 401., and the tenant having and holding premises worth 1001., each would have to pay according to his interest; and thus, according to the land-tax act in force at the time when the lease in question was granted, the lessee would immediately be liable to contribute in the proportion of 95l. to 120l. Having established this principle, there is little difficulty in coming to a conclusion as to the meaning and effect of the land-tax redemption act, 42 G. 3, c. 116. There can be little doubt that it was meant to include all persons and cases, for the object of the government was to induce persons to redeem. Now, no landlord would redeem unless he could afterwards recover from the tenant that for which he paid; and it seems to me that the present plaintiff is clearly entitled to recover two-thirds of the amount formerly charged on the premises in question. The 42 G. 3, c. 116, s. 123, provides, that a person having an interest in reversion, redeeming the land-tax, shall, until that interest vests in possession, be entitled to a yearly sum issuing out of the premises, equal in amount to the land-tax redeemed. There is no doubt that the plaintiff, at the time of the redemption, was a person in reversion; but the difficulty raised by Mr. Follett was, that under this clause the person in remainder or reversion is entitled to a sum equal to the tax redeemed; and, therefore, if the *plaintiff were entitled to anything, he would be entitled to the whole amount charged upon the premises. But I do not think that argument well founded. In substance the transaction was, that the part of the tax formerly payable by the landlord was extinguished by the purchase, and the tenant was redeemed from the payment of the residue, and, therefore, the landlord is now entitled to receive from the tenant a payment equal in amount to that portion only of the land-tax which he can be said to have redeemed. This construction of the act is in conformity with the cases of Yeo v. Leman, 2 Str. 1191, 1 Wils. 21, and Hyde v. Hill, 3 T. R. 377; for, although improvements were there made after the leases had been granted, and the land-tax was on that ground raised, they establish this principle—that of the land-tax imposed on any premises, the landlord is to bear a part only in proportion to the rent that he receives. For these reasons I think that the plaintiff is entitled to a verdict for 10%.

LITTLEDALE, J. The first question is, whose tax the land-tax is. It has been commonly considered as the landlord's tax, but the 4 W. & M. c. 5, s. 6, shows that to be incorrect. The subsequent land-tax acts, down to the 38 G. 3, c. 5, are in similar terms. That declares the tax to be payable by all persons having and holding lands, and those words are applicable to estates of all descriptions, from a fee-simple down to a lease for a year. The question now is, What is their meaning as applied to this case? The tax is to be levied on and paid by the tenant, and he is authorized to deduct out of his rent so much as the landlord ought to bear in *respect of his rent. The tenant, therefore, having a right to deduct a part only adequate to his rent, must bear the This is the only reasonable construction that can be put upon residue himself. the act, and, therefore, on the statute itself, and the authorities collected in Watson v. Home, and Whitfield v. Brandwood, I think that the landlord was only liable to bear a part of the tax in proportion to the rent. Then comes the question on the redemption act, and, under the 123d section, it is contended, that the plaintiff is entitled to recover. That section first enacts, "that where any person having an estate other than of inheritance shall redeem the land-tax with his own property, the estate shall be chargeable with the amount of the consideration and interest equivalent to the land-tax redeemed." That does not apply to the plaintiff. Then, at the latter part, it goes on-"Provided also, that where the land-tax charged on any manors, &c., shall be redeemed by any person or persons having any estate or interest in remainder, reversion, or expectancy therein, such person or persons in remainder, reversion, or expectancy, shall in the mean time, until their respective estates and interests vest in possession by reason of the determination of the preceding estate, be entitled to receive a yearly sum issuing out of such manors, &c., equal in amount to the land-tax so redeemed." If the plaintiff comes within that part of the section, then, by sect. 125, he is entitled to recover. But I have great doubts whether the plaintiff is a person in reversion within the meaning of sect. 123. As to his own share of the profits, he clearly was not within it, and the word reversioner seems more applicable to a person not having any present beneficial *6511 interest; and this view of it is confirmed by sect. 19. *The word reversion applies to the land itself, and therefore a man can hardly be considered as reversioner as to part of the profits of the land. But this is not material to the decision of the case; for if the plaintiff is not entitled under sect. 123, as reversioner, he may be considered as a purchaser of the land-tax, and so entitled to recover under sect. 154. Under one or the other of these sections, the plaintiff, therefore, is entitled to a verdict for two thirds of the sum formerly charged as land-tax on the premises in question.

PARKE, J. The first question in this case is, what was the relative situation of the lessor and lessee with respect to the land-tax at the time the redemption took place? Was the lessor ultimately chargeable with the whole sum of 71. 10s., the land-tax assessed upon the tenements demised, or only with a propor-

tion of it? and if the latter, what proportion?

The land-tax act in force at the time of the redemption, and still in force, is the 38 G. 3, c. 5. The fourth section directs that certain sums shall be raised in each county, and certain places therein named, together amounting to a fixed sum; and that towards the raising that sum, all manors, lands, and annuities, yearly profits, and other real property, and all persons having and holding the same in respect thereof, shall be charged with as much equality and indifference as possible by a pound rate. The fifth section, reciting, "that many of the lands are liable to annual payments, fee farm rents, rents service, or other payments, by reason whereof the true owners do not, in truth, receive to their own use the true yearly value of the same, for which nevertheless they are by this *652] act chargeable with *a certain pound rate," provides that such owners may deduct a proportionate part of the annual payments. The seven-

teenth section authorizes a distress on the lands charged, and contains a provision, "that the several and respective tenants of houses, lands, &c., rated, are required and authorized to pay such sums as shall be rated on such houses, lands, &c., and to deduct out of the rent so much of the said rate, as in respect of the said rents of any such houses, lands, &c., the landlord should and ought to pay and bear." This clause does not provide that the whole tax should be deducted in all cases from the payment to the person filling the situation of landlord, but

contemplates cases where a part only is to be deducted. Looking at these provisions, and the whole object of the act of parliament, I think it clear that each person having a beneficial interest in or arising out of land, is meant to be charged ultimately with the tax in proportion to such beneficial interest, the actual tenant or occupier being in the first instance liable to pay the full amount to the government; and whether, in this case, the lessee is to be considered, as "a proprietor of the tenements, liable to a payment of a rent service" (under the fifth section), or as a tenant, and the lessor as landlord under the seventeenth section, all that the lessor is ultimately to pay, is such a proportion of the entire sum charged on the tenants, as the value of the annual rent payable to him bears to the entire annual value of the tenements. And I consider it wholly immaterial by what contract, or for what consideration, the lessor has divested himself of a part of the annual profits of the tenements; for whatever reason he has ceased to have a portion of the annual profits, as soon as he has ceased, *he is not liable to pay the tax in respect of that por-If, for instance, the lessor, after receiving a rack rent, were to a part of the reversion and the assign a part of the reversion and the rent to a stranger, he would be liable only to allow to the tenant his proportion of the tax: the stranger would have to pay the rest; and can it make any difference, that, instead of assigning to a stranger, the lessor allows the lessee, by the original contract, to retain a part of the profits to himself? Or suppose the lessor to part with the whole interest in fee, subject to a nominal or trifling rent charge, can he be made liable to the whole And does it make any difference in principle in this respect, whilst the term continues, whether he has sold it for a long term of years or in fee? Nor does it matter for what consideration he gives up a part of the profits to the lessee; whether for money paid down to the lessor, as the purchase-money of a leasehold interest; or for money to be afterwards laid out on the improvement of the tenements. The only question is, whether he receives those profits or I feel no doubt, but that the lessee, under a lease like this, is, so far as relates to the whole annual value of the tenements, beyond the rent reserved, in the situation of an owner or proprietor, and chargeable himself; and that the lessor is a landlord, chargeable as such, within the meaning of this act, only to the extent of the annual rent which he receives.

None of the cases cited at the bar are precisely in point, except the Nisi Prius case of Whitfield v. Brandwood, 2 Stark. 440; but as the noble and learned Lord who decided that case has since inclined to a different opinion, on the first impression of the present case, and as the *point in the case cited was not afterwards fully discussed before the Court, I do not rely upon that [*654] as a decisive authority.

The dicta, however, of Lord Kenyon and Mr. Justice Buller, in Hyde v. Hill, 3 T. R. 379, are in favour of this construction of the act of parliament, and that construction is so consistent with reason and justice that it ought to be adopted. The result is, that the lessor is bound to pay such proportion only of the landtax as the reserved rent bears to the total annual value. All question as to the amount of that annual value in this case is precluded by the form of the declaration, which confines it to 75%. The reserved rent was one-third of that sum. The lessor, therefore, at the time of the redemption, was beneficial owner of one third of the rack rent, and ultimately liable to pay one third of the tax; the lessee was beneficial owner of the remaining two thirds of the rack rent, and liable to pay two thirds of the tax.

The second question is, what was the effect of the redemption of the tax by the lessor, so situated.

This depends upon the provisions of the 42 G. 3, c. 116, the only statute in force as to contracts made after the passing of that act. The enactments of this statute are complicated, and not very clearly expressed; but one thing is clear,that a person with such an interest in the land as this plaintiff had, had a right to redeem or purchase either as a party entitled to a preference under sect. 19, or as another person, not entitled to such preference, under sect. 151, and the act of parliament must be so construed as to give effect to such redemption or *655] purchase, and not to leave the *purchaser with a property which is use-less, and which he cannot enjoy. There is no difficulty, as it seems to me, in putting a construction upon the act which will render the purchase by this plaintiff available, and give him a remedy, for that which he is entitled to. against the defendant. The 123d section admits of this construction. The latter part of the clause applies to persons "having any estate or interest in reversion," and provides that, "in the mean time, until their respective estates and interests vest in possession, by reason of the determination of the preceding estate, they shall be entitled to have a yearly sum issuing out of the lands equal in amount to the land-tax so redeemed." This part is certainly meant to meet the case of other reversioners than landlords of estates let at rack rent. The act contains no clause which gives an owner in fee, where the land is let at rack rent without a covenant by the tenant to pay land-tax, any remedy for the amount of the tax after redemption; and it is perfectly just that it should not, because such an owner has no right to cast the burthen on another, where by redemption he only exonerates himself from a burthen. But where he exonerates the estate from burthens which others ought to pay, by redeeming or rather purchasing that burthen, it is most just that he should have a right to receive the amount of it from the person liable to pay it.

In the present case, the plaintiff at the time of the redemption filled a double character. He was with respect to the rent served, and to that extent, liable to the tax; and in the situation of an owner in fee, in possession of the rents and profits; and, therefore, to that extent his redemption exonerated himself from a *sceal* *burthen, and extinguished it altogether. But with respect to the revidue

*burthen, and extinguished it altogether. But with respect to the revidue of the rent, he was not liable, and his redemption operated as a purchase of a burthen which another ought to pay; and, therefore, after that purchase, he ought to continue to receive it. In this respect he is within the spirit of the latter part of the 123d section, a person having an estate in reversion, in lands not let at rack rent; and certainly he is within its express words, for there is no doubt but that he had an estate in reversion. He has a right, therefore, to have a yearly sum issuing out of the lands, in the words of the 123d clause, equal to the amount of the land tax so redeemed; that is (as justice and reason require the clause to be construed), to the amount of the tax redeemed by him in his character of reversioner, not having the tax to pay himself, or in other words, so far as the redemption operates as a purchase of a sum of money payable by If this section does not apply, I am inclined to think the 154th does. To the extent, therefore, of that part (two thirds) of the tax which the defendant ought to pay, the plaintiff is entitled to such yearly sum issuing out of the lands. And the 125th section gives a remedy for it by action.

Postea to the plaintiff.

*RICHARDS v. BASSETT.

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A plaintiff in trespass was the occupier of a farm called Tyr Adam, situate within a manor adjoining a mountain, and claimed to be exclusive owner of that part of the mountain next adjoining his farm. The question in the cause being whether he was exclusive owner of the soil or had a right of common only over that part of the mountain, the defendant, in order to show that the plaintiff had not the right of soil, produced from the rolls of the manor an instrument, purporting to be a presentment in the year 1759, wherein the jurors, after reciting that they were sworn to view such part of the waste land as lieth within the lordship as was claimed by A. B. to belong to his tenement called Tyr Adam, upon their oaths said that they had considered the claim and the evidence, and presented that all the said land within the said boundaries were part and parcel of the common called K., and that neither the said A. B. nor the tenants or occupiers of the tenement called Tyr Adam, had any right to the same, or any further or greater right than such as the other freehold tenants of the lordship had for their commonable cattle:

Held, that this instrument was not admissible in evidence either as a presentment, because the homage had no right to decide the claim made by an individual to the freehold, they being interested, nor as an award, because there was no mutual submission, nor as evidence of

reputation because it was the declaration of the homage post litem motam.

TRESPASS for breaking and entering the plaintiff's close, called Mynydd yr Havod Ycha, situate in the parish of Lanwonno, in the county of Glamorgan. At the trial before Clarke, C. J., at the great sessions for the county of Glamorgan, it appeared that the plaintiff was the occupier of a farm called Havod Ycha, otherwise Tyr Adam, and the defendant was the owner of an adjoining farm called Havod Genol. The two farms adjoined on a mountain called Kefngwingil, in the lordship of Miskin. The plaintiff claimed to be exclusive owner of that part of the mountain adjoining his farm, and gave evidence of acts of ownership exercised there; as turning on his sheep and cattle, and excluding those of other persons, and then proved a trespass thereon by the defendant. The defendant, among other evidence, put in an instrument, purporting to be a presentment of the 3d of August, 1759, which was produced by the steward of Lord Bute, who was lord of the manor of Miskin, and which he found among the rolls and muniments of the manor. In 1759, Lady Windsor was lady of the manor. He then proved that all the freeholders did suit and service, and that Lanwonno was in *the manor of Miskin. That instrument was in the following terms:—

"Lordship of Miskin, with its members, Pentirch and Clunn:—At [*658 the court baron of the right honourable Alice, Lady Viscountess Dowager Windsor, lady of the said lordship, on Friday the 3d day of August, in the year of our Lord 1759, before Thomas Edwards, gent., chief steward there, and William Bruce, Esquire, and Edward Matthew, Esquire, suitors of the same court." (The presentment then set out the names of the jurors of homage, and proceeded as follows:--" we the said jurors, who were sworn and charged to view such part of the common or waste land, called Kefngwingil, as lieth within the said lordship, as is claimed by Evan Richard, a freehold tenant of the said lordship, to belong and appertain to his tenement, called Tyr Adam, situate in the parish of Lanwonno, in the said lordship, do say upon our oaths that we did, on Wednesday the 11th day of July last, repair and go to the said common or waste lands called Kefngwingil, in the parish of Lanwonno, within the said lordship, and view certain boundaries there showed us by the oaths of," &c., &c. (It then described the boundaries, and proceeded as follows.) "And we the said jury, on our oath do say, that we have seriously considered the claim of the said Evan Richard, and the evidences produced by him in support thereof, and we do, on our oath, present that all and every part of the said lands contained within the said boundaries are part and parcel of the common called Kefngwingil, and that neither the said Richard nor the tenants or occupiers of the said tenement, called Tyr Adam, have or hath, or ought to have, to the best of their knowledge or belief, any separate or distinct right to the same, or any other further or greater right *than such as other the freehold tenants of the said lordship can or [*659 may have or claim to the same for their commonable cattle. Also, we, the jury hereunder named, do present the right of Kefngwingil to Evan Richard,

to graze with his commonable cattle as usual." This presentment was objected to; but the learned Judge received it, and finally told the jury to find for the plaintiff, if they thought, upon the evidence, that he had an exclusive right to the possession of that part of the mountain called Havod Ycha; but, if they thought that he had only a right of common, to find for the defendant. The jury having found for the defendant, a rule nisi was obtained for a new trial, upon the ground that this presentment was not admissible in evidence.

Malkin and Whitcombe now showed cause. The document came out of the right custody, and was properly authenticated, and if applicable to the case (which must appear on inspection), was receivable in evidence. It is in substance a presentment, for it is a finding by the homage. There is no amercement indeed, because the party submitted to the preliminary investigation. Amercement is only necessary to show submission, or make it binding or certain. Arundell v. Lord Falmouth, 2 M. & S. 440, it was not contended that such presentments were inadmissible. [BAYLEY, J. You assume that the homage have no right of common over the rest of the mountain. The jury say that he has no other right than the other tenants of the manor. Are they indifferent?] Here the party claiming was actually heard. If the instrument be not admissible as a presentment, it was, as an award, binding between the *parties and their privies in estate. It may be said that no submission was proved to make it binding, but a submission must be implied between Evan Richards. the owner of Tyr Adam, on the one side, and the tenants of the manor on the other. It might be by parol, and then no other evidence could be expected. It is stated on the face of the presentment, that Evan Richards produced evidence before the homage, from which a submission may be implied. And where an ancient customary professed to be made ex assensu omnium tenentium, it was taken to be so. Denn dem. Goodwin v. Spray, 1 T. R. 473, per Ashhurst, J. Acknowledgment by the homage, that Richards had the right claimed, would be evidence against them. [LITTLEDALE, J. The lord ought to have been a party.] The document was at all events admissible as evidence of reputation; it was a declaration by persons who had knowledge on the subject. In Chapman v. Cowlan, 13 East, 10, in case for disturbance of a prescriptive right of common, a paper signed by many copyholders, reciting the ancient right of common, and agreeing to restrict it, was held to be evidence of reputation of the right recited, even against a person not claiming under any of those who signed. Here the homage jurors were selected by the plaintiff's ancestor. As to their interest, it is no more than that of perambulators; and perambulations are admissible, not as evidence of acts, but as reputation. Weeks v. Sparke, 1 M. & S. 687, per Lord Ellenborough. There a defendant by his plea claimed a prescriptive right of common, and plaintiff by his replication replied a prescriptive right of tillage, which qualified the right of common, and it was held that many persons besides the defendant having right of *common over the locus in quo, evidence of reputation as to the right claimed by the plaintiff was admissible, a foundation being first laid by evidence of the enjoyment of such right. So in this case, many persons besides the defendant, all the tenants of the manor, take a right of common over the mountain.

Maule, contrd, was stopped by the Court.

Lord Tenterden, C. J. I am of opinion that this instrument was not admissible in evidence in any view of the case. It was not receivable as a presentment, because the homage had no right to decide the claim made by an individual to the freehold; and by this instrument they appear to have taken upon themselves to say, that Evan Richards had no right to the soil. Then, secondly, this was not receivable as an award. It is admitted, that it contains no direct allegation that Evan Richards had submitted himself; but it is said, that we ought to infer a submission. I think, however, we cannot make any such presumption. It appears that the jury were sworn and charged to view such part of the common or waste as was claimed by Evan Richards to belong to his tenement, called Tyr Adam. Their authority, which began with the charge of the steward, is to

view that part of the waste claimed by Evan Richards. That being the authority originally given to them, the appearance of Evan Richards before the homage, who had no authority to inquire into the ownership of the land, does not give them any power so to do. It is next said that this instrument was evidence of reputation that the plaintiff and those who occupied under him had no more than a right of common upon the *land in question. The answer to that is, that it was a declaration made post litem motam, and therefore not receivable as evidence of reputation.

BAYLEY, J. I am of the same opinion. The steward and the homage had no jurisdiction to enter on the trial of the question of exclusive right to this land. The decision was by persons interested in the question, for the homage say that Evan Richards had no exclusive right to the soil. Evan Richards claimed the land as his own. The homage say that he has no more than a right of common. They, as tenants of the manor, must have had the same right, and, therefore, were not competent judges to decide that question. Then it is said that the instrument operates as an award, and that the homage may be considered as arbitrators, but the answer to that is there was no submission. It is not evidence by way of reputation, because upon the face of the instrument it

appears to have been post litem motam.

LITTLEDALE, J. The instrument was not receivable in evidence as a presentment, because the homage had no jurisdiction to inquire into the right to the They may inquire into encroachments on the waste, and may direct enclosures to be thrown down, but they have no jurisdiction to inquire whether the soil belongs to any individual, or whether he has a right of common only. Secondly, this is not an award, for there was no mutual submission. To make it good as an award, the lord and the other tenants of the manor ought to have been parties on one side, and Evan Richards a party on the other. But here the lord was no party. It is not *evidence as reputation, because it is the declaration by the homage of a fact post litem motam. Besides, the question in the cause was, Whether an individual had a right to the soil itself, or only a right of common over it. Now, although reputation be admitted in evidence in questions concerning public rights, it is by ho means clear that it is admissible in questions of prescriptive rights merely private. In Reed v. Jackson, 1 East, 355, a verdict against one defendant in trespass upon an issue of a justification of a public right of way negativing such right, was held to be evidence in trespass for breaking and entering the same close against another defendant, who justified under the same right; and Lawrence, J., there said that reputation would have been evidence as to the right of way in this case; à fortiori, therefore, the finding of twelve men upon their oath; and Lord Kenyon agreed that reputation was evidence with respect to public rights claimed as in that case; but not with respect to private rights. So in this case, where the question was, whether the plaintiff had a right to the soil, it seems to me that reputation was not admissible to show that he had a right of common only; but, however that may be, as the instrument contained a declaration made most litem motam it was clearly inadmissible. The rule for a new trial must be made absolute. Rule absolute

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH.

IX

Baster Cerm,

IN THE TENTH AND ELEVENTH YEARS OF THE REIGN OF GEORGE IV: 1830.

THOMAS v. WILLIAMS.

A. being indebted to the plaintiff for half a year's rent of a farm, due on the 25th of March, the defendant, an auctioneer, was about to sell the goods of A. on the premises in the month of August. On the day of the sale the plaintiff (the landlord) came there to distrain for his rent. The defendant, in consideration that the plaintiff would not distrain, verbally promised to pay him not only the rent due, but the rent that would become due at the Michaelmas following: Held, that the promise to pay the accruing rent was a promise founded on a new consideration, distinct from the demand which the plaintiff had had against A., and therefore void by the fourth section of the statute of frauds; and that the promise being entire and in the commencement void in part, were void altogether; and that the plaintiff, therefore, could not recover from the defendant the rent due on the 25th of March.

THE second count of the declaration stated, "that before and at the time of the making of the promise and undertaking therein mentioned, one Thomas Thomas was tenant to the plaintiff of a certain farm and the appurtenances, and was indebted to the plaintiff in the sum of 17l. 10s. for rent in respect of the said farm; and thereupon, in consideration that the plaintiff would forbear from distraining the goods upon the said farm, for and on account of the rent so due from Thomas Thomas, the defendant promised the plaintiff to pay to *665] *him the rent that would be due at the Michaelmas then next following from the said Thomas Thomas to the plaintiff, for and in respect of the said farm." Averment that plaintiff had forborne from distraining; that the rent due at the Michaelmas then next following was 38l. 61d., and breach for nonpayment of that sum. At the trial before Goulburn, J., at the Spring great sessions for Carmarthen 1829, it appeared that Thomas Thomas was tenant to the plaintiff of a farm called Gurnos, in the parish of Llangadock, in the county of Carmarthen, at a rent of 40l. per annum, payable half-yearly at Lady Day and The defendant was an auctioneer, and in August 1827 was about to sell Thomas Thomas's effects. The plaintiff went to Gurnos on the day of the sale, with a bailiff and a notice of distress for 17%, being part of a half year's rent, due on the 25th of March preceding (the residue having been paid), and told the defendant that there would be nearly a year's rent due to him at Michaelmas; and that, unless he, defendant, promised to pay him the rent then due, he, plaintiff, would put in the distress. The defendant then verbally pro-Vol. XXI --36

mised that, if plaintiff would not distrain for the rent then due, he, defendant, would pay him the rent that would be due at Michaelmas. The plaintiff did not distrain, and the sale proceeded. It was objected that, the promise not being in writing, the case was within the fourth section of the statute of frauds, 29 Car. 2, c. 3, and that the defendant was entitled to a general verdict. The learned Judge directed a verdict to be entered for the plaintiff on the second count for 221. 10s. (which was a sum formed, partly of rent due at the Lady-day preceding *the promise, and partly of the rent which became due at the following Michaelmas), and gave the defendant's counsel leave to move to enter a verdict for him on that count also, if this Court should be of opinion that the contract ought to have been in writing. In Easter term 1829, John Evans obtained a rule to show cause why a general verdict should not be entered for

the defendant upon the point reserved.

Russell, Serjt., and E. V. Williams, at the sittings in banc after last term. showed cause. It will be argued for the defendant, on the authority of the cases of Lexington v. Clarke, 2 Vent. 223, and Chater v. Becket, 7 T. R. 201, that where part of a promise is within the fourth section of the statute of frauds, and is thereby required to be in writing, the whole is void if the promise be merely Assuming that position to be established, it will not apply to the pre sent case, because no part of the promise upon which the plaintiff founds his claim is within the statute. The plaintiff had an undoubted right to distrain the goods upon the farm of his tenant for the rent due at Lady-day. He abandoned that right in consideration of the defendant's undertaking to pay the rent then due, and that which would become due at the Michaelmas following. Here, therefore, is a new consideration (the abandonment of the right of distress), which moves to the defendant, and is totally distinct from any contract between The defendant's undertaking is consequently orithe plaintiff and his tenant. ginal and not collateral, and is not affected by the statute, which was only meant to apply to such as are *collateral. The case of Williams v. Leaper, 2 Wils. 308, 3 Burr. 1386, S. C., is in principle exactly like the present. In that case the defendant had promised to pay the debt of the tenant, in consideration of the plaintiff's forbearing to distrain, and allowing the defendant to have the goods liable to the distress, and it was there held that as there was a new consideration for the defendant's promise moving to him, the statute did not apply. The principle thus laid down is supported by the cases of Read v. Nash, 1 Wils. 305, Castling v. Aubert, 2 East, 325, Edwards v. Kelly, 6 M. & S. 204, Bampton v. Pauline, 4 Bingh. 264, Tomlinson v. Gill, Ambler, 330. It is true, that, in the present case, the promise extends further than Williams v. Leaper, because it applies to rent not due at the time of making it; but there is no rule of law that the consideration and promise should be co-extensive in order to support an action.

Campbell and John Evans, contrd. There must be a new consideration to render any promise for the debt of another binding under the fourth section of the statute of frauds. The mere fact of the original debtor being indebted, is no consideration at all. If the argument on the other side be correct, the cases of Wain v. Walters, 5 East, 10, and Saunders v. Wakefield, 4 B. & A. 595, were not within the statute, and the discussion of the sufficiency of the written agreement was in those cases unnecessary; but such a proposition is not tenable, and it is clear, that without a new consideration, any promise to pay the debt of another would be nudum pactum. The case of *Williams v. Leaper, 2 Wils. 308, and all the others which have been cited, are very distinguishable from the present. In all of them the defendant received from the plaintiff, or was permitted by him to receive, certain property on which the plaintiff had a lien, which the defendant promised to discharge on having the property delivered to him. This is the view of that case taken by Le Blanc, J., in Castling v. Aubert, 2 East, 325. He there says, "This is a case where one man having a fund in his hands which was adequate to the discharge of certain encumbrances; another party undertook that if that fund were delivered up to him,

he would take it with the encumbrances: this, therefore, has no relation to the statute of frauds." In the present case, the plaintiff had no lien whatever on the property delivered to the defendant for the rent which was to become due at a future time, and this circumstance distinguishes it from all the authorities cited on the other side. As to that portion of the rent, therefore, the promise was within both the letter and the mischief of the statute, and was unsupported by any consideration. If then that part of the promise relating to the rent which would become due at Michaelmas was within the statute, the cases of Lexington v. Clarke, 2 Vent. 223, and Chater v. Becket, 7 T. R. 201, are decisive to show that the whole is void.

Cur. adv. vult.

Lord Tenterden, C. J., now delivered the judgment of the Court.

We are of opinion that this action is not maintainable. One Thomas Thomas was tenant to the plaintiff of certain premises, and indebted to the plaintiff in a *669] sum *of about 17l. for rent due at Lady-day. In August the defendant, an auctioneer, was about to sell the goods of the said tenant on the demised premises. The plaintiff came to the premises, and required security for The defendant promised that if the plaintiff would allow the sale to proceed he would pay him the arrears of rent then due, and also the accruing rent up to Michaelmas then next. This promise was by word only, without writing. Some money had been paid, but not quite so much as the amount of the arrears due at Lady-day. At the trial a verdict was given for the whole difference between the amount of the money paid and the amount of the rent up to Michaelmas, including in that amount the arrears of the rent due at Lady-day. The question is, Whether the plaintiff could recover the whole of that sum, or the difference between the money paid and the arrears due at Lady-day? or whether the whole contract was void? We think the whole was void. Several cases were quoted at the bar in support of the plaintiff's claim; but there is no case in which the promise of payment has gone beyond the amount of the right vested in the party to whom the promise was made, or beyond the assumed value of the fund out of which the payment was to be made. In Edwards v. Kelly, 6 M. & S. 204, the landlord to whom the promise was made had actually distrained the goods of his tenant, and delivered them to the defendant to be sold in consideration of his promise to pay the rent due for which the distress had In Castling v. Aubert, 2 East, 325, the plaintiff gave up to the defendant policies of insurance on which the *plaintiff had a lien to secure *670] defendant poincies of insurance on the faith of that lien had accepted for himself against bills which he on the faith of that lien had accepted for the accommodation of the assured, and the person to whom he delivered them promised to discharge the bills and give to the plaintiff the same indemnity that his lien afforded him. In these cases the promise was founded on a new consideration distinct from the demand that the plaintiff had against the third person, although its performance would have the effect of discharging that demand, and releasing that person. In Williams v. Leaper, 2 Wils. 308, 3 Burr. 1386, there was no actual distress, but there was a power of immediate distress, and an intention to enforce it; and I think the Judges must be understood to have considered that power as equivalent to an actual distress. It is not necessary now to decide whether it was rightly so considered, because supposing it to have been rightly so considered, the decision will not go beyond the amount of the arrears then due, and for which the right of distress might have been immediately exercised.

But this reasoning will not apply to the accruing and future rent. The plaintiff could not have distrained for that rent. The defendant, by paying all that was due at Lady-day, might have proceeded to sell the goods. If that sum were paid or secured, the plaintiff sustained no loss or detriment by the sale of the goods. So that the promise to pay the accruing rent exceeded the consideration, and cannot be sustained on the ground on which the cases referred to are to be sustained, but is nothing more than a promise to pay money that would become due from a third person, and is within the words of the statute, and the mischief

intended to be remedied *thereby. And as to so much, therefore, the [*67]

promise is void by the statute.

The next question, then, is, Whether the promise, being void in part, can be held good as to the other part, viz., the arrears due at Lady-day, in respect of which it might have been good if confined to those arrears. And upon this point the two cases of Lexington v. Clark, 2 Vent. 223, and Chater v. Becket, 7 T. R. 201, quoted in the argument, are authorities directly in point against the plaintiff. In each of them the promise was as to a part, held not to be within the statute, and as to a part to be within the statute; and the actions proceeded for the recovery of the part not within the statute, the other part having been satisfied. But it was held that the promises were entire, and that being in their commencement void in part, they were void altogether. For these reasons, and upon these authorities, we think the plaintiff can recover nothing. The rule for entering a general verdict for the defendant must therefore be made absolute.

COTHAY and Others v. FENNELL and Others. April 29.

Where three parties agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and he made a contract for the purchase accordingly: Held, that all might join in suing the vendor for a breach of that contract.

Assumpsit on a contract for the sale by defendants of a quantity of Barbary gum to the plaintiffs. Plea, the general issue. On the trial before Lord Tenterden, C. J., at the London sittings after last Hilary *term, it appeared that Cothay carried on business in London, others of the plaintiffs at Glasgow, and the rest at Manchester. These three firms had agreed to be interested in the purchase, but that Cothay should be the actual purchaser; and he gave the order, and the broker knew him only. Upon this it was contended, that Cothay alone could sue upon the contract so made. Lord Tenterden overruled the objection, and the plaintiffs had a verdict, the defendants having leave to move to enter a nonsuit.

Gurney now moved accordingly, and contended, that the private agreement between the three houses did not give them a joint right of action against the vendors. They were not all parties to the contract, and if the vendors had been obliged to bring an action on the contract, it must have been against Cothay alone. [LITTLEDALE, J. Cannot a dormant partner sue on a contract made by the ostensible partners?] Yes; but there he is a party to the contract.

Per Curiam. If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made. In Young v. Hunter, 4 Taunt. 582, Gibbs, C. J., puts one special instance to the contrary; but that does not govern the present case. Here, Cothay may be considered as agent for the Glasgow and Manchester houses, *or they may be treated as dormant partners in this transaction; and a dormant partner in one instance, may sue as well as a dormant partner in the general business of a mercantile house. Rule refused.

DOE dem. KETTLE and Others v. LEWIS. April 29.

The stamp required by the 55 G. 3, c. 184, for a lease, is regulated by the consideration (whether fine or rent) expressed to be paid, and not that which is actually paid.

EJECTMENT for premises in the county of Kent.

At the trial before Bayley, J., at the last Spring assizes for Kent, the lessors of the plaintiff made a primâ facie case, in answer to which, the defendant set up a lease for a term which was not expired. The lease, which was granted after the 55 G. 3, did not appear on the face of it to have been granted in consideration of a premium; and it had the stamp required by the 55 G. 3, c. 184, according to the rent reserved. The plaintiff then proved that the lease was granted in consideration of a gross sum of 2001., in addition to the annual rent; and it was contended that there should have been an ad valorem stamp on the premium, and that the lease could not be received in evidence for want of such stamp. The learned Judge overruled the objection, thinking that the statute applied only to such considerations as were expressed in the lease; and the plaintiff was nonsuited, with leave to move to enter a verdict in his favour.

Law now moved accordingly. The 55 G. 3, c. 184, schedule, part 1, requires that "a lease of any lands, &c., granted in consideration of a sum of money, by *674] way *of fine, premium, or grassum, paid (not 'expressed to be paid,') for the same, without any yearly rent, or with any yearly rent under 201., shall pay the same duty as for the conveyance on the sale of lands for a sum of money of the same amount." Then follows a list of duties to be paid for leases at a yearly rent, without any sum of money, by way of fine. Then it goes on, -"Lease of any lands, &c., granted in consideration of a sum of money by way of fine, premium, or grassum, and also of a yearly rent amounting to 201. or upwards, both the ad valorem duties payable for a lease in consideration of a fine only, and for a lease in consideration of a rent only of the same amount." In this part of the schedule there is nothing said about the fine or premium being expressed to be paid, and the duty paid on the lease in question was, by the very words of the schedule, sufficient only for the amount of rent reserved where no fine is paid. It cannot, therefore, be sufficient where the fine is paid. Here a fine was paid, and therefore the stamp was not sufficient, and the lease improperly received in evidence. [BAYLEY, J. Is there not a penalty for not truly setting out the consideration?] There was in the 48 G. 3, c. 149, and perhaps it may be held, that all penalties thereby imposed are incorporated in 55 G. 3, c. 184, by s. 8.

Lord TENTERDEN, C. J. If the case of Duck v. Braddyll, 1 M'Lel. 217, had never been decided, I should nevertheless have come to the conclusion that the stamp-duty is to be regulated by the sum mentioned and expressed in *the lease. There are many instances in which a party mentioning a wrong sum is liable to a penalty, and I am inclined to think it applicable to this case; for granting a lease in consideration of a premium, is a sale of an interest in the premises for a term of years. Looking at the schedule to the 55 G. 3, c. 184, it is provided, that a lease granted in consideration of a premium, and also a yearly rent amounting to 201. or upwards, shall pay both the ad valorem duties payable for a lease in consideration of a fine only, and for a lease in consideration of a rent only of the same amount. Then what is the ad valorem duty for a lease in consideration of a fine only? It is to be the same as on a conveyance. what is the duty on a conveyance on the sale of lands, &c.? It is to be according to the sum expressed in the conveyance, and not according to the sum paid Looking back, therefore, to that part of the schedule, it appears that the duty on the lease was to be regulated by the amount of rent reserved, and the premium therein expressed to be paid. The case of Duck v. Braddyll is exactly in point. It was there argued that a lease granted after the statute 55 G. 3, c. 184, was passed was void, because the consideration given was greater than the sum expressed, and upon which the duty was paid. The Lord Chief Baron Alexander there said, that this was no answer to the action, "because, upon consideration of the stamp laws, it appears that the duty is directed to be paid upon the consideration expressed on the face of the deed. But the transaction is said to be a fraud upon the revenue. Admitting it to be so, it is settled by the case of Robinson v. Macdonnell, 5 M. & S. 228, *that that does not vitiate the instrument." If the construction were different, and the lease were assigned, it would follow that the title of the assignee would be defeated by evidence of a larger sum having been paid as a consideration than appears on the face of the instrument, and of which he was totally ignorant. The construction that obviates such a consequence appears far more reasonable, and it is consistent with the words of the statute. I am therefore of opinion, that the lease was a good answer to the action, and that the nonsuit was right. The rest of the Court concurring.

WORSWICK, Administrator of A. WOOD, v. BESWICK and Others. April 80.

In actions by bill in the King's Bench, the defendant may under the general issue give in evidence matter (amounting to accord and satisfaction of the debt, or damages and costs), which occurred after the issuing of the latitat, and before declaration; and such matter is an answer to the action.

TROVER for household furniture, the property of plaintiff, as administrator. Plea, the general issue. At the trial before Parke, J., at the last assizes for Lancashire, it appeared that, in August 1829, the defendants had sold property which belonged to the plaintiff as administrator of Wood, and kept the proceeds. On the 14th of December, 1829, the plaintiff issued a latitat, returnable in Hilary term, when the declaration was filed. On the 16th of January, the defendants, without communication with the plaintiff's attorney, paid to the plaintiff a sum of 811. 1s. 11d., the amount produced by the sale of the goods after deducting expenses; and there was evidence that the plaintiff was satisfied with that payment. For the *defendant it was contended, that the latitat was the commencement of the action, and that nothing done after that could be given in evidence as an answer to the action under the general issue; and, secondly, that the supposed settlement of the cause was a fraud on the plaintiff's attorney, and that according to either view of the case, the plaintiff was entitled to a verdict for nominal damages. The learned Judge was of opinion, that if the plaintiff received the sum of 81l. 1s. 11d. in satisfaction of his claim for damages and costs, it was an answer to the action, unless the jury found the transaction fraudulent; and he directed the jury to find for the defendants, if they thought that the money was received in satisfaction, and that the transaction was not fraudulent for the purpose of cheating the plaintiff's attorney of his The jury found for the defendants, and the plaintiff had leave to move to enter a verdict in his favour, with nominal damages, if the Court should be of opinion that the direction was wrong.

Alderson now moved accordingly. It is a general rule that payment of debt and costs, after the commencement of an action, cannot be given in evidence, under the general issue, as an answer to the action. It must be pleaded specially as a bar to the further maintenance of the action, Holland v. Jourdine, Holt's N. P. C. 6, Le Bret v. Papillon, 4 East, 502, Lee v. Levy, 4 B. & C. 390. [Parke, J. The payment in this case was before declaration, and that on the record appears to be the commencement of the action.] The real question is, What is to be deemed the commencement of the action? Now, where the time is material, *the party is always at liberty to treat the issuing of process as the commencement, ex. gr. to avoid a tender, or the statute of limita-

tions.

Lord Tenterden, C. J. In proceedings by bill in this Court the declaration is considered as the commencement of the action, unless, for the purposes of justice, the plaintiff is allowed to show an earlier commencement by suing out the writ. Here the jury have found that the money was paid and received in satisfaction of costs as well as damages, and they have negatived fraud; if therefore, we allowed the writ to be considered as the commencement of the action, it would have the effect of defeating instead of advancing justice. This is the same, in effect, as a plea of accord and satisfaction as to damages and costs before bill filed; and in such a case a replication of a latitat sued out before satisfaction would be bad. I am, therefore, of opinion that the direction of the learned Judge was right.

BAYLEY and LITTLEDALE, Js., concurred.

PARKE. J. The plaintiff may, if he pleases, treat the writ as the commencement of his action. But if the defendant had pleaded the facts which he proved in bar of the action and costs generally, a replication that a writ was sued out before the payment would have been bad, for the plea would disclose matter which is an answer to the writ as well as the action. In the instances put in argument, the plea is no answer to the writ: and, therefore, the replication is good.

Rule refused.

*679] *BENJAMIN WOOD and G. NOTTINGE the Younger, Assignees of ISAAC BRIGHTWEN, ROBERT BRIGHTWEN, and ISAAC BRIGHTWEN the Younger, v. GRIMWOOD.

In April, 1826, A. having contracted to purchase an estate from B., and having had the title-deeds delivered to him, agreed to deposit the same with C. as a security for the loan of 5000l., and to give him the mortgage as soon as the legal estate was conveyed to him. B. afterwards conveyed the estate to A., but before such conveyance was made, and after the title-deeds had been deposited with C., the latter refused to complete the mortgage unless A. would agree to pay usurious interest upon the sum of 5000l. A. having so agreed, delivered to C. the deed of conveyance of the estate from B. to A. A. afterwards became bankrupt, and in an action of trover brought to recover the deeds, it was held, that the original possession of the title-deeds being perfectly good, gave C. a right to the estate whenever B. should have conveyed that estate to A.; and that he, and not A.'s assignees, had a right, therefore, to the deed of conveyance from B. to A.

TROVER by the plaintiffs as assignees of the bankrupts Brightwen for titledeeds. The first count was upon the possession of the bankrupts Isaac Brightwen and Robert Brightwen before their bankruptcy; the second count was on the possession of the assignees. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Hilary term 1829, the following appeared to be the facts of the case:—The plaintiffs were assignees under a commission of bankrupt which issued on the 22d of May, 1828, against the three Brightwens, under which they were duly declared bankrupts. Isaac Brightwen carried on, at Coggeshall in Essex, the business of a brewer in partnership with his brother and son, the other two bankrupts, and also the business of a maltster and corn-dealer on his separate account. In the year 1825 the bankrupts were indebted to the defendant in the sum of 5000l. for money lent to them. sum was secured by mortgage of an estate belonging to Isaac Brightwen, and he having afterwards agreed to sell that estate to Mr. Alderman Bridges, gave notice to the defendant that his mortgage would be paid off. In the month of May *680] 1825, Isaac Brightwen and Robert Brightwen *entered into an agreement with one Tabor of Colchester to purchase of him for the sum of 16,000l. a brewery and several public-houses. The premises were part freehold and part copyhold. Isaac Brightwen applied to the defendant to advance 8000l., and proposed to secure 5000%, by mortgage on the freehold part of the property which he and his brother had agreed to buy of Tabor, and the remaining 3000%. by the bond of himself, his brother, and son. Alderman Bridges, on the 31st of August, 1825, completed the purchase of the estate he had agreed to buy of Isaac Brightwen. The parties met at the office of the defendant's solicitor and the defendant was there. The 5000l. was then paid over to the defendant by the attorney of the purchaser, and the defendant re-lent it to the Brightwens, who gave him their promissory note for it as a security until the purchase of Tabor's estate could be completed, and the mortgage deeds of the freehold part of that estate could be executed. In the month of September the defendant advanced them a further sum of 2000l. On the 18th of April, 1826, the titledeeds of Tabor were, with his consent, delivered to the defendant's solicitor, who signed a memorandum in writing, acknowledging that Mr. Brightwen had left with him, as the solicitor of Grimwood, the several title-deeds relating to the estate therein mentioned, and which was intended to be mortgaged to Grimwood for securing the sum of 5000l. immediately on the conveyance of the same estates to the said Messrs. Brightwen. In the course of the year 1826, the defendant having claimed to have the copyholds also included in the mortgage deeds, about the 28th of September, 1826, Isaac Brightwen went to the defendant to remind him that by the agreement between *them the freehold part of the premises only was to be mortgaged to him. The defendant, who was a considerable farmer, upon that occasion said he had 180 quarters of beans and 120 or 130 quarters of barley, which he wished the Brightwens to purchase, and he produced samples. He asked 55s. a quarter for the beans, and 48s. for the barley (which was old barley, of the growth of 1825); the same being much above the market price. Isaac Brightwen said, "It was 1001. more than they were worth; and he could not afford to lose so much money." The defendant said, "He knew it was, but that was the price he meant to have for them." I. Brightwen said, "Then you mean to have a bonus." The defendant said, "Yes; it is worth something for the risk." Brightwen observed, "It will be well to take care of usury." The defendant said he thought he could manage that, but he did not know he should have anything to do with it; and he afterwards said he would let it stand over till Braintree fair in the next week, and that Brightwen must then give him an answer Brightwen and his partners agreed, that as the loan was to be for their benefit, the loss on the transaction should be a joint concern. On the 4th of October, 1826, Isaac Brightwen met the defendant at Braintree fair, and the conversation about the beans and barley was renewed. The defendant said, he would not take anything less than the price he had mentioned; and upon Brightwen's observing that he (defendant) knew that it was more than the market price, the defendant said, "I will have the price, or I will not complete the mort-gage." Brightwen said, "If it must be so, I will take them; but I must have six months' credit, as it will take some time to turn them into money." The *Brightwens accordingly had the beans and barley at the price mentioned, and they sold them at a loss of 81%, though the market price [*682] was higher when they sold them than it was when they purchased them of the defendant.

The brewery and public-house were conveyed by Tabor to the two Brightwens on the 2d of September, 1826, and the mortgage to the defendant was executed by them on the 25th of October, 1826. The conveyance to them from Tabor was at that time handed over to the defendant's solicitor. Upon this evidence Lord Tenterden was of opinion, that it would be a question of fact for the jury, whether the bargain respecting the beans and barley was made as the price of accepting the mortgage for the money previously advanced, instead of immediately calling it in? If they thought that was the price of accepting the mortgage and continuing the loan, it was a corrupt contract, which would vitiate whatever was done afterwards; that it would affect the deposit of the conveyance executed by Tabor to the bankrupts, but that the deposit of title-deeds previously delivered to the defendant would not be vitiated; and he finally told the jury to find for the plaintiffs, if they thought, upon the evidence, that the purchase of, and the bargain respecting, the beans and barley was a consideration to pay the

defendant for going on with this transaction, and suffering the bankrupts to retain the 5000l. for a further time, instead of drawing it out, and that that bargain respecting the beans and barley was his inducement to let the 5000l. remain in their hands, and to take a mortgage instead of calling for the money immediately. But if they were not satisfied that the bargain was a consideration for *683] accepting the mortgage *and allowing the loan to continue, but that the acceptance of the mortgage-deed was to be referred solely and distinctly to the original contract, not influenced by the bargain as to the beans and barley, then they should find for the defendant. The jury found for the plaintiff, with nominal damages, the defendant undertaking to deliver to the assignees the deeds of conveyance from Tabor to the bankrupts, which were deposited on the 26th of October.

A rule nisi had been obtained for a new trial, upon the ground, first, that the plaintiff, according to Fitzroy v. Gwillim, 1 T. R. 153, ought, in order to entitle himself to recover the deeds, to have tendered to the defendant all the money really advanced; secondly, that the defendant, by the deposit of the title-deeds of Tabor's estate in April, became the equitable mortgagee, and was thereby entitled, as soon as the purchase was completed, to have the legal estate conveyed to him, and the deeds, which were evidence of the legal estate, delivered to him when the title was completed; and that the deeds deposited in October were so deposited in pursuance of that contract, and not in pursuance of the usurious one.

On the other hand, a cross rule had been obtained by the Attorney-General

to extend the verdict for the plaintiffs to all the other deeds.

The Attorney-General and Follett, in last Hilary term, showed cause against the rule for the new trial. The case of Fitzroy v. Gwillim cannot be supported on any principle, because a person can have no title to the possession of deeds obtained upon a usurious consideration. The *mortgage, therefore, is void; and if that be void, the defendant can have no right to keep the deeds by which Tabor conveyed to the bankrupts, and which were delivered on the same day the mortgage was executed. [\hat{B} rougham admitted that he could not support the decision in Fitzroy v. Gwillim.] Secondly, assuming that the deposit of Tabor's title-deeds in April gave the defendant an equitable lien, he could not, after the corrupt contract which has been found by the jury, enforce that claim in a court of equity, because he was then a party in delicto. mortgage was accepted in pursuance of the corrupt contract, for the defendant refused to go on with the original bargain: he said he would not complete the mortgage, unless Brightwen would pay the price he asked for the beans and barley. [PARKE, J. The question is, whether he had not an equitable title to that deed before the mortgage was executed? If his title first arose at the time of the mortgage, it is quite clear that it could not be maintained on account of the usurious contract; but prior to that contract he had an equitable title to the deeds of conveyance from Tabor to the bankrupts, and such title is a good answer to an action brought by the assignees of a bankrupt. Suppose, at the time this usurious contract was made, the defendant had had those deeds deposited with him, he would then have had a legal title to them. Would he lose that title by any subsequent usurious transaction, as by refusing to continue the loan without a bonus? and if he would not, then does he lose his equitable right in this case; if he does not, he cannot be answerable to the assignees. He did not acquire his equitable title by the corrupt bargain, he had it before. If, by saying that he would not complete, he meant to abandon all *right to have a mortgage, and no longer to enforce the contract made in April for that mortto remain on loan any longer, then he has not lost his equitable right.]

gage, then he has lost his equity by his own act. But if he intended not to abandon his existing right, but only to say that he would not allow the money deeds were not deposited as a security for the 50001, but for the specific pur-Pose of completing the mortgage security; and having been deposited for that Purpose, and the person with whom they were deposited having refused to com-

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plete that mortgage, he would no longer have an equitable right, because he had refused to perform the specific purpose for which the deeds were deposited.

Brougham, F. Pollock, and Wightman, contrd. The plaintiffs in this action cannot recover the deeds executed subsequently to the alleged usurious transaction, because the execution of the mortgage by the party depositing the deeds was not voluntary. The title-deeds to Tabor's estate having in the April preceding been deposited by Brightwen as the security for the 5000%, the defendant then became the equitable mortgagee, Russell v. Russell, 2 Bro. Cha. Ca. 290; and a deposit of title-deeds of an estate on a contract of loan or upon any other good consideration, gives to the pledgee a right to have the legal estate conveyed to him, Ex parte Wetherell, 11 Ves. 401. So upon a contract for the sale of an estate, the title and abstract to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract until either the purchase is finally rescinded by consent or declared impracticable by a court of equity, Roberts v. *Wyatt, 2 Taunt. 268. Here the defendant had nothing to complete, but Brightwen had; he had only partially secured the estate to the mortgagee by depositing with him Tabor's title-deeds, and thereby gave him an equitable right: he had yet to give him the legal right to the land. The defendant was entitled by virtue of the contract made in April 1826, to the conveyance made in October. He did not lose that right by agreeing to give an illegal consideration for it, because his right existed independently of that consideration. In Barnes v. Hedley, 2 Taunt. 184, it was held that after usurious securities given for a loan had been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest was founded on a sufficient consideration, and binding. Suppose there had been a legal mortgage, and the defendant had said he would not continue the loan unless 10 per cent. was paid, and that interest was paid, that would not vacate the original security; for the statute declares securities to be void only where they are made for the payment of money lent upon usury. A contract or security which is originally valid cannot therefore be avoided by a subsequent usurious contract. If after a mortgage had been executed the defendant had said he would call in the money unless usurious interest was paid, the mortgage deed would be good, although the defendant might be subject to the penalties imposed by the statute of usury. The defendant is clearly entitled to retain all the deeds deposited before the 4th of October.

As to the other deeds, the only question is, whether they were deposited in pursuance of the original *contract made in April? If they were, the defendant is entitled to retain the verdict. The question which ought to have been left to the jury was, whether Grimwood would, unless the usurious consideration had been paid, have refused to accept the deposit of the deeds? [BAYLEY, J. He would not have refused to accept the deposit, but he would have refused to let the money remain on loan. PARKE, J. The plaintiffs, as assignees, are only entitled to what the bankrupts were legally and equitably entitled to. By the deposit, the bankrupt had parted with his equitable right to the estate for a good consideration. The defendant, therefore, at the time when the usurious contract was made, had an equitable right to have the estate conveyed to him, and the title-deeds delivered to him as soon as the purchase was complete. That was the state of things when the usurious contract was made; then he said that unless a bonus were given to him, he would not complete the mortgage. Now, did he thereby mean to abandon the equitable right which he had to have the estate conveyed to him? or did he mean that he would not give any longer time of payment unless he had the bonus? If he had an equitable title before to have the estate conveyed to him, he must have it still; and if he had the equitable estate, then the assignees have not.] Cur. adv. vult.

Lord TENTERDEN, C. J.,(a) delivered the judgment of the Court.

We are of opinion that the rule for a new trial should be made absolute. *The defendant had, in April 1826, obtained the possession of the title-*688] deeds of an estate about to be purchased of Tabor by two of the Brightwens, upon a good consideration, unmixed and untainted with any usury whatever; and the question is, whether or not he is entitled to retain the conveyance of the estate from Tabor to the Brightwens, which was deposited with him in October? The objection was, that in the interval between the deposit of the title-deeds in April, and of the conveyance from Tabor to Brightwens in October, there had been conversations between Isaac Brightwen and Grimwood, in which Grimwood had insisted upon having a bonus, otherwise, according to his own phrase, he would not complete; and it was contended, on behalf of the plaintiffs, that the deed of conveyance from Tabor to the Brightwens having been delivered after that conversation, that conversation being evidence of a usurious contract, Grimwood could not retain that deed. We think, however, that the original possession of the title-deeds being perfectly good, and free from any vice or any kind of usury, gave him a right to the estate whenever Tabor should convey that estate to the Brightwens; and that he having a right to the estate whenever it should be conveyed, had a right to the deed of conveyance from Tabor to the Brightwens. The verdict taken was confined to that deed, and we think he is entitled to retain that deed, and consequently that the rule for a new trial should be made absolute. The rule obtained on behalf of the plaintiffs, that the verdict should stand, as a security for the delivery up of other deeds, must of

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course be discharged.

*WOOD and Another v. GRIMWOOD.

Rule absolute for a new trial.

In January, 1827, A. paid C. a premium, in consideration of his having agreed to continue to A. on loan for one year a sum of 5000L, at 5 per cent. interest, payable half yearly, on the 8th of March and the 8th of September. The half year's interest at the rate of 5 per cent., on the 8th of March was paid to C.: Held, that C. having then taken, accepted, and received more than 5 per cent. for the forbearance of 5000L for half a year, the offence of usury was then complete, and that C. did not commit a second offence by reason of his having received on the 8th of September another half year's interest at the rate of 5 per cent.

Where a plaintiff in a qui tam action for usury, sued out his writ in September, 1828, and delivered a declaration in Trinity term, 1829, and at the Summer assises in that year withdrew

the record, the Court refused to allow him to amend the declaration.

The statute 6 G. 4, c. 50, enacts, that the party who shall apply for a special jury shall pay the costs occasioned thereby, unless the Judge before whom the cause is tried shall immediately ofter the verdict certify: Held, that a defendant who had applied for a special jury was not entitled to the costs of that jury, where the Judge who tried the cause nonsuited the plaintiff on his opening.

This was an action for penalties. The first count of the declaration stated, that 5000l. had been lent by the defendant, and secured to him by the note of Isaac Brightwen, Robert Brightwen, and Isaac Brightwen the younger, and 30001. had been lent by him, and secured by bond of the same persons; that it had been agreed that the 5000l. should be secured by mortgage to be granted by Isaac Brightwen and Robert Brightwen; that the said sums had been forborne by the defendant upon the note and bond, before and from the 9th of September and 28th September, 1826, respectively, until the time of the contract next mentioned; that it was corruptly agreed between the defendant and Isaac Brightwen, on the 4th of October, 1826, that defendant should sell certain beans and barley to I. B., at prices far exceeding the value, and should take, by way of shift, the difference between the prices and the true value thereof as a bonus for the further forbearing of the said sums as hereinafter next mentioned, over and above 5l. per cent., to be also paid upon them while forborne; such prices to be paid at three months' credit. That defendant, in pursuance of the contract, forbore the 5000l. upon the note till the execution of the mortgage next mentioned,

and from its execution, *upon the mortgage until the 8th September, 1827, and forbore the 3000l. upon the bond until the 28th of September, 1827. That on the 25th of October, 1826, I. B. and R. B. executed a mortgage bearing date the 9th of September, 1826, by which the 5000%. was mentioned as a sum lent by the defendant and one John Cunnington to I. B. and R. B., and was made payable to the defendant and I. C., at the expiration of one year from the date, with interest at 51. per cent., on the 8th of March and 8th of September ensuing the date. That the defendant, on the 10th of January, 1827, was paid for the beans and barley the prices agreed upon, amounting to 760l. 10s., and defendant took the said difference, amounting to 114l. 2s. 8d., as a bonus That on the 25th of April, 1827, the defendant and J. Cunnington took from I. B. and R. B. 1251. for forbearance of the 50001., from the 9th of September 1826 to the 8th of March 1827, and defendant took from I. B., R. B., and I. B., 75l. for forbearance of the 3000l. from the 28th of September 1826 to 28th March 1827. And that on the 24th of October, 1827, defendant took 2001, for forbearance of the 50001, and the 30001, viz. 1251, from I. B. and R. B., for forbearing the 5000l. from the 8th of March 1827 to the 8th of September 1827; and 75l. from I. B., R. B., and I. B., for forbearing the 3000l. from the 28th of March 1827 to the 28th of September 1827; and by so taking the said 2001, over and above the bonus, and the other sums, took above five per cent., &c., contrary to the form of the statute, &c. Plea, not guilty. The writ was sued out in September 1828. The declaration, which contained fifty-two counts, was delivered in Trinity term 1829. The plaintiff took down the record to trial at *the Summer assizes for the county of Essex 1829, but withdrew the record. A rule nisi was obtained in Michaelmas term to amend the declaration by adding sixteen counts. In Hilary term 1830,

Brodrick showed cause. The Court will not allow an amendment in a penal action, where the plaintiff has been guilty of delay in carrying on the suit. Ranking and Others qui tam v. Marsh, 8 T. R. 30. Here two assizes have elapsed since the action was commenced, and the alleged usury was committed

in April 1827.

Attorney-General, contrd, cited Cross v. Kaye, 6 T. R. 543, Maddock qui tam

v. Hammett, 7 T. R. 55. Lord TENTERDEN, C. J

Lord Tenterden, C. J. An act of parliament has limited the time within which a penal action like the present must be commenced. I think a party, who, after he has commenced such an action, has been guilty of any delay, is not entitled to any indulgence. Here the alleged usury was committed in 1827, the action was commenced in September 1828. The plaintiff did not declare till Trinity term 1829, and then did not go to trial at the next assizes. The time which has elapsed is so great, that I think the rule should be discharged

Rule discharged. At the trial before Bayley, J., at the Spring assizes for the county of Essez 1830, upon the plaintiffs' counsel stating, in addition to the facts disclosed in the former *case, that the payment of the 7601., the stipulated price of the beans and barley, in January 1827, exceeded the market price by 1141.; that by the mortgage deed the 50007. was payable at the end of one year, with five per cent. interest, payable half yearly, on the 8th of March and the 8th of September; that in pursuance of that deed, 1251., half a year's interest, due on the 8th of March, 1827, was paid in April to the defendant, and 1251., another half year's interest, due on the 8th of September, was paid in October 1827, and that the present action was commenced on the 28th of June, 1828; the learned Judge nonsuited the plaintiff, on the ground that the action was not brought within one year after the offence of usury was committed, the offence being complete on the 25th of April, 1827, when the first half year's interest reserved by the mortgage deed was paid; and that in October 1827, when the interest for the second half year was paid, the defendant received no more than legal interest.

Stephen, Serjt., now moved for a new trial. This action was brough within

one year after an offence committed. The bonus was taken by the defendant as a consideration for his forbearing the principal money lent for the period of one whole year. A distinct portion, therefore, of that premium was the consideration for his forbearance for the last half year. Although, therefore, the defendant committed one offence of usury as soon as he received the first half year's interest reserved by the deed, he committed another distinct offence when he received the second half year's interest, because a portion of the entire premium was applicable to each *half year. In Wasle v. Wilson, 1 East, 195, there was a contract to forbear 600l. for a year, reserving interest at the rate of 5 per cent.; but a premium of ten guineas was paid in the first instance, and it was contended that the loan being for a year, and the premium paid for that time, the usury was not complete till the end of the year, when the whole interest was received in addition to the premium; but this Court held that the usury was complete upon the lender's receiving any part of the growing interest within the year; and Lawrence, J., observed, that there was a premium of ten guineas paid at first, which was to run through the whole year; and Le Blanc, J., said that he was of opinion that at least one moiety of the premium was to be apportioned to the half year's interest which was received, and that the true spirit of the agreement was, that the premium was to run through the whole year in proportion as the interest accrued. Although, therefore, the decision of the Court in that case is a direct authority only to show that the offence of usury was committed here when the first half year's interest was paid, yet the opinions expressed by Lawrence and Le Blanc, Js., warrant an inference that a distinct offence was committed when the second half year's interest was paid. In Scurry v. Freeman, 2 Bos. & Pul. 381, A., in 1794, lent B. 500l. upon his bond, and an assignment by way of mortgage of leasehold premises, and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified. After the execution of the deeds, B. gave A. 501., and paid interest at the rate of 5 per cent. on the 500l. for five years; at the end of which period an action was brought for penal-*691] ties, founded on the *receipt of the last half year's interest in 1799. It was objected, that the crime of usury so as to subject the party committing it to penalties, being complete on the taking of the usurious interest, was in that case committed by the receipt of 50l. given by way of compensation for the loan in September 1794, and, consequently, that the action was not brought in due time; but the Court held that the receipt of the last half year's interest was usurious, and that consequently the action was brought in due time. case is an authority to show that the action in this case is maintainable in respect of the usurious interest received by the defendant in October 1827, because it proves, that a bonus originally taken will vitiate all subsequent payments of interest, though in themselves not exceeding 5 per cent., and that every such payment constitutes a distinct offence.

Lord TENTERDEN, C. J. I am of opinion that the nonsuit was right. appears that, before September 1826, Grimwood had advanced the Brightwens 5000%. That sum had been secured by their promissory note; but it was agreed, that it should be secured by a mortgage to be afterwards executed. time arrived for the execution of the mortgage, Grimwood gave the Brightwens to understand that he would not complete the mortgage unless they would purchase of him some beans and barley at a price much higher than they would have produced in the market, and they agreed so to do. The mortgage deed, which bears date the 9th of September, 1826, was executed in October. The 50001. was payable at the end of one year, with interest at 5 per cent. payable half yearly, on the 8th of March and 8th of September. In January 1827, 7601., the stipulated price of the beans and barley, was actually paid to *the defendant. It exceeded the market price by 114l. On the 25th of April, 1827, 1251., the half year's interest due by the mortgage deed on the 8th of March, was paid to the defendant. On that day, therefore, the delendant had taken, accepted, and received 2391. for the forbearance of 50001. for half a year, and an action might have been brought against him for the penalty, viz. treble the amount of the money lent, but no action was then brought. Another half year's interest became due on the 8th of September, 1827, and for that half year's interest another sum of 1251. was paid to the defendant on the 24th of October, 1827. The present action was commenced on the 25th of June, 1828, and, therefore, more than one year after the payment of the half year's interest made in April, but less than one year after the payment made in October. It is clear that no more than 5 persent, was received in October 1827, unless it be supposed that part of the bonus of the 1141. was then paid; but the whole was, in fact, paid in January 1827, and we cannot, in order to subject a party to a penalty, presume contrary to the fact that any part of the bonus was paid in October 1827. The case of Wade v. Wilson, I East, 195, does not militate against our decision. It was not decided there that any action could be maintained for penalties in respect of the payment of the 5 per cent. interest for the last half year, but merely that the receipt of interest by the defendant for the first half year, which, with what he had before received, amounted to more than 5 per cent., constituted usury. By deciding that, the Judges decided all that was necessary. Scurry v. Freeman, 2 Bos. & Pul. 381, was decided on *the ground that the actual loan was only to be deemed a loan of 450l., and not of 500%, and that the receipt of 25% as one year's interest was therefore usurious. I think we should do great violence to the words of the statute, if we held that in this case more than 5 per cent. was received within the year before the action was commenced.

LITTLEDALE, J. I think there should be no rule in this case. It appears that there was a contract for a loan of 5000l.; that it was secured in the first instance by a promissory note, but that it was agreed that it should be afterwards secured by mortgage; that the defendant, before the mortgage was executed, informed the borrowers that he would not complete the mortgage unless he had a bonus. They agreed to pay the bonus, and did actually pay it in January The mortgage deed, which bore date on the 9th of September, 1826, was executed in October that year. The first half year's interest became due on the 8th of March, and was paid on the 27th of April. The offence of usury was then complete; for the defendant had then taken, accepted, and received more than at the rate of 5 per cent. per annum upon the sum lent. I think that the 114l. cannot be considered as divisible so as to be applied to the whole period for which the money was lent, in order to make the party, who afterwards received half-yearly the legal interest as it became due, liable to the penalty of usury. The subsequent payments were common payments of 5 per cent. But even if the bonus were apportionable during the whole period for which the loan was to continue, I doubt whether any action could be maintained for penalties after the receipt of the first half-yearly *payment, because then the offence was complete. The defendant had taken more than five per cent. in respect of the corrupt contract, and had thereby subjected himself to the penalty imposed by the statute, of treble the money lent; and the statute does not subject a party to a second penalty, for taking a second time more than at the rate of 5 per cent. in respect of the same contract.

PARKE, J. I am of the same opinion. The only sum received by the defendant within one year before the commencement of this action was 125l., being half a year's interest at the rate of 5 per cent. upon the original loan which became due on the 8th of September. That, primâ facie, was legal interest, and no offence was committed against the statute by the receipt of it. But it is said that the bonus of 114l. was paid as a premium for the forbearance of the 5000l. for one year, and that some part of that bonus is to be considered as paid for the forbearance for the last half year, the interest in respect of which, was received in October 1827. That argument is founded on some expressions which fell from Lawrence and Le Blanc, Justices, in Wade v. Wilson, I East, 195, not necessary to the decision in that case. But even admitting that argument to be correct, it does not follow, that an action can be maintained for a

penalty, by reason of the defendant's having received that half year's interest; because, looking to the words of the statute, I am of opinion that the moment one penalty was incurred upon one bargain or loan, no other offence could be committed in respect of the same bargain or *loan, by reason of the lender having received a further sum by way of usurious interest. statute of 12 Anne, st. 2, c. 16, enacts, "that all persons who shall upon any contract take, accept, and receive by way or means of any corrupt bargain, loan, &c., for the forbearing or giving day of payment for one whole year of or for their money above the sum of 5l. for the forbearing of 100l. a year, and so after that rate, shall forfeit and lose for every such offence the treble value of the The statute, therefore, requires two things to constitute the moneys lent, &c. offence: a corrupt bargain; and an actual taking of a higher rate of interest than 5 per cent. for forbearing or giving day of payment for one whole year. As soon as these two things concur, the offence contemplated by the statute is The party who has received the usurious interest in respect of the corrupt bargain then incurs the penalty, and I think the only penalty attached by the statute to that corrupt bargain and the receipt of usurious interest thereon, by forfeiting treble the value of the moneys lent or forborne. If it were otherwise, and each subsequent payment of the legal interest should constitute a distinct offence of usury, where a premium has been given; the consequence would be, that if a party took legal interest for such a loan, at intervals, he would be liable to forfeit treble the amount of the moneys lent, not merely once, but each time he received the interest; and if those intervals were short, penalties to the amount of many thousands might be incurred by a loan of a single 1001. This never could have been the intention of the legislature, I think it must have meant that no more than three times the amount of the money lent, could ever be forfeited by the offender. In the *case of Scurry v. Freeman, 2 Bos. & Pul. 382, this point does not appear to have been pressed on the attention of the Court.

BAYLEY, J. The offence of usury consists in taking, accepting, and receiving more than 5 per cent. interest in respect of a corrupt bargain, and we must consider the statutable provision inserted in the declaration, and then we are to say whether more than 5 per cent. has been received by this defendant within one year before the action was commenced. In point of fact, only two sums of 1251. were received within the year before the action was commenced, and they do not exceed 5 per cent. upon the sum lent, provided the debt of 50001. continued. Now, it has been decided that the taking of usurious interest upon a pre-existing debt, does not destroy that debt, although the party may be liable to penalties. The 50001., therefore, continued a debt, and two payments only, not exceeding the legal rate of interest, were made within the year before the action was commenced. The case of Scurry v. Freeman may be right, and would undoubtedly be right, provided the lender of the money, after the 501. was returned, had claimed 4501. as the debt.

This cause having been set down for trial at the Summer assizes for the county of Essex 1829, the plaintiffs withdrew their record, and at the Spring assizes 1830 the plaintiffs were nonsuited. A special jury was moved for and nominated on the part of the defendant, and the learned Judge certified that the *700] *cause was proper to be tried by a special jury. On the taxation of costs, it was objected, that the defendant ought not to be allowed the costs of a special jury on a judgment of nonsuit; nor the costs of the special jury on occasion of the record having been withdrawn at the Spring assizes, and that the certificate of the judge could only apply to the day of trial. The Master overruled both objections, and the defendant's costs were taxed at a sum of 464l., 47l. of that sum having been allowed as the costs of the special jury. A summons was taken out for the Master to review his taxation; but the judge declined making any order, stating that the plaintiffs might apply to the court, and in the interim pay the amount on the Master's allocatur under protest; and they accordingly paid the sum of 464l.

Follett afterwards obtained a rule for the Master to review his taxation, and to disallow the costs of the special jury, and for the defendant to refund so much of the sum of 464l. as the master should find to have been overpaid: in moving for the rule, he urged that the Judge of assize had not any power to grant a certificate; and, secondly, that even if he had, the Master ought not to have allowed the costs of the first jury, who were not sworn, and who were paid by the defendant after the plaintiffs had withdrawn the record; that by the 24 G. 2, c. 18, s. 1, it was enacted, "that the party applying for the special jury shall pay the costs and expenses thereof, unless the Judge before whom the cause is tried shall, immediately after the trial, certify in open court under his hand upon the back of the record, that the same was a cause proper to be tried by a special jury." By that statute, therefore, the discretion of the Judge was limited; he could *only certify immediately after the trial; and in [*701 Waggen v. Shaw, 3 Campb. 316, Lord Ellenborough was of opinion, that a Judge had not authority to grant a certificate the day after the trial; and in Crockford v. Orme, 1 Carr. & P. 537, where the plaintiff was nonsuited without any evidence being given, Lord Tenterden refused to certify, on the ground that the case had not been gone into. The statute 6 G. 4, c. 50, enacts, "that the party who shall apply for a special jury shall pay the costs occasioned thereby, unless the Judge before whom the cause is tried shall, immediately after the verdict, certify," &c. Here the legislature have varied the term, and they must be intended to have done so intentionally. The cause was not tried; at all events there was no verdict.

Brodrick showed cause. Here the cause was, in fact, tried. The plaintiffs had stated all the facts they were capable of proving, and the learned Judge was of opinion, that if all the facts stated were proved upon oath, he would be bound to direct the jury to find for the defendant; and having nonsuited the plaintiff, immediately after the trial, certified that the cause was a fit cause to be tried by a special jury. It is true, that the statute 6 G. 4, c. 50, substitutes the word verdict for trial; but though that term be used, the intention was manifestly the same.

Lord TENTERDEN, C. J. We must construe the term "verdict" in the act of parliament in its ordinary sense. Here there was no verdict, and consequently the Judge had no power by his certificate to charge the plaintiff *with the costs of a special jury which was moved for by the defendant.

BAYLEY, J. I am of the same opinion. The term "verdict" must be con-

strued in its ordinary sense. Here there was no verdict.

PARKE, J. I think the legislature must have intended to give the Judge a discretionary power to allow the costs of the special jury to the party at whose instance it was obtained, in those cases only where the jury have been called on to exercise their judgment by returning a verdict. It is possible that the legislature may have meant otherwise, but we must collect that intention from the words of the act of parliament construed in their ordinary sense. The statute 49 G. 3, c. 121, s. 10, has received a similar construction. It enacts, that in actions by assignees of a bankrupt, the commission and proceedings shall be evidence of the trading, &c., unless notice shall have been given to dispute; and where such notice shall have been given, the Judge may grant a certificate that the matter disputed was proved, and the assignee shall be entitled to the costs occasioned by such notice, and such costs shall, in case the assignee shall obtain a verdict, be added to his costs; and if the other party shall obtain a verdict, shall be set off or deducted from the costs which such other party would otherwise be entitled to receive from such assignee. It was held that the assignees are not entitled to costs upon a Judge's certificate, under this clause, where they have been nonsuited, Atkins v. Seward, 1 Brod. & Bing. 275. Rule absolute.

*703] *NORMAN and Another, Assignees of Thomas, a Bankrupt, v. BOOTH and Another. May 1.

Assumpeit by the assignees of a bankrupt against a sheriff, to recover the proceeds of goods seized under a fi. fa. The defendant did not give any notice to dispute. The plaintiffs proved that an act of bankruptcy was committed before the levy: Held, that they were not bound to prove that a petitioning creditor's debt existed at that time, per Lord TENTERDEN, C. J., and PARKE, J. BAYLEY, J., and LITTLEDALE, Js., contrd.

Assumpsite for money had and received. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the Westminster sittings after last Hilary term, it appeared that under a fieri facias against the bankrupt, the defendants (sheriff of Middlesex) levied on his goods on the 10th of September. The goods were sold on the 25th, and the money was paid over on the 22d of October. A commission issued on the 14th of October, and the plaintiff proved that an act of bankruptcy was committed before the levy. The defendants had not given notice to dispute the trading, petitioning creditor's debt, or act of bankruptcy; but for the defendants it was contended, that if the plaintiffs rested their case on the fact of an act of bankruptcy having been committed before the seizure, they were bound to prove that a good petitioning creditor's debt then existed. Lord Tenterden overruled the objection, and the plaintiffs had a verdict.

J. Williams now moved for a rule nisi for a new trial on the ground of misdirection, and contended, that although the defendants, by omitting to give notice, were not at liberty to dispute that there was a valid commission, and that there were such a trading, petitioning creditor's debt, and act of bankruptcy, as would support that commission, yet if the plaintiffs, in support of their case, *704] found it necessary to prove the date of an *act of bankruptcy, they were bound to prove also that of the petitioning creditor's debt.

Lord TENTERDEN, C. J. I am of opinion, that on the true construction of this act of parliament, a party who does not give notice of his intention to dispute the proceedings, admits all that is necessary to support the commission, and if the assignees for any purpose give evidence of an act of bankruptcy, it is not to be presumed that any other was committed. If that be so, then it follows that the admission is in effect, that at the time of that act of bankruptcy there

was a good petitioning creditor's debt.

BAYLEY, J. I am inclined to be of a different opinion. Unless a party gives notice of his intention to dispute, he is taken to admit all that is necessary to support the commission. But if the assignees, in order to make the commission operate by relation, prove the time when an act of bankruptcy was committed, that seems hardly sufficient, unless they show that the petitioning creditor's debt also existed at that time.

LITTLEDALE, J. In order to support the commission on the act of bankruptcy proved at the trial, I think the assignees should have proved also the petitioning creditor's debt. The implied admission by the defendants extends

only to such matters as are necessary to support the commission.

PARKE, J. I agree with the opinion expressed by my Lord, and therefore no rule can be granted. As the defendants did not give any notice, they admitted all *that was necessary to support the commission; and when the plaintiff proved one act of bankruptcy, we are not to presume that there was any other. If, indeed, the defendant had given evidence of an act of bankruptcy committed between the time of the sale and the issuing of the commission, that might have driven the plaintiffs to the proof that the petitioning creditor's debt existed at the time of the act of bankruptcy on which they relied. But in the absence of any such evidence on the part of the defendants, I think that the plaintiffs proved all that could be required of them. Rule refused.

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THOMAS FISHER and MALACHI FISHER, Assignees of G. O. HOULISTON, v. BOUCHER. May 4.

Where a trader being under apprehension of arrest gave directions to his servant to deny him in case A., as sheriff's officer, called: Held, that the sheriff's officer not having called, this of itself was not any evidence of a beginning to keep house.

Semble, that in order to constitute an act of bankruptcy, by departing from the dwelling-house, the departure must be with an absolute intent to delay creditors. If it be only with intent to delay creditors in case a particular event occurs, and that event does not occur, it is not an act of bankruptcy.

Assumpsit for money had and received. Plea, the general issue. At the trial before Gaselee, J., at the Spring assizes for the county of Dorset, 1830, it appeared that the defendant, who was late sheriff of that county, had executed a fieri facias on the goods of George Ord Houliston, and the only question in the cause was, whether he had committed an act of bankruptcy? As to that, the evidence was as follows: - Houliston, who was a grocer, carrying on business at Blandford, in the county of Dorset, on the 11th of June, 1829, received from Francis and Co., in London, who had supplied him with goods, a letter containing a threat of arrest, unless a debt of 70l. was paid them. On the *15th of June, Houliston wrote to the plaintiff Thomas Fisher, to whom he was indebted 600%, informing him, that on taking stock, it was impossible for him to meet his creditors in full, and his fear that his estate would pay very little more than 10s. in the pound. He then proposed to assign everything to the plaintiff in trust for the benefit of him and other creditors; and added, that it was of the utmost importance that something should be immediately done, as he was threatened with an arrest for 731., which he could not then pay, although he was certain of being enabled at a future time to pay the full amount, provided his affairs could be arranged without being consumed in law. On the same day, Houliston called his shopman into the room behind the shop, and told him that Francis had threatened to arrest him; that he had written to Fisher, his principal creditor, and that possibly his goods would be seized; and he then directed the shopman, if Pitney, the sheriff's officer, came to the door, to say that he (Houliston) was not at home. On the 17th of June, Houliston, having told his wife that if anything particular happened, she was to send to him at the Shillingston turnpike-gate, left home, with the avowed purpose of going his journey through Durweston, Shillingston, and other places in the neighbourhood (as was his usual custom), to deliver goods which had been ordered before, and to take It had been his habit on former occafresh orders in his business of a grocer. sions to take this journey on a Tuesday. On the Wednesday morning he left home before the mail from London arrived, by which a letter might be received from his creditors Francis and Co., or a warrant by Pitney, the sheriff's officer, to arrest him. His usual time of starting was between eight and *nine o'clock. On this occasion he left home soon after seven. He went on slowly through Durweston, without calling at any house, through the Shillingston turnpike-gate, and stopped at a house a short distance beyond the gate, where he went in, left a small parcel, and settled an account, and waited there till the mail cart came up, when the driver delivered to him a letter from Francis and Co., which had been received at his house after his departure. letter contained the following passage:-" We are not inclined to be unnecessarily harsh in the arrangement of our account. You say you can pay 10s. now, and the remaining 10s. at some future time. Let us have a good guarantee for the payment of the first 10s. at as short a date as can be accomplished, and we will take your own note for the remaining 10s., payable some time hence, provided the time be not too long." Houliston wrote with a pencil on the back of this letter,—"I shall now return with comfort to my wife and children;" and sent the letter to his wife by a private hand. He then went on to Tippy Oakford, the next village to Shillingston, called at one house there, and then returned

home by a different route from that which he usually took. It appeared further. that on the morning of the 17th of June, his wife had packed up some clothes for him in a deal-box, which he was in the habit of taking when he went a long journey. Upon this evidence it was contended, that Houliston had committed an act of bankruptcy, by beginning to keep house, he having given orders to be denied to the sheriff's officer Secondly, that Houliston committed an act of bankruptcy by departing from his dwelling-house with intent to delay his creditors. Gaselee, J., was of opinion that Houliston had not committed any act of bankruptcy by *beginning to keep house with intent to delay his creditors, the direction given to the shopman to deny him to the sheriff's officer, if he called, being only evidence of an intention to delay his creditors, but no evidence of an actual beginning to keep house. Upon that point he reserved liberty to the plaintiff to enter a verdict in his favour, in case the Court should be of opinion that the facts proved amounted to a beginning to keep house. Upon the other point, he was of opinion that the question, whether an act of bankruptcy had been committed by the departure from the dwelling-house, depended upon the intention which Houliston had at the time when he so departed. If at that time he intended not to return, unless he should receive a letter from Francis and Co., and should be satisfied with its contents, that might be a departure with an intent to delay his creditors in a given event, and might possibly constitute an act of bamkruptcy; but if he departed from his dwellinghouse to go his usual rounds in the ordinary course of his business, intending to return, that was not a departing with intent to delay his creditors, and consequently not an act of bankruptcy: and he left it to the jury to say, whether Houliston departed from his dwelling-house with intent to delay his creditors, or merely to go his rounds in the ordinary course of business. The jury found, that he did not depart from his dwelling-house on the 17th of June with intent to delay his creditors, but to go his rounds in the ordinary course of his business.

Wilde, Serjt., now moved, pursuant to the leave reserved, to enter a verdict for the plaintiff, on the ground that Houliston had committed an act of bank-*709] ruptcy by *beginning to keep house; or for a new trial, upon the ground that the finding of the jury, as to the intent with which Houliston departed from his dwelling-house, was a verdict against the weight of evidence. As to the first point, he contended, that the act of a trader having given an order to be denied to all creditors, was of itself, according to Lloyd v. Heathcote, 2 Brod. & Bingh. 388, sufficient evidence of a beginning to keep house with intent to delay creditors, and constituted an act of bankruptcy, although no creditor was actually delayed. In Harvey v. Ramsbottom, 1 B. & C. 55, a trader, for fear of being arrested, desired his servants not to let into the house any person whom they did not know; and on the following morning the doors of the house were kept shut, and no person was admitted, until it had been ascertained from the window who he was; it was held that this amounted to an act of bankruptcy, though no creditor was actually denied. These cases show that, in order to constitute an act of bankruptcy by beginning to keep house, an actual denial to a creditor is not necessary. Here Houliston's order to be denied to the sheriff's officer was itself an act of bankruptcy, although the sheriff's officer did not call.

Secondly, the verdict of the jury was against the weight of evidence; for the circumstance of his wife having packed up the clothes at the time when Houliston left his dwelling-house, was the strongest evidence that he did not intend to return. The question is, what was his intention at the moment of departure? It is manifest that his intention was, if the letter from Francis & Co. proved unfavourable, not to return that evening. *He therefore departed from his dwelling-house with intent to delay his creditors.

Lord TENTERDEN, C. J. The question reserved by the learned Judge for the opinion of the Court is, whether Houliston committed an act of bankruptcy by beginning to keep house? It appears by the evidence that he had given directions to his shopman, if the sheriff's officer came to the door, to say that he was

not at home. If he had followed up that direction by retiring to a part of the house which he did not usually occupy, that would have been evidence of a beginning to keep house with intent to delay his creditors, although there was no actual denial to a creditor; but he did nothing of that kind. There is no authority to show that a mere direction given by a trader to his servant to deny him to his creditors generally, or to any particular creditor by name, not followed up by an actual denial, or by any other act which is evidence of an actual beginning to keep house, is an act of bankruptcy. Here, the facts proved were evidence of an intent to begin to keep house in case the sheriff's officer should call, but not of an actual beginning to keep house. Then, as to the other supposed act of bankruptcy, construing the evidence most favourably for the plaintiffs, it appears that there was nothing more than an inchoate intention by Houliston to delay his creditors, by not returning to his dwelling-house, in case a particular event have pened. That event not having happened, he did in fact return to his dwelling-house according to his usual habits. That was a departure, not with an absolute, but only with an inchoate intent to delay; and I am not aware that *this is an act of bankruptcy. Besides, there was ample evidence to warrant [*711] the jury in finding that he departed from his dwelling-house with intent to go his rounds in the usual course of business, and not with an intention to delay his creditors; and that being so, there is no ground for saying that he committed an act of bankruptcy by departing from his dwelling-house with intent to delay his creditors.

BAYLEY, J. The jury have found that Houliston departed from the dwelling-house with intent to go his rounds according to the usual course of his business, and not with intent to delay his creditors; and I think that they were warranted by the evidence in the conclusion they came to. Even taking the evidence most favourably for the plaintiffs, I should doubt whether there was any departure with intent to delay creditors; for the bankrupt, at most, only intended to delay his creditors in case a given event should occur. That event did not occur. If the letter had proved unfavourable, and he had delayed, even for a short time, to return home, that might have been an act of bankruptcy, by absenting himself. But the jury have, by their finding, negatived any such act

of bankruptcy.

Then, as to the beginning to keep house, I am not aware that the giving directions by a trader to deny him to a creditor, unless there be some act done to show that he began to keep house, is an act of bankruptcy. If Houliston, to prevent his being seen, had retired into a secluded part of the house or adjoining premises, or if there had been an actual denial to a creditor, then such acts would have been evidence of a beginning to keep house. *In Lloyd v. Heathcote, 2 Brod. & Bingh. 388, there was not only a direction to deny, but an actual denial to the collector of the king's taxes; and when he called, the bankrupt retreated into the garden, showing thereby that he meant to keep himself from the view of persons who called. In Harvey v. Ramsbottom, 1 B. & C. 55, there were not only directions to be denied, but the doors of the house were kept shut, and no person was admitted until it had been ascertained from the window who he was. There, the bankrupt was not conducting himself in his usual manner in his own house. The authorities show that a mere direction given by a trader to deny him is not an act of bankruptcy, unless that direction be followed by an actual denial, or by concealing himself, or by some other act which is evident of a beginning to keep house. There is a locus pœnitentiæ for the debtor; for notwithstanding his direction, he may, before a creditor calls, revoke it, and elect to see him; and in that case there would be no beginning to keep house. Unless the direction be followed by some act done by the trader, it is not a beginning to keep house.

LITTLEDALE, J. I think the question whether there was an act of bankruptcy by departing from the dwelling-house was properly left to the jury, and that their conclusion was warranted by the evidence. The evidence shows, that at the time when Houliston departed from his home, he doubted whether he would

return. He intended, if the letter were unfavourable, not to return. He intended in that case to commit an act of bankruptcy by absenting himself.

*713] But the letter having *turned out favourably, he did not carry that intent into execution. I think that this was not a departure from the

dwelling-house with intent to delay creditors.

Then, as to the question whether there was a beginning to keep house within the meaning of the bankrupt act, it seems to have been for some time considered that an actual denial was indispensable to prove an act of bankruptcy by beginning to keep house. But it has been settled, that a denial is not the only evidence of a beginning to keep house: it may be proved by other circumstances. Now, if in this case there was anything to show that Houliston, after he had given directions to be denied, had not conducted himself in his house in his usual manner; that he had retired to a secluded part of his house, contrary to his ordinary habits; I think that would have been a beginning to keep house: but there must be some act done by the trader to show that he actually began to keep house. Here the directions given to deny him to the sheriff's officer were evidence of an intent to keep house, and thereby to delay his creditors, but it was not followed up by any act showing that he began to keep house.

PARKE, J. As to the departure from the dwelling-house, I think the question was properly submitted to the jury, and that their conclusion was right. Houliston may possibly have intended to commit an act of bankruptcy, if the information he should receive at the turnpike proved unfavourable. It was more favourable than he expected; and he returned to his dwelling-house according to his

usual habit.

As to the other question,—the beginning to keep house,—the authorities only show, that an actual denial to a *creditor is not necessary to constitute a beginning to keep house; but that it may be evidenced by other circumstances. It is sufficient, if the creditor or creditors be excluded from the debtor while he remains in or about his house. Here Houliston gave directions to his shopman to deny him to the sheriff's officer: that showed an intention to delay his creditors. But a simple intention to delay creditors is not of itself a beginning to keep house.

Rule refused.

ROBERT HUNTER, Secretary of the ST. PATRICK Assurance Company of IRELAND, v. WRIGHT. May 4.

By a policy of insurance on ship for a year, the underwriter stipulated to return a part of the premium, if sold or laid up, for every uncommenced month: Held, that the words laying up meant a laying up for the season, without being employed for the current year; and, therefore, that where a vessel insured for one year had been laid up for several months during the year, but was employed again within the year, that was not such a laying up as entitled the assured to a return of premium.

Assumpsit for premiums of assurance due from the defendant to the plaintiff, as secretary of the St. Patrick Assurance Company. Plea, non assumpsit. At the trial before Lord Tenterden, C. J., at the London sittings after last term, it appeared that the policies effected on ships by the company contained a stipulation "for a return of part of the premium, if sold or laid up, for every uncommenced month." The defendant claimed a return of premium for a vessel called the Lord Stanley, insured from the 25th of March, 1826, to the 25th of March, 1827, by reason of that vessel having been laid up for several months during the year that the policy was in force, and if he was entitled to such returns, it was conceded that the plaintiff was not entitled to a verdict; but it was contended that, inasmuch as the vessel was employed again within the year, it was not such a "715] *laying up as entitled the defendant to a return of premium. Lord Tenterden was of opinion that the words laying up meant a laying up for the season or winter, without being employed again during the current year; and

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a verdict was found for the plaintiff, leave being reserved to the defendant to

move to enter a nonsuit.

Campbell now moved accordingly. In construing a policy, the strict letter should not be so much regarded as the object and intention; Per Lord Mansfield in Stevenson v. Snow, 3 Burr. 1240. By the clause in the policy, the assured might lawfully lay up the ship, and suspend the policy for an entire month. If the policy were dated the 1st of May, and the ship were laid up on the 25th of July, by sending a certificate, the policy would be suspended from the 1st of August; and if the ship were laid up all June, the policy might recommence in July. The words, "or laid up for every uncommenced month," show the period during which the vessel might be laid up, to entitle the assured to an abatement of the premium. Such a construction cannot operate unjustly towards the underwriter, for the risk is suspended. If the ship be unemployed, it is fair to give the owner an opportunity to suspend the payment of the premium. There is the same cessation of risk, whether the policy be suspended, or entirely put an It is highly improbable that the owners should ever intend to lay up their vessel for the whole year. They ought to have power to employ her again under protection of the policy. If she should be employed again, there would clearly be no abatement of premium while she was employed.

*Lord TENTERDEN, C. J. I am of opinion, that the words laid up being in company with the word sold, must mean a permanent laying up, similar to that which would take place if the ship had been sold; that is, such

a laying up as would put a final end to the policy.

BAYLEY, and LITTLEDALE, Js., concurred.

PARKE, J. The parties might undoubtedly stipulate in the manner it is contended they did stipulate on the behalf of the defendant, but I think the true construction of the words "laying up" must be such a laying up as would put an end altogether to the policy.

Rule refused.

GARRY, Assignee of FLOWERS, an Insolvent Debtor, v. SHARRATT. May 4.

The assignment of the real and personal estate and effects of an insolvent debtor under the statute 7 G. 4, c. 57, passes to the assignee only what the insolvent was entitled to at law and in equity; and where an insolvent had deposited with a creditor the title-deeds of an estate, as security for a debt: Held, that the assignee of the insolvent debtor could not recover from such creditor the rent of such estate received by the latter subsequently to the discharge of the insolvent debtor.

Assumpsit for money had and received to the use of Flowers. Plea, non assumpsit. At the trial before Littledale, J., at the Spring assizes for the county of Stafford, 1830, the plaintiff proved an indenture of assignment, dated the 1st of May, 1828, from Flowers to H. Dance, provisional assignee of the insolvent debtor's real and personal estate and effects; a copy of a rule made the 13th of September, 1829, by the court for the relief of insolvent debtors, authorizing the provisional assignee to assign to the plaintiff; and copy of an indenture of 27th of April, 1829, of the assignment of all the estate and effects of Flowers, by the provisional assignee, *to the plaintiff; and, further, that the defendant, since Flowers's discharge, had received 7l. 1s. on account of rent of an estate belonging to an insolvent. It was proved that Flowers, before his discharge, always received the rent of the house in question. On the part of the defendant, Flowers the insolvent was called, and proved that he, being indebted to the defendant, in 1826, deposited in the defendant's hands the title-deeds of the estate, as a security for a sum he then owed, or might thereafter owe him; that before he was discharged by the court for the relief of insolent debtors, he had given verbal authority to the defendant to receive the rent of the estate. Littledale, J., told the jury to find for the defendant, if they thought that he had

authority from Flowers to receive the rents, and that that authority had not been revoked. The jury said, they considered the deposit of the title deeds a sufficient authority to receive the rents, and found for the defendant. The learned Judge reserved liberty to the plaintiff to move to enter a verdict for 7*l*. 1s.

Campbell now moved accordingly. The effect of the deposit of the title-deeds was to make the defendant an equitable mortgagee of the estate in question; but such a mortgagee has not necessarily an authority to receive the rents. The insolvent, who was the owner of the legal estate, was, before his discharge, entitled to the possession of the land, and to the rents. The mortgagee in equity may, in a court of equity, compel the conveyance of the legal estate. But, assuming that there had once been an authority given by Flowers to the defendant to receive the rents, that authority was revoked by the discharge of the insolvent by the *718] court for the *relief of insolvent debtors, and by the assignment then made to the plaintiff. The legal estate then vested in him.

Lord Tentenden, C. J. By the assignment of the estate of the insolvent to the plaintiff, all that Flowers was entitled to at law and in equity passed to the assignee. At law, Flowers was entitled to the land; in equity, the defendant, as mortgagee, was entitled to the land and the rents accruing from it. .The assignment to the plaintiff did not give him any right to those rents. The verdict, therefore, was right.

Rule refused.

DOE dem. BENJAMIN JONES v. MICHAEL JONES, CATHERINE JONES, and MORGAN otherwise MORGAN MORGAN.

Where a minister of a dissenting congregation, after his election, was placed in possession of a chapel and dwelling-house by certain persons, in whom the legal fee was vested in trust to permit and suffer the chapel to be used for the purpose of religious worship, Held, that he was a mere tenant at will to those persons, and that his interest was determinable by a demand of possession without any previous notice to quit.

EJECTMENT. Plea, not guilty. At the trial before Raine, C. J., at the great sessions for the county of Merioneth, 1830, it appeared that the action was brought to recover possession of a chapel and dwelling-house. By lease and release of the 5th of August, 1783, J. K. and L. R. bargained, sold, and assigned unto Benjamin Jones, and nine other persons therein named, and to their heirs and assigns, a piece of land therein particularly described, and the structure or meeting-house thereon erected and built, to have and to hold the same, with their and every of their appurtenances, unto the said Benjamin Jones and the *719] nine other persons *therein mentioned, and their successors, ministers of the respective meeting-houses or places therein mentioned for the time being, for ever, in trust, and to the intent and purpose, that the said structure or building should be used as a meeting-place or house for public and religious worship, by the society or congregation of protestant dissenters called Presbyterians; and that they should permit and suffer the same from time to time to be used, occupied, and enjoyed, as and for a meeting-house, place or house for such public and religious worship, by such society or congregation of protestant dissenters, and to and for no other use, intent, or purpose whatsoever. It appeared further, that the defendant Michael Jones had been, according to the usual practice, elected by the congregation minister of the chapel sixteen years ago, and was then put into possession of the house and premises by officers acting under the authority of the trustees. At a meeting of the congregation, in the year 1828, it was determined by a large majority that the minister should be changed; but no other minister was elected. Possession of the chapel, dwellinghouse and premises, was demanded of the defendant Michael Jones on behalf of the trustees, but he refused to go out. Benjamin Jones was the last surviving trustee of those named in the deed; and his grandson of the same name was his heir at law, and was the lessor of the plaintiff. On this evidence it was contended, that the lessor of the plaintiff could not recover possession of these premises against the defendant so long as he continued minister of the chapel. By the very deed under which the lessor of the plaintiff claimed, the trustees held it in trust, to permit and suffer it to be used as a place of religious worship. The defendant was duly elected to fill the office *of minister of the chapel, and had an office coupled with an interest, and continues to hold such former occasions. Raine, C. J., was of opinion that the legal estate was in Benjamin Jones, the heir at law of the last surviving trustee mentioned in the deed; and directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

Campbell now moved accordingly. The trustees cannot recover in ejectment against the present defendant, so long as he continues minister; and he having been duly elected, continues minister until another has been appointed by the congregation. The proper course would have been for the congregation to elect another minister; and then the Court, by mandamus, would have compelled the defendant to give him possession of the chapel, &c. So long as the defendant continues in his office of minister, he has a possessory right to the house. In Rex v. Baker, 3 Burr. 1265, Lord Mansfield says, speaking of such a case as the present, "The deed is the foundation or endowment of the pastorship. The form of the instrument is necessarily by way of trust: for the meeting-house, and the land upon which it stands, could not be limited to Entry (the minister) and his Many lectureships and other offices are endowed by trust-deeds. successors. The right to the function is the substance, and draws after it everything else as appurtenant thereto. The power of the trustees is merely in the nature of an authority to admit. The use of the meeting-house and pulpit in this case follows, by necessary consequence, *the right to the function of minister, preacher, [*721 or pastor, as much as the insignia do the office of a mayor, or the custody of the books that of a town clerk. [PARKE, J. The mandamus was to admit the party elected to the use of the pulpit as pastor, minister, or preacher. That is like an easement, a right of common or of way. In this case the defendant had no other estate in the premises than that of tenant at will, and that has been put an end to by the demand of possession. The trustees have a right to the It is possible the defendant may have a remedy against them in

equity, if they have improperly turned him out.]

Lord TENTERDEN, C. J. For the reasons given by my brother PARKE, I think it perfectly clear that the legal estate in the premises was in the lessor of the plaintiff.

Rule refused.

DOE dem. NICHOLL and Others v. M'KAEG.

A minister of a dissenting congregation placed in the possession of a chapel and dwelling-house by certain persons, in whom the legal estate is vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those trustees; and his tenancy is determined instanter by a demand of possession. He is not entitled de jure, before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture.

Semble, that he will not be a trespasser, if he enter afterwards to remove his goods, and continue a reasonable time for that purpose.

EJECTMENT for a chapel, two messuages, and two yards. Plea, not guilty. At the trial before Park, J., Sir J. A., at the last assizes for the county of York, it appeared that the defendant was a dissenting minister, the premises sought to be recovered being the meeting-house and dwelling-house adjoining thereto; that both the dwelling-house and meeting-house had been conveyed to *the lessors of the plaintiff as trustees for the congregation; that they had placed the defendant in the possession of the same on his having been [*722]

elected minister by the members of the congregation; that the latter having become dissatisfied with some of the dectrines of the defendant, in consequence wished to remove him, and came to a resolution to that effect. The trustees demanded possession, and immediately served a declaration in ejectment. The defendant had an annual salary of 201; and it was objected at the trial, that the defendant was entitled to some notice to quit. The learned Judge reserved the point, and a verdict passed for the plaintiff. On a former day in this term.

the point, and a verdict passed for the plaintiff. On a former day in this term, F. Pollock moved pursuant to such leave. The defendant was entitled to some notice, and as, without any previous notice, the declaration in ejectment was served immediately after the demand of possession, the plaintiff ought to have been nonsuited. The defendant was not, strictly speaking, a tenant at will; he was occupying the house exclusively; which distinguishes this case from that of a servant occupying part of his master's house: he was a tenant of some sort: he was, in fact, occupying the house as part of his reward for doing the duties of minister to the chapel. If he had been paid entirely by a salary, and had rented the house of the trustees, it is clear he would have been a tenant entitled to a regular notice to quit. Instead of paying rent in money, he paid rent by Supposing that he was not entitled to a regular notice to quit, he his services. was entitled to a reasonable notice, and could not, at a moment's warning, be called upon to go out with his family and furniture into the street at the peril *723] of being *dealt with as a trespasser. In all cases of a continuing contract, some reasonable notice must be given of putting an end to it. It is for the Court or jury to say what is a reasonable notice; but surely an exclusive occupation of a dwelling-house, as a part of a minister's reward, cannot be determined without some notice. Here there was none.

Cur. adv. vult.

Lord TENTERDEN, C. J. This was an ejectment brought to recover from the defendant, who was minister of a dissenting congregation, a chapel and dwellinghouse, which he was put in possession of by the lessors of the plaintiff, in whom the legal estate was vested, in trust to permit the chapel to be used for the purpose of religious worship. The defendant was tenant at will to them. It was contended, that a demand of possession was not sufficient in this case to determine the tenancy, but that a reasonable time ought to have been allowed the defendant for the purpose of removing his goods. We can find no authority in the law for such a position. The general rule is, that where an estate is held at the will of another, a demand by that other determines the will. If, in this case, we were to hold otherwise, we should introduce a new rule, not to be found in the books, which might be productive of great inconvenience; for then, in every case of a tenancy at will, it might be made a question, what is a reasonable time for removing goods. If the tenant, after the determination of his tenancy in this case, by a demand of possession, had entered on the premises for the sole purpose of removing his goods, and continued there no longer than was necessary for *that purpose, and did not exclude the landlord, perhaps he might not have been a trespasser; but, however that may be, we are of opinion, that he being a tenant at will, his estate was determined by a demand of possession, and, consequently, that the lessors of the plaintiff were Rule refused. entitled to recover.

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RICHARD HALFORD v. KYMER and Others. May 4

The statute 14 G. 3, c. 48, by section 1, enacts, "that no insurance shall be made on lives, or any other event, wherein the person for whose benefit the policy shall be made shall have no interest; and that every such assurance shall be void;" and by section 3, "that in all cases where the insured hath interest in such life or event, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured in such life, or other event:"

Held, that in order to render a policy valid within the meaning of this act, the party for whose benefit it is effected must have a pecuniary interest in the life or event insured; and that therefore a policy effected by a father in his own name, on the life of his son, he not having

any pecuniary interest therein, was void.

This was an action of covenant on a policy of insurance, tated the 13th of February, 1826, whereby the directors of the Asylum Life Insurance Company agreed with the plaintiff to insure the life of Robert Bargrave Halford, the son of the plaintiff, in the sum of 5000l. for the term of two years, and covenanted, that if Robert Bargrave Halford should die at any time within the term of two years, to be computed from the day of the date of that policy, the funds of the company should be liable to pay, within six calendar months after proof of the death of the said Robert Bargrave Halford within the said term of two years, unto the said Richard Halford, his executors, &c., the sum of 5000l. Plea, first, that at the time of making the policy in the declaration mentioned, the plaintiff was not interested in the life of the said Robert Bargrave Halford. Secondly, that at the time of the death of the said Robert Bargrave Halford, *the plaintiff was not interested in his life. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last term, it appeared from the statement of the plaintiff's counsel, that by a settlement, dated the 18th of May, 1805, made on the marriage of the plaintiff with S. T. Bargrave, the sum of 80001., and also the moneys to arise from the sale of certain freehold and leasehold estates, were settled, after and subject to the trusts for the plaintiff and his wife successively during their lives in trust for the children or child of the said marriage, according to the appointment of the said plaintiff, and of his said wife, as therein mentioned; and in default of appointment, if there should be but one child of the said marriage, then in trust for such child, to become a vested interest in such child, if a son, at the age of twenty-one years; and if no child of the said marriage, or issue of such child, should become entitled to the vested interest in the said trust moneys, then upon such trusts as the said S. T. Bargrave should appoint; and in default of her appointment, in trust for her next of kin as if she had died intestate and unmarried." There was only one child of the marriage, namely, Robert Bargrave Halford; and the marriage of the plaintiff with the said S. T. Bargrave having been dissolved by act of parliament, the plaintiff married again, and effected the policy in question to provide against the death of his son, Robert Bargrave Halford, before he attained the age of twenty-one. The said Robert Bargrave Halford did attain the age of twentyone years on the 2d of June, 1827, and on the 5th of January, 1828, made his will, and thereby gave all his real and personal estate to the plaintiff, his father, and appointed him sole executor, and died on the 11th of January, 1828. The plaintiff, on the 17th of July, 1828, *proved his son's will in the Prerogative Court of the Archbishop of Canterbury. Upon this statement of facts, Lord Tenterden was of opinion that the plaintiff not having any pecuniary interest in the life of his son at the time when he effected the policy, the same was void by the statute 14 G. 3, c. 48, s. 3, and he nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict if the Court should be of opinion that he had an insurable interest.

F. Pollock now moved accordingly. It is quite clear that, but for the statute 14 G. 3, c. 48, this policy would be available. That statute, by sect. 1, enacts, "that no insurance shall be made by any person or persons on the life of any person or persons, or on any event or events whatsoever, wherein the person for whose use, benefit, or on whose account such policy shall be made, shall have no

interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning thereof shall be null and void to all intents and purposes whatsoever." Now, the plaintiff clearly had an interest in the life of his son, for he might reasonably expect that the latter would reimburse him the expenses of his maintenance and education. This clearly was not a wagering policy within the meaning of that clause. It is true that the third section enacts, "that in all cases where the assured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer than the amount or value of the interest insured on such life or lives, or other event or events. It is clear that a man may effect an insurance on his own life, although he may have no pecuniary interest depending on it, and *727] although his own income may be of the most ample *kind, not depending on his own exertions or on any contingency; and if that be so, upon what principle can it be said that he cannot have an insurable interest in the life of his son or his wife? If a man be deprived of the comfort, society, and assistance of his wife by the misconduct of another, he may recover damages for that loss. So, if he be deprived of the services of his daughter by her seduction, or if he lose the assistance of any other member of his family by the wrongful act of another, he may maintain an action for damages. Surely the law which gives a man a right of action for the wrongful act of another, by which he is deprived of the assistance of his wife, daughter, or servant, will not prevent him from protecting himself against that casualty, which for ever deprives him of that assistance. [BAYLEY, J. In Innes v. The Equitable Assurance Company (which was tried before Lord Kenyon), the plaintiff had effected a policy on the life of his daughter. In order to show that he had an interest, he produced a paper, purporting to be a will, by which it appeared that he was entitled to the sum of 1000l. in the event of his daughter dying under the age of twenty-one. One Gardiner swore that he was a subscribing witness to the will, and that it was made at Glasgow, and that he was acquainted with the other subscribing witnesses; but another of those witnesses stated, that it was not made at Glasgow, but by a schoolmaster in the Borough. Innes was tried, convicted, and executed for the forgery, and Gardiner, who had sworn that the will was made at Glasgow, was convicted of perjury. Lord TENTERDEN, C. J. was in effect admitted, in that case, that it was necessary to prove that the father had a pecuniary interest in the life of his daughter, otherwise *there would have been no occasion to go into the question as to the will; and unless it were a fact material in the case, the witness could not have been convicted of perjury.] That was only a nisi prius case. But a father has a legal interest in the life of his son sufficient to entitle him to insure. By the statute of Elizabeth, if a father become poor in his old age, and his son be capable of maintaining him, he is bound to do so. Now, why does a man insure the life of his debtor? Because the death of his debtor diminishes the chance of his being paid. So if a son dies, the chance of the father being maintained in poverty and old age is diminished. [BAYLEY, J. The parish is bound to maintain him, and it is indifferent to him whether he be maintained by the parish or his son.] The amount of maintenance which a parish must afford may in many cases, be much less than that which a son would be ordered to pay. Besides, a father may have a claim on his son, when he has no claim on the parish. He may not be able to show his settlement in the parish from which he claims relief. that case the life of his son would be of importance to him, as affording him the certainty of having a comfortable provision. The word "interest" in the act of parliament is not to be confined in construction to pecuniary interest, but may be taken to mean legal interest; and the third section, which allows the insured to recover to the amount or value of his interest, shows that the law would recognise an interest of any kind, provided a value can be set upon it.

Lord TENTERDEN, C. J. I retain the opinion which I expressed at the trial,

that the word interest in this statute means pecuniary interest.

*BAYLEY, J. It is enacted by the third section, "that no greater sum shall be recovered than the amount of the value of the interest of the insured in the life or lives." Now, what was the amount or value of the interest of the party insuring in this case?—Not one farthing certainly. It has been said that there are numerous instances in which a father has effected an insurance on the life of his son. If a father, wishing to give his son some property to dispose of, make an insurance on his son's life in his (the son's) name, not for his (the father's) own benefit, but for the benefit of his son, there is no law to prevent his doing so; but that is a transaction quite different from the present; and if a notion prevails that such an insurance as the one in question is valid the sooner it is corrected the better

LITTLEDALE and PARKE, Js., concurred.

Rule refused.

MOSELEY, Assignee of ROBINSON, a Bankrupt, v. HANFORD. May 7.

Where a promissory note is, on the face of it, made payable on demand: oral evidence of an agreement entered into when it was made, that it should not be paid until a given event happened, is inadmissible.

Declaration against the maker of a promissory note for 2331., payable to the bankrupt or his order on demand. Plea, general issue. At the trial before Alexander, C. B., at the last assizes for the county of Derby, the handwriting of the defendant to the note set out in the declaration was proved. Evidence was given on the part of the defendant, that he and one Richardson, being in partnership as booksellers at Derby, agreed to purchase certain premises belonging *to the bankrupt, and it was stipulated that the bankrupt should deliver up possession by the first day of August, 1825, or pay, for the time he should keep possession beyond that day, a rent agreed upon between the parties; that on the 1st of August, 1825, Richardson and the defendant paid up the whole of the purchase-money except 2331.; and that the defendant, with the consent of the bankrupt, gave his sole note for the balance, it being expressly stipulated that it was to be paid on the bankrupt's delivering up possession of the premises, and accounting for the rent to the 1st of August. It was further proved, that part of the premises continued in possession of the bankrupt's sister down to and since the commencement of the action. A verdict having been found for the plaintiff.

Denman, on a former day in this term, moved for a new trial, on the ground that the verdict was against the weight of evidence. But the Court intimated a doubt whether parol evidence could be given to restrain the effect of a promissory note absolute on the face of it, and referred to Woodbridge v. Spooner, 3 B. & A. 233, as an authority to the contrary; and Parke, J., observed, that every bill or note imported two things—value received, and an engagement to pay the amount on certain specified terms; that evidence was admissible to deny the receipt of value, but not to vary the engagement.

Cur. adv. vult.

Lord Tentenden, C. J., now delivered the judgment of the Court, and, after stating the facts of the case, proceeded as follows:—When this application for a new *trial was made, it occurred to the Court that the evidence given on [*731 behalf of the defendant ought not to have been received, on the ground that evidence of an agreement that the note was not to be put in suit until a given event happened, was not admissible; the effect of it being to contradict by parol the note itself. And, upon consideration, we are of opinion, that, upon principle as well as authority, that evidence was not admissible. Several cases to that effect are collected in Selwyn's Nisi Prius, 394.(a) Rule refused.

GAUSSEN and Others v. W. MORTON and E. MORTON. May 7

A. being indebted to B., in order to discharge the debt, executed to B. a power of attorney, authorizing him to sell certain lands belonging to him, A.: Held, that this, being an authority coupled with an interest, could not be revoked.

TRESPASS for breaking and entering two closes in the county of Hertford. Plea, first, the general issue; secondly, that the closes in which, &c., are parcel of the manor of Park in the county of Hertford, and customary tenements of that manor demised and demisable by copy of court-roll by the lord of the said manor, or his steward for the time being, to any person or persons willing to take the same in fee-simple or otherwise, at the will of the lord, according to the custom of the manor; and that before the said time when, &c., to wit, on, &c., the Earl of Essex, then being lord of the said manor, at his court baron then holden in and for the manor before P. C., then his steward of the court of the said manor, by copy of the court-rolls of the said manor granted to one J. L. the said closes in which, &c., in fee, at the will of the lord, according to the custom *of the manor. By virtue of which grant the said J. L. afterwards, and before the said time when, &c., to wit, on, &c., entered into the said closes, in which, &c., and became and was seised in fee thereof, &c., and died seised; whereupon the same descended to one M. L. as eldest daughter and heiress of J. L., whereby the said M. L. became and was seised in fee of the said closes in which, &c.; and being so seised, intermarried with W. Morton, the defendant, whereby the said W. M. and M. his wife, in right of the said M., became and was seised in fee, &c.; wherefore the said W. M. in his own right, and E. M. by his command, and as his servant, broke and entered the said closes Replication, that J. L. at the time of his death was not seised of and in the said closes in which, &c., as defendants have alleged. Issue thereon. At the trial before Tindal, C. J., at the last Hertfordshire Spring assizes, it appeared in evidence, that in 1787 J. L. became bound to William Forster and Co., for a debt of 231l. due to them from his son. The money not having been paid according to the condition of the bond, J. L., in order to discharge the debt, being seised in fee of the customary premises in question, executed a power of attorney on the 3d of December, 1787, authorizing W. Forster to appear for him at the then next or any subsequent court baron or customary court holden in and for the manor of Park, and surrender the said premises to the use of such person or persons as might become purchasers thereof; and he further authorized W. Forster to sell the premises, and receive the purchase-money. this power W. Forster, on the 7th of February, 1788, sold the premises by auction for 1051., and received 201. from the purchaser as a deposit. On the 12th of April, 1788, *J. L., alleging that W. Forster had violated some stipu-. lation in the agreement between them, executed a deed-poll revoking the power given to W. Forster, and gave notice thereof to the steward of the manor. On the 15th of May, 1788, W. Forster applied to the steward to take his surrender of the premises to the use of the purchaser. The steward at first refused to do so, on account of the revocation of the power; but afterwards, an indemnity being given to him, he took the surrender, and admitted the purchaser, from whom a title was deduced to the plaintiffs. The plaintiffs being in possession, defendants entered and carried away some hay. For the defendant it was contended, that as J. L. revoked the power of attorney before the surrender was made, he died seised of the premises as the plea alleged. The Lord Chief Justice reserved this point, and the plaintiffs obtained a verdict, subject to a motion to enter a nonsuit.

Brodrick now moved accordingly. The authority given in this case had not been executed at the time when the alleged revocation took place; and according to the opinion of Haughton, J., in Webb v. Paternoster, Poph. 151, a license, when executed, is not countermandable; but it is otherwise while it remains executory. In Walsh v. Whitcomb, 2 Esp. 565, Lord Kenyon held, that a

power of attorney given as part of a security for money, was not countermandable; and in Watson v. King, 4 Campb. 272, Lord Ellenborough expressed a similar opinion; but that was not the point before the Court; and in Walsh v. Whitcomb the power had been executed before the countermand.

Cur. adv. vult.

*Lord TENTERDEN, C. J., now delivered the judgment of the Court.
The question, whether J. L. died seised of the premises in which the trespass was alleged to have been committed, depended upon this: whether he could revoke the power of attorney given to Forster. We think that it was not a simple authority to sell and surrender the premises, but an authority coupled with an interest; for Forster was to apply the proceeds in liquidation of a debt due to himself and his partners; and there are several cases in which it has been held, that such an authority cannot be revoked.(a)

Rule refused.

(a) See Hodgson v. Anderson, 3 B. & C. 842, 851.

The KING v. IVIE M'KNIGHT. May 8.

A servant of a licensed tea dealer was sent by his master round the neighbourhood to ask for orders for tea, and was subsequently sent by his master to deliver small parcels of tea in pursuance of those orders: Held, that this was not a carrying to sell within the meaning of the hawkers' and pedlars' act, 50 G. 3, c. 51, so as to subject the servant to a penalty for trading as a hawker without a license.

THE defendant was convicted by two justices, of hawking without a license. Upon appeal, the sessions quashed the conviction, subject to the opinion of this

Court on the following case:-

The defendant was the servant of W. Gray, a licensed tea-dealer residing at Dudley, about four miles distant from Cradley, and was sent by his master from time to time (once a fortnight) round the neighbourhood to ask for orders for tea, and he was subsequently sent by his master to deliver tea in pursuance of the orders which he received when he so went round; but it was not his practice to deliver any tea at the time he so received the orders for it. On the 6th of April he *was sent round by his master with forty-four small parcels of tea, containing each a quarter of a pound, for which he had previously received orders in one of his former rounds. He was sent to deliver them to the persons who had given those orders, and when taken into custody at Cradley at three o'clock in the afternoon of that day, he had only seventeen of the parcels in his possession. Neither he nor his master had any hawker's license at any of the times of his so going round, either for orders or to deliver tea. The question for the opinion of the Court was, whether, upon these facts, the defendant was properly convicted of having, as a hawker and trading person going from town to town, and to other men's houses, carried to sell and exposed to sale packages of tea on the said 6th of April, 1829, and of being found trading as aforesaid without a license, within the meaning of the statute 50 G. 3, c. 41, he not having otherwise carried to sell or exposed to sale than as aforesaid.

Godson, in support of the order of sessions. The conviction is bad. The charge is, that the defendant carried to sell and exposed to sale. The proof was, that he took out packages of tea, which he delivered in pursuance of orders previously received. He carried the tea, therefore, to deliver, and not to sell. In Rex v. M'Gill, 2 B. & C. 142, the defendant carried the tea with him, and sold

and delivered it at the same time.

Shutt and M'Mahon, contrà. This case is within the letter, and within the mischief, of the act of parliament. *First, it is within the letter; for when he carries the article in pursuance of the previous order, he literally "carries to sell." The mere asking for orders, and receiving them, cannot be called a sale, which is defined by Blackstone "transmutation of property." Here

no property passed. There is merely an offer to sell on the one hand, and a promise on the other to buy when (that is, if) the article shall be brought and approved. [BAYLEY, J. Has the man who gave the order a right to refuse to take the article when brought? He may refuse to take, as well as the other may omit to bring, without subjecting himself to an action. All that passes in the first instance is matter of treaty. When in pursuance of this treaty the article is carried and accepted, then, and not before, is the sale complete. When it is thus carried in pursuance of the treaty, it is carried, not in consequence of a sale already effected, but for the purpose of effecting the sale, which was the subject of the treaty; and this is literally "a carrying to sell," in the very words [BAYLEY, J. If going round the country to collect orders be a case within the act, every traveller for a London house must have a hawkers' and pedlars' license.] But, secondly, this case is clearly within the mischief of the act, and the act ought to be so construed as to advance the remedy and prevent the mischief, Heydon's case, 3 Co. 7 b. The mischief was, that hawkers and pedlars were enabled to carry on profitable trades in the country, without contributing to any of its burdens, and to the great prejudice of the resident trader, upon whom those burdens attached, per Graham, B., in Attorney-Gen-*7271 eral v. Tongue, 12 Price, 60, and *Bayley, J., in Rex v. M'Gill, 2 B. & C. 147. The act of carrying to sell after orders received, differs from that of carrying to sell without orders received only in this,—that in the one case the hawker has rather a more certain expectation of selling than in the But in both cases the mischief is precisely the same. He carries on a profitable trade in the towns through which he passes, without contributing to the burdens of those towns, and to the great prejudice of the resident trader.

Lord Tenterden, C. J. The sale and delivery of goods are two distinct acts. The charge against this defendant is, that he carried to sell, and exposed to sale, seventeen packages of tea. The proof was, that on one occasion he had taken orders from several customers, and on a subsequent occasion carried the packages in order to deliver them. I think that that was not an exposing to sale, or

carrying to sell within the meaning of this act of parliament.

BAYLEY, J. This is not a case within the words of the act of parliament; and I can only collect the spirit from the words. The legislature may have intended to make a difference between a party who takes goods with him for the purpose of selling, and one who delivers goods in pursuance of a previous order. If the defendant had taken the articles with him, so as to enable another person to form a judgment whether he would buy or not, that would have been a carrying to sell, and he would have been in the situation of a shopkeeper; but
if. instead of carrying the goods with him, he goes *out to seek orders

at a distant place without having the goods with him, he is in a very different situation. There is a difference between a bargain for and a delivery of goods. A man who carries goods in pursuance of an order previously given, is entitled to have the price paid if they correspond with the order, and may declare for them as goods bargained and sold. Here the defendant did not carry to sell,

but to deliver goods previously bargained for.

LITTLEDALE, J. The charge against the defendant is, that he carried to sell, and exposed to sale, seventeen packages of tea. There is no pretence for saying that there was any exposure to sale, and I think that there was not a carrying to sell. Those words import a future contract. Here the bargain to sell was made before the goods were carried. There was a contract by the defendant to sell and deliver the goods, and he took the goods to the person who contracted to buy them. The question is not whether the property passed, but whether the defendant can be said to have carried to sell within the meaning of this act of parliament, and I think he cannot.

Order of sessions confirmed.

*The KING v. The Inhabitants of EDINGALE. May 8. [*739

Where a pauper applied to a master to take him as an apprentice, and the master said he would not, because if he did he should offend the farmers, but would take him on agreement for four years; and a week afterwards it was agreed between the master and the father-in-law of the pauper that the pauper should serve the master four years to learn his trade, to have meat, drink, washing, and lodging the whole time, and 2s. 6d. a week for the last two years: Held, that the principal object of the parties being that the pauper should learn the trade of the master, it was to be deemed a contract of apprenticeship, and not one of hiring and service.

UPON an appeal against an order of two justices, whereby Henry Brown, his wife and children, were removed from the township of Edingale, in the county of Stafford, to the township of Clifton and Haunton, the sessions quashed the

order, subject to the opinion of this Court on the following case:-

The pauper, Henry Brown, before the death of his father, which took place about thirty years ago, when the pauper was ten or eleven years of age, had used to work with his father at his trade of a tailor. After the death of his father, he was put by his mother from time to time to work with other tailors, who paid him for the work he did. At the age of fourteen he went to live with John Tricklebank, a tailor residing in the township of Clifton and Haunton, under an agreement, the circumstances of which were as follow:-The pauper first saw Tricklebank when he went over to his shop on an errand for a suit of black. Tricklebank said the pauper was just such a one as he wanted; he thought he The pauper said his mother would like to make him an appren-Tricklebank said he would not take him apprentice, because if he did he should offend the farmers; he would take him on agreement for four years. A week after this, Thornton, the pauper's father-in-law, and the pauper, went over again to Tricklebank, and Thornton agreed with him that the pauper should serve him four years. He was to go to him to learn his trade, to have meat, drink, washing, and lodging *the whole time; to receive no money for the first two years, but 24. 6d. a week for the last two years. It was said at the time when the agreement was made, that the pauper was to go to him to learn When the pauper had lived with Tricklebank under this agreement about a year and eight weeks, his father-in-law having neglected to supply him with clothes, Tricklebank agreed with the pauper to give him 1s. 6d. a week from that time for the remainder of the term, instead of 2s. 6d. a week for the last two years. In the third year the pauper, having quarrelled with his master, ran away and went to his mother at Tamworth; upon which he was taken by Tricklebank before a magistrate, who made him return to his master, with whom he continued to live until the expiration of the four years, and remained four days over to make up for the lost time. During the whole time that he thus lived with Tricklebank he worked at his trade of a tailor, and did nothing else. He slept in the township of Clifton and Haunton during all the time.

Whateley in support of the order of sessions. The principal object of the parties to this contract was, that the pauper should learn the business of a tailor, and not merely serve; and therefore, according to Rex v. St. Margaret's, King's Lynn, 6 B. & C. 97, and Rex v. Combe, 8 B. & C. 82, the sessions were right

in finding it to be an imperfect contract of apprenticeship.

Campbell, Shutt, and M' Mahon, control. It appears manifestly from the facts stated in the case, that the *intention of both parties to this contract twas, that it should be one of hiring and service, and not one of apprenticeship. The pauper proposed to serve as an apprentice. The master said he would not take him as an apprentice, and assigned a reason for his refusal. That distinguishes this case from Rex v. St. Margaret's, King's Lynn, and Rex v. Combe.

Lord Tenterden, C. J. The question is, Whether the contract between the master and the pauper is to be considered a contract of apprenticeship or of hiring and service? If that was a question of fact, as it may be, the sessions

have decided it. If, on the other hand, it be a question of law for the decision of this Court, I am of opinion the contract was one of apprenticeship, and not one of hiring and service. We must form our judgment of the nature of the contract from the substance of the bargain between the parties. It appears that when the pauper first saw the master, the latter said he would not take him as an apprentice, because if he did he should offend the farmers; but at the time when the agreement was finally made between the master and the pauper's fatherin-law, it was stated that the pauper was to go to him to learn his trade. being the object of the parties, expressed at time of making the agreement, I cannot distinguish this from the case of Rex v. Combe, which followed shortly after that of Rex v. St. Margaret's, King's Lynn, in which the master offered to take a boy to learn his business; and that being the object for which he was to be taken, the Court thought that there was not sufficient to warrant the *742] *sessions in finding that the relation of master and servant subsisted between those parties.

BAYLEY, J. A plain intelligible rule is laid down in Rex v. St. Margaret's, King's Lynn, which was acted upon in Rex v. Combe, that where the substantial object of the parties to a contract is to learn, and not to serve, the contract should be deemed one of apprenticeship, and not one of hiring and service. this case, it is manifest that learning and teaching were solely in the contemplation of the parties at the time when the contract was made. The sessions. therefore, were right in coming to the conclusion, that it was an imperfect contract of apprenticeship. If it were a mere question of fact, we ought, before we reverse their decision, to see clearly that there were not sufficient premises to

warrant that conclusion.

LITTLEDALE and PARKE, Js., concurred.

Order of sessions confirmed.

The KING v. ST. ANDREW THE LESS, CAMBRIDGE. May 8.

Where the lessee of tolls and a toll-house of a navigation underlet the same for the remainder of a term of three years, at the annual rent of 42L, and the under lessee occupied them for upwards of a year, and paid a year's rent, and it was found as a fact that the toll-house had always been used as a public-house as well as for the collection of tolls, and was worth 25L a year if let as a public-house without the tolls, and 4L a year if not so let; it was held, that the under lessee did not gain any settlement by the renting of a tenement, inasmuch as he was a person renting the tolls, and residing in a toll-house of a navigation, within the 54 G. 3, c. 170, s. 5.

Upon an appeal against an order of two justices, whereby Henry Unwin, his wife and children, were removed from the parish of St. Andrew the Less, in the *town of Cambridge, in the county of Cambridge, to the parish of Fen Ditton in the same county, the sessions quashed the order, subject

to the opinion of this Court on the following case:—

The conservators of the river Cam, acting under the authority of an act of parliament, passed in the first year of the reign of Queen Anne, entitled "An Act for making the river Cam alias Grant, in the county of Cambridge, more navigable from Clay Hithe Ferry to the Queen's Mill in the University and town of Cambridge;" and of another act of the 53 G. 3, entitled "An Act for extending and amending an act of Queen Anne for making the river Cam more navigable from Clay Hithe Ferry to the Queen's Mill in the county of Cambridge," are empowered by the latter of the said acts to let to farm the tolls, duties, and rates by the said act made payable, or any part or parts thereof, and also the messuages, buildings, yards, gardens, and premises belonging, or which shall belong, to the said conservators. In pursuance of this power the said conservators, on the 14th of June, 1825, duly demised and let to farm unto one Thomas Nutter, common brewer, for the term of three years, all those the tolls, duties, and rates which, by virtue of the said acts, or one of them, and the orders Vol. XXI.—40

of the conservators of the said river, were then payable at Baitsbite Sluice on the same river; and which tolls, duties, and rates were specified in the first schedule thereunder written, and all and singular the powers and authorities by the said acts, and each of them, created and given for collecting and recovering the same; and also the messuage, sluice-house, or tenement, outbuildings, yards, and gardens belonging to the *said sluice-house, together with the use of the several fixtures and effects then remaining, and being in, upon, or about the said messuage, sluice-house, or tenement, outbuildings, yards, and gardens, and which were specified in the second schedule thereunder written, at the rent of 56l. 14s. a year. And T. Nutter did thereby covenant, at his own costs, to pay and bear all taxes, rates, assessments, charges, and impositions whatsoever that should or might be charged upon the said thereby demised premises, or on the occupier or occupiers, owner or owners thereof, in respect of the same by authority of parliament, or otherwise howsoever, for or by reason or in consequence of the said sluice-house being used or kept open as a public-house. And the conservators did covenant, at their own costs, to pay and bear all taxes, rates, assessments, and impositions whatsoever upon the thereby demised premises by authority of parliament, or otherwise howsoever, save and except those taxes, rates, assessments, charges, and impositions which should or might be charged on the said thereby demised premises, or on the occupier or occupiers, owner or owners, of the same in respect thereof, by reason or in consequence of the said sluice-house being used or kept open as a public-house. Nutter afterwards entered into an agreement in writing with Henry Unwin, dated the 6th of February, 1826, whereby it was agreed between them as follows:-"T. Nutter having hired Baitsbite Sluice and the tolls thereof of the conservators of the river Cam for three years from Midsummer last, hereby agrees to let the same to H. Unwin, and H. Unwin hereby agrees to hire the same of T. Nutter from this day for and during the remainder of the three years, at *the annual rent of 421., payable half yearly (but the said Henry Unwin to be allowed to receive from the conservators the annual salary of 10l. for looking after the sluice and water), the rates and taxes to be paid by H. Unwin." The agreement also stipulates, that Unwin should buy all the beer and liquors which he might use or sell at the said sluice of Nutter, under a penalty. Baitsbite Sluice is part of the line of navigation under the control of the aforesaid conservators, and is situate between Clay Hithe

Unwin, under this agreement, entered upon all the premises so demised by the said conservators to T. Nutter; he occupied them for upwards of a year, and paid a year's rent for the same. It was proved that the messuage and premises had always been used as a public-house, as well as for the collection of the tolls belonging to the conservators, and consisted of a dwelling-house, garden, paddock and stable, and were worth 25l. per year if let as a public-house, without the said tolls, duties, and rates, but only 4l. a year if not let as a public-house. It was also proved that Unwin was rated to the parish of Fen Ditton for the same as for a public-house and garden, at a rental of 4l. 10s. a year, and no more, but was not rated for the said tolls, duties, or rates; but that it is usual in Fen Ditton to assess property much below the rack rent. It was also proved that the house in question had no sign or name except the Baitsbite Sluice House, and had no sign; that there was no high road connecting it with the village of Fen Ditton, and that the towing-path is the only road passing by it.

*Gunning in support of the order of sessions. The quarter sessions [*746 have come to the right conclusion. The statute 54 G. 3, c. 170, s. 5, enacts, that no game-keeper or toll-keeper of any turnpike road or navigation, or person renting the tolls and residing in any toll-house of any turnpike road or navigation, shall thereby gain any settlement. The object of the statute was to prevent any burden being thrown upon the parish by any person renting the tolls and residing in the toll-house. Here the pauper did rent the rolls, and did reside in the toll-house of a navigation. He is therefore within the very words

of the act of parliament.

Ferry and the Queen's Mill.

Alderson, control. The meaning of the fifth section is to be found in the word thereby. By the construction contended for on the other side, that word must be rejected. Here it appears that the messuage and premises were worth 25l. a year if let as a public-house, but only 4l. a year if not so let. The pauper may be considered as having taken the house as a public-house, and he would gain a settlement by renting it when applied to that purpose, though it was not used as a toll-house.

Lord TENTERDEN, C. J. I am of opinion that the pauper gained no settlement in the parish of Fen Ditton. Here the pauper rented the tolls and resided in a toll-house of a navigation. He therefore was a person coming within both parts of the description mentioned in the act of parliament. I think we should defeat the object of the legislature if we held that he gained a settlement by residing in the toll-house. By deciding *otherwise, we abide by the words of the act of parliament, taken in their ordinary and popular sense.

BAYLEY, J. This is a case within the very words, and probably within the

mischief contemplated by the act of parliament.

LITTLEDALE and PARKE, Js., concurred. Order of sessions confirmed.

The KING v. Inhabitants of CHEW MAGNA. May 8.

A. being seised in fee of a close of land, gave a small piece by parol to B., who built a cottage on it, and resided in it fifteen years, when A. told him he had sold the land to C., and asked B. to give him possession and to sell him his right; A. agreed to give B. 3t. for giving possession, and that B. should take the materials; B. pulled down the cottage and carried away the materials, and delivered possession to C.: Held, that B. did not gain any settlement by residing in the house.

Upon appeal against an order of two justices, whereby James Naish and Joannah his wife were removed from the parish of Ubley, in the county of Somerset, to the parish of Chew Magna, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

William Bath, about 1795, being seised in fee of a close of land in the parish of Ubley, gave a small piece thereof by parol to his nephew James Naish, the pauper, whereon to build a cottage. Naish, who had no settlement in Ubley, took possession of the spot, and built his cottage, and inhabited it with his family. In October 1800, while he so resided in Ubley, his wife and children became ill, and he applied to the overseers of that parish for relief, and received the same; and on their complaint, an order for the removal of Naish, his wife and children, to the parish of Chew Magna was made by two justices of the *7487 peace, and Naish was under that order removed *and delivered to the overseers of Chew Magna, who relieved Naish from time to time. Naish slept in that parish for one night only, and the next day returned to the cottage in Ubley, from whence neither his wife or children, on account of their illness, had been removed. Naish continued to reside there till about 1810, when Bath told him that he had sold the ground to one Carpenter, and asked Naish to give him free possession, and to sell him his right. Naish was unwilling to do so; but before Naish said anything, Bath proposed that Naish should receive 31. for giving such possession, and should take away the materials of the cottage. Naish never paid Bath any acknowledgment. Bath paid the 3l. to Naish, and Naish pulled down the cottage, carried away the materials, and delivered possession to Carpenter. No writing passed on the occasion. The question for the opinion of this Court was, Whether the pauper, James Naish, gained a settlement in Ubley?

Jeremy, in support of the order of sessions, was stopped by the Court.

Rogers and Erle, contrd. A gift of land by parol confers a rightful possession, though perhaps not strictly a legal title to the land, Rex v. Calow, 3 M. &

8. 22. The rule of presumption, as laid down by Lord Ellenborough in Keene v. Dearborn, 8 East, 263, is ut res rite acta est, and is applied whenever the possession of the party is rightful, to invest that possession with a legal title. Besides, the rule of presumption is always construed liberally when to support a *right, per Ashton, J., Eldridge v. Knott, Cowp. 214. From 1795 to [*749 1810 the pauper occupied under this gift. Now this occupation, taken by itself, was as long as the occupation in the case of Rex v. Calow. But further, at this time Bath, the original owner, tells the pauper he had sold the ground to one Carpenter, and asks him to give him free possession, and to sell him his right; he, therefore, being the only person competent to question the title of the pauper, acknowledges that the pauper has some right in the land. Now if the original owner in 1810 admits that the person in possession has a beneficial and saleable interest in the land (and the quantity of interest for this purpose is immaterial), and if it also appears that that interest was acquired fifteen years previously, there is an unbroken title for thirty-five years-fifteen years' occupation, an admission by the original owner that he had then a saleable interest, and twenty years since that, undisturbed occupation by the vendee; and the occupation of the vendee is the occupation of vendor, Rex v. Bitton, 2 Bott, 472, 631, Rex v. Calow, 3 M. & S. 22, Rex v. Butterton, 6 T. R.

Besides, here Naish was the donee of an estate at will, and gained a settlement by residing on his own estate. He is not within either of the two exceptions to the rule of common law, that a man gains a settlement by residing on his own estate; the one introduced by the 13 & 14 Car. 2, c. 12, of persons coming to settle upon tenements under the yearly value of 10l., has been decided to apply only to persons taking tenements by contract of renting, Rex v. Bowness, 4 M. & S. 210, *Rex v. St. John's, Glastonbury, 1 B. & A. 481, [*750] and not to persons coming to tenements by any other title; as executor, Rex v. Stone, 6 T. R. 295; or by marriage, Rex v. Ynys Cynhanarn, 7 B. & C. 233; or by purchase, 9 G. 1, c. 7; he did not come in by contract of renting. The other exception, introduced by the 9 G. 1, c. 7, as to purchases for less than 30l., has been decided not to apply to gifts of estates from natural affection, Rev. Marwood, Burr. S. C. 396. This estate was given from that consideration. The words passed an estate, which, by the statute of frauds, is reduced to an estate at will; but a tenancy at will is a sufficient estate to gain a settlement, unless within the exceptions above mentioned, Cranly v. St. Mary, Guildford, Str. 502.

Lord Tenterden, C. J. There is no ground for contending that Carpenter's occupation is to be considered a continuance of the estate of Naish; and if that be so, there was no more than a possession for fifteen years. The adverse possession in the cases cited had continued for more than twenty years. There is no authority to show that a residence on an estate at will of a value less than 10l. per annum can confer a settlement.

BAYLEY, J. Undisturbed possession for twenty years confers an estate. It is evidence for a jury to presume a grant. Here there was only possession for fifteen years. It is said possession of Carpenter is possession of Naish. But Carpenter came into possession, not under Naish, but under his uncle Bath.

*LITTLEDALE, J. I think that Naish was no more than a tenant at will to his uncle. There is no authority to show that a mere tenant at will can gain a settlement by residing upon an estate of less value than 101. a year.

Order of sessions confirmed.

SAINSBURY v. PRINGLE, Bail of CRAMP and CROWDY. May 10.

Where a plaintiff issued a joint soi. fa. against A. and B., bail of C. and D., upon which A. only was summoned, B. not being found, and A. entered an appearance for himself only: Held, that a declaration against him alone was irregular.

JUDGMENT having been obtained against Cramp and Crowdy, a ca. sa. was issued on the 16th of November, 1829, and lodged with the sheriff of Middlesex for a return of non est inventus, which was made on the 21st of November; and on that day a sci. fa. was issued against James Coppock and Pringle, the bail of Cramp and Crowdy, by which it appeared that the recognisance was as usual joint and several; but the command to the sheriff was, that he should make known to them that they should appear, &c., and show why the plaintiff ought not to have execution against them, according to the force, form, and effect of The summons, following the terms of the sci. fa., was joint, the recognisance. but was served on Pringle only, as Coppock could not be found. Pringle entered an appearance for himself only. On the 18th of January, 1830, an alias sci. fa. was issued against Coppock alone, and lodged with the sheriff of Middlesex for a return of nihil. On the 19th of January the plaintiff declared in sci. fa. against Pringle alone; and on the 23d Cramp and Crowdy rendered in discharge of their bail, and notice thereof was given on the same day; and thereupon a rule was *752] obtained for *staying all proceedings on the sci. fa., and setting aside the

declaration as irregular; against which,

Campbell and Fish showed cause. The plaintiff is perfectly regular in declaring against Pringle alone, notwithstanding the sci. fa. issued against both the bail, he having been unable to summon Coppock, and no appearance having been entered for Coppock. The proceeding by sci. fa. is merely for the purpose of bringing the bail into court, and is in that respect analogous to non-bailable process; and in non-bailable process it is the usual practice to insert the name of John Doe as well as that of the real defendant, and yet to declare against the latter only. And no distinction can be drawn between John Doe and a real defendant in such case, Stables and Another v. Ashley and Others, 1 Bos. & P. The course which has been pursued by the plaintiff seems warranted by the case of Gee and Wife v. Fane, I Lev. 225. There it was held, that, notwithstanding the writ of sci. fa. which had issued against the bail was joint, and the judgment had thereon was also joint, execution against one of the bail only was Now, if, after going on to judgment against both the bail jointly, the plaintiff may be permitted to take out execution against one only, a fortiori may he be permitted to discontinue the proceedings against one of the bail in an earlier stage of the suit. The recognisance of the bail being joint and several, it is quite clear that the plaintiff might have proceeded against Pringle alone in the first instance; and it would be very hard if he should now be estopped from proceeding against him alone, in consequence of *having joined Coppock in the sci. fa., as by the affidavits it appears that he used all diligence to summon Coppock, and it is solely attributable to Coppock's keeping out of the way, and to the circumstance of the plaintiff not being permitted, by the practice of the Court, to issue a sci. fa. into London, that Coppock was not summoned. Then, the render is too late, not having been made until long after the return of sci. fa. as to Pringle was made.(a)

Manning, contrd. The case of Gee and Wife v. Fane does not prove that the plaintiff's proceedings are regular. The execution in sci. fa. is on the recognisance, and not on the judgment, and, therefore, the execution may be joint or several, the recognisance being in that form; and the judgment is, that the party shall have execution according to the force, form, and effect of the recognisance.

Cur. adv. vult.

Lord TENTERDEN, C. J. This was an application to show cause why proceed-

ings in sci. fa. against bail should not be stayed, and why the declaration should not be set aside. The irregularity complained of was, that upon a sci. fa. against two, the plaintiff declared against one only, without bringing the other into court. The case was discussed, and stood over for consideration. The sci. fa. was in the usual form, describing the recognisance as one by which the bail bound themselves, and each of them bound himself, and it called upon them to show, if they had or knew, or if either of them had or knew, anything to say for themselves or *himself, why the plaintiff ought not to have his execution against them according to the form and effect of the recognisance. Upon that sci. fa. one of the bail was summoned and appeared; the other was not summoned and did not appear. The plaintiff thereupon sued out an alias sci. fa. against the latter, and declared in sci. fa. against the former; and whether such declaration was regular or not was the question; and we are of opinion it was not. The form of the recognisance, indeed, as set out upon the sci fa., shows that each binds himself separately, so that each might be sued separately; but where the sci. fa. calls upon them (not upon each by himself) to show cause why execution should not issue against them according to the force of the said recognisance, we think the sci. fa. is to be taken to be a proceeding against the two jointly, and that, though several executions may be awarded against the bail, because execution is prayed against them according to the force, form, and effect of the recognisance, which is several as well as joint, Gee v. Fane, I Lev. 225; Tidd. 1099, 1133; yet as the sci. fa. calls upon them to show cause, we think there can be no award of execution against either until both are before the Court; and there is no instance that we can discover in which, upon such a sci. fa. as this, the plaintiff has declared separately against one of the bail; and the best books of practice appear to take it for granted, that until both defendants are in court, there can be no declaration against either.(a) We consider this, therefore, a departure from the ordinary course of proceeding against bail, and that the rule ought to be made absolute.

Rule absolute.

(a) Tidd, 1127. Impey, 477.

*HORSFALL and Another v. FAUNTLEROY and Another. May 10.[*755

A., a merchant at Liverpool, circulated catalogues of certain goods to be sold by auction, subject to the following condition amongst others:—"Payment to be made on delivery of bills of parcels, by good bills on London, to the satisfaction of the sellers, not exceeding three month' date, to be made equal to cash in four months." B., a broker at Liverpool, sent a catalogue to C., a merchant in London, who in return gave him directions to buy certain lots, which B bought accordingly. Before the sale began the auctioneer stated, that payment by known buyers was to be on the usual credit, two and two months. B., as a known buyer, received the goods without giving bills, and forwarded them to C. in London, with an invoice, stating that payment was to be equal to cash at four months; and a few days afterwards B. drew of C. for the amount, at four months from the day of the sale, which bill C. accepted and paid at maturity. Within two months from the sale B. failed, never having given bills to A. for the price of the goods, and A. finding that C. was B.'s principal, such him for the value: Held, that he could not recover, as C. would naturally be induced by A.'s catalogue, to suppose that B. had given bills for the goods at the time of delivery, and therefore accepted B.'s draft under a mistake occasioned by A.; and per Parke, J. The broker B. had not any authority from C. to make a contract for goods to be paid for at two and two months, and consequently C. was not bound by it.

Assumpsit for goods sold and delivered, and on the money counts. Plea, the general issue. At the trial before Parke, J., at the last Spring assizes for Lancashire, it appeared that the action was commenced to recover the value of eight lots of ivory which the plaintiffs alleged to have been purchased of them by Messrs. Lloyd and Williams on behalf of the defendants, under the following circumstances:—The plaintiffs, who were importers of ivory at Liverpool, caused catalogues to be circulated stating that a quantity was to be sold by auction by Shand and Horsfall on the 6th of May, 1829, subject to several conditions of sale, and amongst others, the following:—"Payment to be made on

delivery of bills of parcels by good bills on London to the satisfaction of the sellers, not exceeding three months' date, to be made equal to cash in four months from this date." Lloyd and Williams, brokers at Liverpool, who were frequently employed by the defendants, who were dealers in ivory in London, to purchase ivory for them, sent one of those catalogues, with the conditions an*756] nexed, to the defendants, and received in return *directions to buy certain lots, which they did accordingly, to the value of 1081l. 2s. 2d. Before the sale began the auctioneer, Horsfall (not the plaintiff), on reading the conditions of sale, made the following verbal alteration as to the payment:—
"Payment by known buyers the usual credit of two and two months. By strangers on delivery of the bill of parcels by good bills on London to the satisfaction of the sellers, not exceeding three months' date, to be made equal to cash in four months from this date." After the sale the auctioneer asked Lloyd and Williams to whom their lots were to be put down, and in answer received the following bought note:—

"Messrs. Shand and Horsfall.

"Sirs,—We have this day bought from you the following lots of ivory, viz. (The lots were then specified.) With customary allowances. Payment two and two months. (Signed) "LLOYD and WILLIAMS."

Shand and Horsfall then sent an invoice in the same form to Lloyd and Williams, to whom the ivory was delivered, and they forwarded it to the defendants, with an invoice as follows:—

"R. Fauntleroy and Son, per Lloyd and Williams,
"Bought of Horsfall and Tobin, per Shand and Horsfall,
"Eight lots elephant teeth. Payment equal four months' cash."

They then set out the particulars, making the amount 1081l. 2s. 2d., and added brokerage and commission, making the whole amount to 1093l. 9s. 6d.; and a few *days afterwards they drew on the defendants for the amount *757] at four months from the 6th of May; which bill the defendants accepted and paid. Within two months after the sale Lloyd and Williams stopped payment; and then the plaintiffs, having for the first time (as they said, but on this point there was conflicting evidence) ascertained that the defendants were the real buyers of the ivory, demanded payment of them. The defendants answered, that they had already accepted a bill for the amount, which would be paid at The plaintiffs, having waited until more than four months from the time of the sale had elapsed, commenced this action, contending that, inasmuch as they did not at the time of the sale know that Lloyd and Williams purchased as agents and not as principals, they had a right to resort to the principals as soon as they were discovered. The learned Judge was of opinion that the defendants had not authorized Lloyd and Williams to make a contract for them upon any other terms than those specified in the catalogue and conditions transmitted to them, and consequently that the defendants were not bound by the contract for payment at two and two months, the contract authorized by them being a contract requiring payment on the delivery of bills of parcels; and he directed a nonsuit.

Pollock on a former day in this term moved for a rule nisi for a new trial, and contended that the plaintiffs had a right to resort to the defendants for payment as soon as they discovered them to be the parties for whom the ivory was purchased. The invoice sent by Shand and Horsfall to Lloyd and Williams mentioned the terms on which payment was to be made; the defendants *afterwards received and kept the ivory, and they must be presumed to have received it upon the terms contained in that invoice. The payment to the broker did not exonerate the principals; it was an unauthorized payment; the principals should have looked to the application of the bill which they accepted. [Parke, J. It did not appear that the defendants ever authorized their agents to make a contract for the goods to be paid for at two and two mouths; nor did they ever ratify it after it was made by the agents.] The time at which pay-

ment is to be made is not material; for in all cases where goods are bought to be paid for by a bill at a certain date the plaintiff may declare generally for goods sold and delivered, as soon as the time has arrived at which the bill contracted for would become payable.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J. It appeared at the trial of this cause that before the ivory in question was sold, catalogues had been circulated containing certain conditions of sale. One of those was transmitted to the defendants, who thereupon sent orders to their agents to make certain purchases on their account. The agents made the purchases accordingly, and sent the ivory to the defendants in Loudon, with an invoice stating the mode of payment in the same terms as were contained in the conditions of sale. It further appeared, that before the auction began the auctioneer stated that known buyers would be allowed to pay at the end of two months by bills payable at two months from that time; and Lloyd and Williams, the agents for the defendants, being known buyers, were allowed to have the *ivory without giving bills at the time; and they immediately drew on the defendants, who accepted their draft for the The learned Judge at the trial was of opinion that no other contract could be substituted for that which the defendants in the first instance authorized their agents to make, and on that ground directed a nonsuit. That is a very important question, and, as it is not essential to the decision of this case, I avoid giving any opinion upon it. But inasmuch as the plaintiffs, by circulating a catalogue with certain conditions of sale, a copy of which was transmitted to the defendants, naturally led them to suppose that Lloyd and Williams could not have obtained the ivory without giving good bills on London, and that therefore they might properly accept the bill drawn by Lloyd and Williams for the amount, if we held that the acceptance and payment of that bill did not exonerate the defendants from the present demand, it would be an exceedingly hard case; for they have fallen into the difficulty, being misled by the document put forth by the plaintiffs themselves. On this ground I think that the plaintiffs are not entitled to recover, and consequently that the nonsuit ought not to be disturbed.

Parke, J. Since the trial of this cause I have fully considered the point upon which the nonsuit proceeded, and I still think it was right. The defendants gave authority to Lloyd and Williams to make one contract only, vis. a contract for ivory, to be paid for by good bills on delivery. No authority to make any other contract can be presumed; nor was there any evidence of a subsequent ratification. The circumstance of a general declaration for goods sold and delivered being allowed *after the time of credit has expired where goods are sold to be paid for by bills, has no bearing on the question. That is a mere rule of pleading, and does not at all vary the necessity of proving the contract.

J. BARTLETT the Elder and J. BARTLETT the Younger v. PENTLAND, Secretary of the SAINT PATRICK'S Assurance Company of IRELAND. May 11.

An assured who resided at Plymouth employed an insurance broker in London to recover a loss from the underwriters; and the latter adjusted the loss by setting off in account against it a debt due to them from the broker for premiums. The name of the underwriter was then struck off the policy. It was proved to be the custom at Lloyd's Coffee House in London to consider such set-off as payment between the broker and underwriter. The broker became bankrupt, and never paid the money to the assured: Held, that the set-off in account between the underwriter and the broker was not payment to the assured, inasmuch as the broker had only authority to receive payment for the assured in money; that the custom which prevailed at Lloyd's Coffee House was not binding on the assured, who were not shown to be cognisant of it, or to have assented to it; and that the erasure of the name of the underwriter from the policy, that not having been done with the assent of the assured, did not discharge the former.

This was an action to recover a total loss of 8351. upon a policy of insurance for that amount, effected with the St. Patrick's Insurance Company, of which the defendant was secretary. Plea, general issue. At the trial before Lord Tenterden, C. J., at the London sittings after Trinity term 1827, the jury found a verdict for the plaintiffs, damages 8851, subject to the opinion of this

Court on the following case:-

The plaintiffs, who are corn merchants, carrying on business near Plymouth in the county of Devon, were owners of a cargo of wheat shipped on board the ship Rose on a voyage from Boston to Plymouth; and by one James Mitchell, an insurance broker, effected an insurance on the said cargo in the said ship, to the amount of 8351., with the St. Patrick's Insurance Company, at their office in Lombard Street in the city of London. *This company was established in the year 1824, and by an act of parliament passed in the 5th G. 4, c. clx., is enabled to sue and be sued by its secretary. Their business was and is carried on in London, at the office in Lombard Street. The policy was in the usual form, stating that Mitchell, as well in his name as for and in the name and names of all and every other person and persons to whom the same did, might, or should appertain, did make insurance. In the copy of the policy, forwarded by Mitchell to the plaintiffs, he was stated to be agent. The agent of the company, when the policy was effected, knew that it was effected by Mitchell as agent to the plaintiffs, and on their account, the letter of instructions having been communicated to him. The ship sailed on the voyage in question, and a total loss of the cargo happened by perils of the seas in November 1825; and on the 4th of December following the plaintiffs wrote a letter to Mitchell, containing the following passage:—"We hope you will get the amount of insurance for us. You of course know better how to act than we do, as we never lost a vessel or cargo before. We have been in the habit of insuring for more than thirty years."

On the 30th of December an adjustment of a total loss on the policy was made on behalf of the said company, as follows:—"The company agree to settle a claim 1001. per cent. for total loss on policy, 8351." Mitchell, the insurance broker, produced to the agent of the company the original policy of insurance, and the adjustment was written upon it in the usual manner. Mitchell had an account with the company, and effected from time to time insurances for other people with them. On the *day of making the adjustment the sum of 835%. was placed by the company to the credit of Mitchell in that account, and at the same time, a pen was struck through the name of the company's agent subscribed to the policy and to the memorandum of adjustment. On the 3d of January, 1826, Mitchell wrote to the plaintiffs a letter, from which the following is an extract :-- "I am in receipt of your esteemed favour of 1st instant. I received an answer from Dunkirk to my letter respecting the loss of the Rose, but not any more satisfactory than the account which appeared in Lloyd's List: they mention that a vessel had come on shore to the eastward of their harbour, but that no trace could be found of any of the crew, nor of any papers, nor even of the cargo she had on board; only a boat had been found near the spot, marked 'Rose of Jersey,' and a spar branded in the same way. Under such circumstances, the underwriters on your policy might have kept us out of a settlement for twelve months, as is the custom where no direct proof can be brought forward. They have, however, in this instance, agreed to settle at the The customary payment here is to wait one month, and then regular time. draw at three months; but you are not at liberty to value for half the amount at three months, and in a few posts I hope to be able to hand you a regular account of what the balance will be, when you may value on me for the same at four months." To this letter the plaintiffs, on the 7th of January, returned the following answer: -- "We are glad to hear you have agreed to settle with the underwriters; you will please to draw on them bills of 2001. and 3001. each, and *763] remit us the drafts. We *should think they can have no objection for you to draw on them for the full amount. You will please to furnish us

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with your account of insurance for the last year, that we may remit you the amount. This is the first cargo we ever lost, and we trust it will be the last." On the 11th of January Mitchell replied to this letter as follows:- "You appear to have misunderstood me about drawing for the loss per Rose. The underwriters here will not accept for losses. In the present case, the company might have kept you out of a settlement for twelve months and a day, which is according to law; but, on urging the matter with them, they have agreed to waive that point, and to settle, unless something turn up to throw a doubt upon the loss of the vessel. As I mentioned to you before, the established custom here is, for the assured to wait a month after the underwriters have agreed to settle, and then draw at three. In the present instance, I give you leave to draw now for 400% at three months, subject to one month's discount, and 400% at four months, writing me a letter engaging to provide for the bills in the event of the company not paying. You may draw these amounts in such sums as best suit your own purpose." The plaintiffs replied by letter, and enclosed therein two bills of exchange for Mitchell's acceptance, value 400l. each, which

he duly accepted.

No balance was struck at the date of the adjustment, nor was any struck until the 1st March following, when, after crediting Mitchell's account, the amount of the loss on the policy in question, a balance of 2281. 4s. 1d. was due by the company to Mitchell, which was paid to Mitchell. On the 9th of April, 1*764 *1826, Mitchell became insolvent; and not having paid the said bills, or any part of the said 835l. to the plaintiffs, they were obliged to take up the bills. The placing of the said sum to the credit of Mitchell in the account between him and the St. Patrick's Company was a bonf fide transaction on the part of the company, and not made in contemplation of Mitchell's insolvency. It was proved on the trial, that the usage of Lloyd's Coffee House in the city of London, where a great majority of marine insurances are effected, is, that when a policy is adjusted, payment is made at the expiration of a month, at which time the broker's account is credited with the amount of the loss; and if the premiums due fall short of such amount, the balance is paid to the broker in cash. If, at the time of adjustment, the amount of the premiums due from the broker to the underwriters exceeds the amount of the loss, it is usual for the underwriter to strike his name off the policy at that time, but the broker is not credited till the end of the month, it being considered that during the intervals the assured may call for the money from the underwriter. In the present case, the amount of premiums due from Mitchell to the defendants when the loss was adjusted was 10721. 2s. 9d. The plaintiffs did not call for the money from the underwriters within a month, nor until after the failure of Mitchell. Neither the policy nor adjustment, nor any notice of the adjustment, nor any notice of the credit in account given to Mitchell, was sent to the plaintiffs, but the policy remained in the hands of Mitchell till after his insolvency. The question for the opinion of this Court was, whether the credit given to Mitchell in *account, or the payment of the balance of that account to him, under the circumstances above stated, was a payment to the plaintiffs, in part or in all, of the said sum of 835l.? If the Court should be of opinion that it was not, the verdict to stand; if otherwise, a nonsuit to be entered, or a verdict for such sum as the Court should direct.

Campbell for the plaintiffs. The plaintiffs are entitled to recover the sum of The defendant adjusted the loss payable within a month, and is liable to pay the sum for which he subscribed his name, unless he had paid that sum to the assured or has been released. The defendant alleges that he has paid Mitchell, the broker, by setting off in account the loss against premiums due from Mitchell The only question is, whether Mitchell had authority from the assured to receive payment from the defendant in that mode? He was the agent of the assured for certain purposes, viz. to receive the amount of the loss from the underwriter in money: that was the only authority given to and accepted by the broker, Todd v. Reid, 4 B. & A. 210, Russell v. Bangley, 4 B. & A. 395. But

money was not paid to Mitchell. The defendant, therefore, continues liable. As to the usage at Lloyd's to allow such settlement in account to be considered payment as between broker and underwriter, first, the defendant is the secretary of an Irish company. The policies are Irish policies. Though the agent of the company may reside here, *still he signs them for underwriters who reside in Ireland. They cannot be bound by a custom which prevails in London; and the plaintiff, who resides in Plymouth, cannot be bound by such a custom. But, secondly, the custom as stated was not pursued. The transfer is to be made to the credit of the broker at the end of a month. Here it was done instanter. Russell v. Bangley, 4 B. & A. 395, is an authority strongly in point. There, indeed, the name of the underwriter remained on the policy: here it has been erased. But Mitchell had no authority from the assured to release the underwriter; and his having struck out the name, or authorized it to be done, cannot operate as a release. Suppose that a bill or bond were given to an agent to receive the money, and the agent allowed the debtor to set off a debt, and erased his name from the bill or bond: that would not have any effect. [BAY-LEY, J. The name was erased too on the 30th of December, when the adjustment was made; on any supposition that was too soon.] The defendant is not entitled to consider the sum of 2381. which he paid to Mitchell in money as payment to the assured. That sum was paid on the general account, and not on account of the particular policy.

Maule, contrd. The first letter set out, in which the plaintiffs say, "You of course know the matter better than we do," and several passages in the subsequent letters, show that the plaintiffs employed Mitchell as agent to transact the business in the usual manner; *and although Mitchell misrepresented the custom, the plaintiffs never objected to have the business conducted according to the custom. The custom may be legally binding on the assured. The underwriters, though established as a company in Ireland, have an agent in England who effects policies for them. They may, therefore, be bound by the usage as well as if they resided in England. [BAYLEY, J. In Gabay v. Lloyd, 3 B. & C. 793, it was held, that a usage at Lloyd's did not bind a person not cognisant of it.] In Todd v. Reid, 4 B. & A. 210, the report is very short, and the judgment, taken literally, goes too far. It is not a case of great authority. In the subsequent case of Russell v. Bangley, 4 B. & A. 395, it seems to have been admitted that such a usage might be valid and binding. In Thorold v. Smith, 11 Mod. 71, 87, the defendant being indebted to Sir Charles Thorold in 1001., Sir Charles sent his servant to receive the money. The servant took the goldsmith's note upon one Johnson, and thereupon gave a receipt to Smith. Johnson broke within a week after. Holt, C. J.—"Sir Charles gave no receipt, but the servant. Where a man has authority to receive money, he cannot receive anything else. It is a common practice, if a man receive a goldsmith's note, and give a receipt; it is purchasing the bill. In this case it must be understood according to the course of the world and trade, that his servant had a general authority to do what his master would have done. This case differs much from *768] the case of a servant or attorney to *one particular purpose, but this is in nature of a factor, &c." Here Mitchell had not merely a special authority to receive the money, but a general authority to do what was usual. ordinary cases the authority of the broker is derived from the possession of the policy. Russell v. Bangley, 4 B. & A. 395, is strongly in favour of the defendant. There the underwriter was held to be liable because his name was not struck off the policy. Lord Tenterden there said, "If that be done, and the plaintiff forbears to call upon him within the period warranted by the usage of trade, then the underwriter is discharged; but otherwise he is not." [BAYLEY, J. That must be understood to apply only where the name is struck off with the assent of the assured. There is no ground for presuming that the name of the underwriter was struck off the policy with the privity of the plaintiffs.] At all events, the defendants are entitled to deduct the sum of 2281. paid in money by the defendant to Mitchell.

Campbell in reply. The sum of 228l. was not paid to Mitchell on account of the loss on the policy, but generally on account. If the principal, knowing of the adjustment, had allowed the underwriter, on the faith of that adjustment, to give new credit to the broker, the assured would have been bound; but when no new credit was given, the set-off cannot be allowed. Here there was no fresh

credit given by the underwriter to the broker.

*Lord TENTERDEN, C. J. I am of opinion that the plaintiff is entitled to recover. An authority given by a principal to his agent to receive money cannot be construed an authority not to receive money, but to allow the debter to write off an authority not to receive money, but to allow the debtor to write off so much as may be due from the agent to him. If that were allowed, it would enable the agent to collude with the debtor to defraud the principal. If the authority was originally to receive money and not to allow a set-off, the fact which exists in this case, of the broker having struck out of the policy the name of the underwriter, was an act not authorized by the principal: for, if he did not authorize the broker to accept a set-off in payment, he cannot be supposed to have authorized him to do an act which would amount to a release of the debt. The fact of the name of the underwriter having been struck off the policy may have that effect, provided it be shown to have been done with the consent of the assured. It appears by the report of Russell v. Bangley that I said, that if the name of the underwriter were struck off the policy, and the assured forbore to call for payment within the period warranted by the usage of the trade, the underwriter might be discharged. The expression is, that he might be, not that he would be. I should certainly have expressed myself more accurately if I had added, "if the name were struck off with the assent of the assured." My brother BAYLEY in that case did add that qualification; and Best, J., intimated that in order to discharge the underwriter, the name must be struck off with the plaintiffs' privity. Here there is nothing to show that the name of the underwriter was struck off *the policy with [*770] the consent of the assured. If that were the fact, it might have been proved. Nothing appeared to raise such a presumption. As to the supposed usage at Lloyd's; the usage in a particular place, or of a particular class of persons, cannot be binding on other persons, unless those other persons are acquainted with that usage and adopt it. Merchants residing in London, and effecting insurances there, may reasonably be supposed to be acquainted with that usage, and to act upon it. But there is nothing in the case to raise such a presumption against the present plaintiffs; on the contrary, there is everything to rebut such a presumption. It appears by the letters that the plaintiffs were ignorant of the usage; for they allowed themselves to be imposed upon by the representation which Mitchell made to them, and acted on his misrepresentation. This was the first loss that ever occurred in their experience; so that they had no opportunity of becoming acquainted with the usage. Then, if the original transaction on the 30th of December was not binding on them, has anything occurred since which can give the defendant the benefit of any partial payment the company may have made to the broker? If the plaintiffs had by their neglect, even though that neglect had been induced by the misrepresentation of their agent, placed the defendant in a situation different from that which he might have been in if no such neglect had taken place, there might be ground for contending that, in point of justice, they, and not the defendant, ought to be losers. But there has been nothing of that kind, because the transaction which took place after the 30th of December will *be found not to be of that character. After the 30th of December, the defendant was indebted to Mitchell, the broker, in a large sum of money. The payment made to Mitchell subsequently to that time must be understood to have been made in respect of that debt. The transaction of the 30th of December was treated as complete and perfect. The defendant therefore has sustained no inconvenience by anything that has occurred since.

BAYLEY, J. I am of the same opinion. In this case, the company knew, at the time when the policy was effected, that it was effected for the benefit of the

plaintiffs; and a loss having occurred, they were bound to pay that loss, either to the plaintiffs themselves, or to some person who was duly authorized by the plaintiffs to receive it; and in making the payment to a third person, it was their duty to see whether he was authorized or not. Here, the company, knowing who the principals were, might have paid the broker by accepting a bill payable to the order of the principals; and by adopting that course, would have been perfectly secure. But if, instead of making the payment in that way, they make the payment to the broker in a manner which gives the latter an opportunity of misapplying the money, then as the broker was not authorized to receive payment in that way, it was done at the peril of the underwriters. Here, the plaintiffs, in their letter of the 4th of December, say, "We hope you will get the amount of insurances for us." That gives authority to the broker to get payment in money, but not in any other way. Now, suppose that letter had been exhibited to the *underwriters, they would have known that he had authority to receive payment, and that they ought to pay him in such a manner as to enable him at once to pay his principals and make a remittance to them. If they had paid the broker in money, it would have become his duty to have transmitted the money to the plaintiffs, and they would have been the sufferers if he had omitted to transmit the money to them; but as the company did not put Mitchell in the possession of money, so as to give him an opportunity of transmitting that money to the principals, but merely wiped off a debt of their own, and paid not by money but by set-off, they did that which was not authorized by the plaintiffs. Suppose, at the time the plaintiffs had sent the authority, the company had communicated to them that they would pay Mitchell not by money, but by set-off, can it be supposed that the plaintiffs would have assented to such a mode of payment? They would have repudiated it, and said, that the defendants must pay them, the plaintiffs, in money, and that they had nothing to do with debts between Mitchell and the defendant. If the defendants had looked at the language of this letter, that appears to me the line of conduct which they would have been bound to have adopted; and if they had adopted that line of conduct, namely, by paying in money, Mitchell would, if he were an honest man, have transmitted that money to the present plaintiffs. The present plaintiffs were desirous of doing that which would have made them secure, viz., of drawing on the underwriters, but Mitchell misleads them, and tells them to draw upon him. Then, does their drawing upon him in pursuance of that direction exonerate *the present defendants? Russell v. Bangley, 4 B. & A. 395, shows that it has not that effect. The drawing of the bill shows merely that the plaintiffs were not unwilling to get their money in that way if they could; but then, if that bill be not paid, those originally liable to pay still continue liable. The present defendants were bound to pay Mitchell in cash; they have not paid him in cash, and therefore they are still liable to pay the amount to the plaintiffs. But then it is said, that for the sum of 228l. the defendants are entitled to credit. I agree with my lord that there is no ground for making such a distinction, and that the defendants are not entitled to credit for that sum. If that sum had been paid specifically on account of the debt in question, in order to enable Mitchell to make a remittance to the plaintiff, that might have varied the transaction with respect to that sum; but it was paid generally on account, and there are many other items in the account besides that of 8351. I am, therefore, of opinion that the company, never having paid the plaintiffs the amount of their demand in money, and never having done that which is equivalent to payment, are liable.

LITTLEDALE, J. A total loss having happened, it was the duty of the underwriters to pay the amount to the assured; and supposing they ought to have paid them in money, and have not so done, the only question is, whether they have done that which is equivalent to payment in money? They have settled *774] an account with *Mitchell, the broker, who was employed by the plaintiffs to conduct the transaction between them and the underwriters. The only question, therefore, is, whether Mitchell had authority from the plaintiffs to set-

tle the account with the underwriters in the way in which he has done? There certainly was no express authority given by the plaintiffs to Mitchell so to do: but that authority might be implied if there had been any course of dealing between the plaintiffs and the present underwriters and Mitchell, in which losses had been set off in this manner against a debt due from the broker to the under-There certainly was no such course of dealing, because it appears that this was the first loss which the plaintiffs ever had. Then, if there was not any course of dealing from which such authority can be implied, is it to be inferred from the usage which is stated to have prevailed between the underwriters at Lloyd's and the brokers? The usage which prevailed at Lloyd's cannot be called in aid of the defendants in the present case, because they are not persons They are an Irish insurance company; and who effect insurances at Lloyd's. although they have agents in this country, that does not make them subject to the same rules as those are who effect policies at Lloyd's. Secondly, it cannot be supposed that the plaintiffs are particularly cognisant of what is done at

Lloyd's, inasmuch as they reside not in London, but at Plymouth.

Then, if there was no express authority, and no course of dealing between the parties, or usage from which such authority can be implied, the only question is, whether any such authority can be collected from the letters stated in the case? It appears that Mitchell *misled the plaintiffs as to the mode in which they were entitled to be paid. They tell him that [*775 was the first time they had had any loss, and that he must know better how to act than they do. It may be said that that gave him authority to act according to the best of his judgment. Mitchell afterwards leads them to suppose that the underwriters will pay the loss, not immediately, but at a certain time after-They expect to be paid in money; and Mitchell tells them that the underwriters might have kept them out of a settlement for twelve months; that the custom was to wait one month, and then draw at three, but that they might value for half the amount at three months. The plaintiffs understood that they or Mitchell were to draw on the defendants; for they desire him to draw on the defendants, and to remit them, the plaintiffs, the drafts: but Mitchell tells them that the underwriters will not accept for losses, but that they, the plaintiffs, might draw on him at three months, subject to one month's discount; and they did then draw upon Mitchell. The effect of this correspondence is, that the plaintiffs, having confided to Mitchell to settle in the best manner he could, afterwards, on his representation, draw on him two drafts, which he accepted. It may be said, that by so doing the plaintiffs agreed to give credit to Mitchell, and to waive any right of action against the underwriters: but it appears to me in this case that that cannot be so, because the plaintiffs drew on Mitchell in consequence of his having represented that the underwriters would not accept for losses; and the plaintiffs fully expected that either the underwriters or Mitchell would take up the bills when they became due. I think, *therefore, that the plaintiffs did not by drawing the bill upon Mitchell [*776] Mitchell would take up the bills when they became due. abandon their right to sue the underwriters; because they drew upon him in consequence of his having represented that the money would not be paid by the There has been a settlement between Mitchell and the underwriters, but the plaintiffs have nothing to do with it.

Then, with regard to the other two sums, I entirely agree, for the reasons given, that they ought not to be deducted. The judgment of the court must

therefore be for the plaintiffs.

PARKE, J., having been concerned as counsel in the cause, gave no opinion Judgment for the plaintiffs.

*777] *COLLINS and Others, Assignees of F. ROBINE, v. JONES.

Assumpsit by the assignees of R., a bankrupt, on a promissory note drawn by defendant, payable to G. or order, and by him endorsed to the bankrupt before the bankruptcy. It appeared that in October, 1825, G. applied to the bankrupt to discount the note, and took as part of the proceeds a bill of exchange, accepted by the bankrupt, payable to G.'s order. G. endorsed this bill for value to the defendant, and he got it discounted by H., who was the holder when it became due. A commission of bankrupt issued against R. on the 23d December, and the bill became due on the 24th, when it was presented and dishonoured. On the 26th H. received the amount from the defendant, and returned the bill to him: Held, that he had a right to set off the bill against the demand of the assignees on the promissory note.

This was an action on a promissory note bearing date the 15th of October, 1825, for the sum of 300*l*., drawn by the defendant in favour of one Gunn or order, payable four months after date, and by Gunn endorsed to the bankrupt. Plea, the general issue. The defendant paid 60*l*. into Court, and gave a notice of set-off of the bill of exchange for 177*l*. hereinafter mentioned, and also for money paid, money had and received, and money due on an account stated. At the trial before Lord Tenterden, C. J., at the London sittings after Trinity term 1827, a verdict was found for the plaintiffs, subject to the opinion of this Court

on the following case:-

In October 1825, Gunn, being possessed of the promissory note for 300l., applied to the bankrupt to discount that and sundry bills of exchange to the amount of between 600l. and 700l. To this the bankrupt agreed, but not being able to return cash for the whole sum, Gunn, in order to make up the deficiency, drew a bill on the bankrupt for 1771., dated the 21st of October, at two months after date, payable to the order of Gunn, which the bankrupt accepted, and which Gunn accordingly received in part return for the said note and bills. This bill for 1771., Gunn, a few days afterwards, endorsed to the defendant for value, and the defendant, on the 26th of October, paid it into his *bankers, Messrs. Hopkinsons, who on the 25th of November discounted it for him, and were the holders thereof when it became due. The commission against Robine bears date the 23d of December, 1825. The bill for 1771. became due on Saturday the 24th of that month, on which day it was duly presented for payment and dishonoured, and Messrs. Hopkinsons, on the 26th, received the amount of it from the defendant, and returned the bill to him. Prior to the issuing of the commission, the bankrupt deposited the note for 300l. with Messrs. Herries and Co. as his bankers, who held it when due, when it was dishonoured by the defendant, who, upon proceedings being threatened by Messrs. Herries and Co., paid two instalments thereon amounting together to 61l. 14s. 8d., which Messrs. Herries and Co. afterwards paid over, and also delivered up the note to the plaintiffs, who commenced the present action. The defendant, at the trial, claimed to be entitled to credit for or to set-off the said bill for 1771. against the demand of the plaintiffs upon the note, and if he were so entitled the plaintiffs could not recover; the sum of 61l. 14s. 8d. paid on account of the note, together with the 65l. paid into Court, covering the difference of principal and interest between the two sums of 177l. and 300l. The question for the opinion of the Court was, whether the defendant was entitled to set-off, or to credit for the amount of the said bill for 1771.

The case was argued at the sittings in Banc before this term, by D. Pollock for the plaintiffs, and *Hutchinson* for the defendant; but as all the points made are fully discussed in the judgment of the Court, it has been thought unnecessary to publish the arguments.

*BAYLEY, J., now delivered the judgment of the Court.

This was an action on a promissory note for 300l. at four months after date, dated the 15th of October, 1825, and Jones, the defendant, was the maker, Gunn payee, and Robine, the bankrupt, endorsee. Robine discounted this note (in part) for Gunn; but, not being able to make up the amount in cash, Gunn drew upon Robine in favour of himself for 177l. at two months after date, dated the 21st of October, 1825, and that bill Gunn endorsed to the defendant. At

that time, therefore, Jones held Robine's acceptance for 1771. due the 24th of December, 1825, and Robine held Jones's note for 300l. due the 18th of February, 1826. On the 26th of October, Jones paid the bill for 1771. into his bankers, and they discounted it for him 25th of November. On the 23d of December a commission issued against Robine; on the 24th his acceptance for 1771. was dishonoured; and on the 26th the defendant took it up. The defendant's note for 300l. was dishonoured, and Robine's assignees brought this action upon it; and the only question is, whether the defendant is entitled to set off, against the claim of the assignees, Robine's acceptance for 1771. ? This depends upon the 6 G. 4, c. 16, s. 50. That clause provides "that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and *no more, shall be claimed or paid on either side respectively; and every debt or [*780] demand hereby made provable against the estate of the bankrupt may also be set-off in manner aforesaid against such estate; provided the person claiming the set-off had not, when such credit was given, notice of the act of bankruptcy." This clause is substituted for the 5 G. 2, c. 30, s. 28, which provided, that where it should appear to the commissioners that there had been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the commissioners, &c., should state the account between them, and one debt might be set against another, and what should appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, should be claimed or paid on either side respectively.

The 6 G. 4, c. 16, s. 50, therefore, contains in substance what the 5 G. 2, c. 30, s. 28, did; but it does not make the act of bankruptcy the time at which the set-off is to cease, it makes all debts thereby made provable items of set-off, and does not allow the set-off on the creditor's part if the credit was given by him after the act of bankruptcy, provided such creditor knew thereof at the time of

giving credit.

The objection to allowing the set-off in this case is, that at the time of the commission the defendant was not the holder of this acceptance; it was in the hands of a third person, who might have proved it, and who, had he been a debtor to the bankrupt's estate, might have made it an item of set-off for his own debt; and it was *insisted, that the clause in question gives no right of set-off upon a negotiable security, unless to the person who was the holder of such security at the time the commission issued. It is conceded that the defendant might have set it off had he never parted with it, or if it had been returned to him before the commission issued, but that as it was out of his hands when the commission issued, and was not returned to him till afterwards, the right of set-off he would have had, had he not parted with the bill, was extinguished; and that, when he took up the bill, even though he did it because he was compelled to do so, he was not remitted to his prior state, and such right was not revived. It appears to us, however, that this is not the true construc-tion of the statute. The difference in the phraseology of the statute, where mutual debts and mutual credits are the subject of consideration, is not immaterial; for in speaking of the former, mutual credits, it speaks in the past tense, as of a time prior to the commission, where there has been mutual credit; and in the case of debts, it speaks in the present tense, where there are mutual debts. The question then is, whether this is a case in which there has been, within the meaning of the 6 G. 4, mutual credit. Hankey v. Smith, 3 T. R. 507, assists us in judging what is to be understood as an item of credit. That case imports distinctly that an acceptance in the hands of an endorsee, not due until after the bankruptcy, is an item of that description. There the defendants discounted for

Towgood and Co. (the holders) a bill accepted by Vaughans (the bankrupts), and the assignees of Vaughan and Co. having a demand upon the defendants for *goods sold, the question was, whether this acceptance of Vaughan and Co. constituted an item of credit, and the Court was clear that it did. Lord Kenyon said, "mutual credit was constituted by taking the bill on the one hand, and selling the goods on the other;" and Buller, J., said, "if a bill of exchange which is accepted is sent out into the world, credit is given to the acceptor by every person who takes the bill. Now that constituted the credit on one side in this case; then, on the other, credit was given to the defendants by the bankrupts for goods." That case establishes, that whoever takes an acceptance is to be considered within the 5 G. 2 as giving a credit to the acceptor, and it will follow as a consequence, that whoever takes a note must be considered within the same statute, as giving a credit to the maker. Here then Robine, by discounting Jones's note, gave credit to Jones, and Jones, by taking Robine's acceptance, gave credit to Robine; and it is in consequence of thus having given credit, that Robine has a claim upon Jones upon the note, and that Jones has a claim against Robine upon the acceptance. There had, then, at the time of the bankruptcy, been mutual credit between these parties. It is true, that at the time of the bankruptcy, Jones was not the creditor upon this acceptance; his bankers were; but when the bill comes back to him, and he is forced to take it up, why is he not to stand in the same situation as if he had never parted with it, and to be remitted to his former rights? He is within the words of the statute; there has been a credit between him and the acceptor. And is he not within the spirit also? There were then mutual debts between the parties, and they had their origin in a mutual credit before the bankruptcy. Then why should one be forced *to pay what he owes in full, and take a dividend only for what is owing *783] to him? It was insisted that this would open a door to fraud, by encouraging the debtors to a bankrupt's estate to endeavour to get into their possession bills of the bankrupt, which have passed through their hands; and that instead of being forced to pay them, they will press forward to do so as volunteers. There may be instances of such practices, but the possibility of fraud will not enable us to put a construction upon the statute different from what its words require. It is true the case Ex parte Hale, 3 Ves. 304, is against our opinion. There, as here, the bankrupt was the acceptor of a bill, the petitioner, i. e. the person claiming to make it an item of set-off, had endorsed: it was in the hands of the endorsee at the time of the bankruptcy; and there, as here, the petitioner had been obliged after the bankruptcy to take it up. Lord Loughborough held "that the petitioner might prove, but that he could not set off; that he could not by paying the bill put himself in a better situation than any other creditor; that there was no mutual credit; that though the acceptance constituted a debt due at the time of the bankruptcy, that debt was not due to the petitioner; and that, therefore, the set-off failed." That case, therefore, went upon the principle that it was not a case of mutual credit, in which respect it is at variance with Hankey v. Smith; and it was decided upon the 5 G. 2, c. 30, the language of which is not so strong in favour of the right of set-off as that of the 6 G. 4, c. 16. This latter statute provides de novo that every debt and demand thereby made provable against the estate of the bankrupt, may also be set off against *such estate, provided the person claiming the set-off had not, when he gave credit to such bankrupt, notice of an act of bankruptcy committed by him. And if that provision be confined, as perhaps it must, to such debts and demands as are thereby expressly made provable, this is a case in which the defendant's claim is made provable by this statute, for it falls expressly within the fifty-first section, and the defendant is a person entitled to prove as having given credit within the meaning of that clause.

The recent case of Bolland v. Nash, 8 B. & C. 105, is an authority that a bill which forms an item of credit on one side, need not be in the hands of the person claiming it as an item of credit at the time of the bankruptcy; and we see no reason to doubt the propriety of that decision. We are, therefore, of opinion

that the defendant had in this case a right to set off the acceptance for the 1771., and, consequently, that a nonsuit should be entered.

Postea to the defendant.

*JOHN WINGFIELD, THOMAS WINGFIELD, and JAMES [*785 TORKINGTON, v. THARP.

The commissioners under an enclosure act, were required to allot the lands directed to be enclosed, unto the several proprietors thereof, in such shares, quantities, &c., as they should adjudge to be a just compensation for their several and respective lands, rights of common, &c., therein; and were empowered also to set out, allot, and award any lands, &c., within the parish of A., "in lieu of or in exchange for any other lands, &c., within the said parish, provided that all such exchanges should be ascertained, specified, and declared in and by the award to be made by the consent of the owners of the lands exchanged." The commissioners awarded a certain allotment to A. B. "as a compensation for his open field, lands, and rights of common, and an old enclosure given up by A. B. to be allotted by the commissioners in exchange: "Held, that the commissioners had not pursued the powers vested in them by the act, and that A. B. could not make a good title to the allotment.

This was a case sent by His Honour the Vice-Chanceller for the opinion of this Court:—

Samuel Hunt, late of Wakerley in the county of Nottingham, clerk, deceased, was at the time of making his will, and continued from that time until the time of his death, seised to him and his heirs, according to the custom of the manor of Kennett-with-Kentford, in the county of Cambridge, of (among other estates and hereditaments) a messuage or tenement, and farm-house and homestall, and pasture adjoining thereto, containing 1 A. 2 R. 20 P., and of certain open field lands, rights of sheep-walk, rights of common, and an old enclosure, all copyhold of the same manor, and situate in the parish of Kennett, in the said county of Cambridge; the whole of which he had duly surrendered to the use of his will; and being so seised, the said Samuel Hunt duly made and published his will, bearing date the 24th day of August, 1813, and which was executed by him, and attested in such manner as by law is required for devising freehold estates of inheritance, and he thereby gave and devised unto the plaintiffs, and their heirs, all his real estates, freehold and copyhold, whatsoever and wheresoever, to hold the same unto and to the use of the plaintiffs and their *heirs, in trust to sell the same in manner in the said will mentioned, with all proper powers for that purpose. The testator died on the 4th day of January, 1814, without having altered or revoked his will as to the particulars before mentioned, leaving the plaintiffs him surviving. In the year 1813 an act of parliament passed entitled "An Act for enclosing lands in the parish of Kennett, in the county of Cambridge," and by the said act (after reciting that there were in the said parish of Kennett certain old enclosures, open and common fields, common meadows, heaths, and other open and commonable lands and waste grounds, and further reciting that the lands in the said open and common fields lay intermixed and dispersed in small parcels, and the said common meadows, heaths, and other open and commonable lands and waste grounds, in their then state, yielded but little profit, and were incapable of any considerable improvement, and that it would be very advantageous if the same were divided and allotted amongst the several owners thereof and persons interested therein, in proportion and according to their respective estates, rights, and interests in the same, and if such allotments were enclosed so far as were expedient), it was enacted, that Charles Wedge and Edward Gibbons should be and they were thereby appointed the commissioners for carrying the purposes of the general enclosure act and the said act into execution, subject to the regulations of the general enclosure act in all cases except where the same were by the said act varied and altered; and after giving various directions to the said commissioners relating to the execution of their duties under the said act, it was, amongst other things, enacted, that the said commissioners should

*then set out, attest, and award unto the several proprietors and owners thereof, and persons having a right of common or other interest therein, all the then residue and remainder of the lands and grounds thereby directed to be divided and allotted, in such quantities, shares, and proportions, as they the said commissioners should adjudge and deem to be a just compensation and satisfaction for and to be equal to their several and respective lands, grounds, rights of common, rights of sheep-walk, and other rights and interests therein. And it was thereby further enacted, that it should be lawful for the said commissioners to set out, allot, and award any lands, tenements, or hereditaments within the said parish of Kennett in lieu of or in exchange for any other lands, tenements, or hereditaments within the said parish of Kennett, or within any adjoining hamlet, parish, or place, provided that all such exchanges should be ascertained, specified, and declared in and by the award of the said commissioners, and should be made with the consent of the owner or owners, proprietor or proprietors of the lands, tenements, or hereditaments which should be so exchanged, whether such owner or owners, proprietor or proprietors, should be a body or bodies politic, or corporate, or collegiate, or a tenant or tenants in fee-simple or for life or lives, or in fee-tail, general, or special, or by the courtesy of England, or for years, determinable on a life or lives, or having a beneficial lease for years, or with the consent of the guardians, trustees, feoffees for charitable or other uses, husbands, committees, or attorneys of or acting for any such owners or proprietors as aforesaid, who at the time of making such exchange or exchanges should be respectively infants, femes covert, lunatics, or under any other legal *disability, or who should be beyond the seas or otherwise disabled to act for themselves, himself, or herself, such consent to be testified in writing under the common seal of every such body politic, or corporate, or collegiate, and under the hands of the other consenting parties respectively; and all and every such exchange and exchanges so to be made should be good, valid, and effectual in the law to all intents and purposes whatsoever. Provided nevertheless, that no exchange should be made of any lands, tenements, or hereditaments held in right of any church or chapel, or other ecclesiastical benefice, without the consent, testified as aforesaid, of the patron thereof, and of the lord bishop of the diocese in which such lands, tenements, or hereditaments so to be exchanged And it was further enacted that nothing in the said act should be situated. contained should extend or be construed to extend to revoke, make void, alter, or annul any will or settlement; but that the person or persons to whom any lands, grounds, or hereditaments should be allotted or given in exchange by virtue of the said act, should be seized thereof to such and the same uses, and for such and the same estates, and subject to such and the same wills, jointures, rents, charges, and encumbrances, and no other, as the messuages, cottages, lands, grounds, and hereditaments whereof such person or persons was or were seised or possessed at or immediately before the execution of the award of the said commissioners, or for which or in respect whereof such allotments or exchanges should be made, would have been subject to, charged with, or affected by, in case the said act had not passed.

*789] On the 14th day of July, 1820, the said commissioners, *pursuant to the directions of the general enclosure act, executed their award in writing under their hands and seals, dated the said 14th day of July, 1820, and they thereby awarded and allotted amongst other things, "unto and for the plaintiffs in the said award, described as devisees of the Rev. Samuel Hunt, deceased, in lieu of and as a compensation for their copyhold, open field lands, rights of sheep-walk, rights of common, and an old enclosure, given up by them the said plaintiffs, to be allotted by the said commissioners in exchange, all of which were copyhold of the manor of Kennett-cum-Kentford, two several allotments of land, therein particularly described, containing respectively 21 A. 3 R.

37 P., and 90 A. 1 R. 10 P.

The plaintiffs have agreed to sell to the defendants the two allotments made

to them by the said award, and the question for the opinion of the Court was,

Whether the plaintiffs could make a good title to those allotments.

Preston for the plaintiffs. The objections made to the title of the plaintiffs are, that the award does not show what was done with the old enclosure, and that the commissioners had no power to give the plaintiffs an allotment in lieu of the old enclosure. But the plaintiffs cannot be in a worse situation than if the same allotment had been made to them and no mention had been made of any old enclosure. If the allotment was too large for their common rights, the other commoners should have appealed. But they did not do so; and all allotments not appealed against are binding. It may therefore be taken as conceded, that the allotment, if made in respect of the common rights, would be valid, and not too large; why, then, should the title of the *plaintiffs be impeached, place of the allotment, something else was given for it, viz. the old enclosure. In Cooper v. Thorpe, 1 Swanst. 105, Plummer, M. R., thought, that an award under an enclosure act, if bad in part, was altogether bad; but in Rex v. Washbrook, 4 B. & C. 732, this Court held, that an award might be good in part and bad in part; and in Rick v. Clarkson, 2 W. Bl. 1318, it was said, that awards are not to be construed strictly, as executions of authorities.

Rolfe, contrd. Assuming the facts to be as stated, the plaintiffs have no title to the allotment. Whatever title they have is derived from the enclosure act and the award, which can have no other or greater authority than an award made All that they do within the scope of their authority is by private arbitrators. conclusive, but if they exceed it their acts are void. The question, then, is, Whether the commissioners, in making this allotment, acted within the scope of their authority? First, let the case be considered without reference to the exchange clause. Suppose the party were still living, and that he brought ejectment for the old enclosure, it is clear that no defence could be set up; and if so, the award would not be mutual; it would give the allotment without securing in return the old enclosure, and would, therefore, be at all events void as to that, Pope v. Brett, 2 Saund. 292. Then, does the exchange clause alter the The power is "to allot lands in Kennett in lieu of or exchange for other lands;" that is, a power to the commissioners to exchange one enclosure for another by *consent of the parties, not to make an allotment in consideration of other land to be given up and allotted in lieu of it. person can say how much of this allotment was in respect of common rights and how much for the old enclosure; other parties would, therefore, lose their opportunity of appealing. Besides, it does not appear that any assent was given to this exchange.

Preston in reply. The plaintiffs cannot rely on the exchange clause; but the case may be considered as if no exchange was actually made. Then the case stands thus: the commissioners say that they made the allotment in respect of two things; in respect of one of those things they might lawfully make it, in respect of the other they could not. The Court will therefore assume that it was made in respect of the former. [Lord Tenterden, C. J. The commissioners say that there was an exchange, why should we assume that there was not?]

Cur. adv. vull.

The following certificate was afterwards sent :-

This case has been argued before us by counsel. We have considered it, and are of opinion, that the plaintiffs cannot make a good title to the allotments therein mentioned.

Tenterden.

J. BAYLEY.

J. LITTLEDALE.

J. PARKE.

*792] *The KING v. The Inhabitants of BLACKAWTON. May 12.

In an appeal against a county rate, the party appealing must, in his notice of appeal, rtate that he is aggrieved, or state that from which it follows of necessity that he is so; and where a notice of appeal against such a rate stated, as the ground of appeal, that the county rate was unequal and defective, inasmuch as the appellant parish was charged and assessed in the rate at a higher proportion of the pound sterling, according to the fair annual value of the rateable property, than the respondent parish; and the sessions, upon the hearing of the appeal, received the evidence of surveyors as to the annual value of the rateable property of both parishes, and amended the rate by altering the assessment according to the annual value of the two parishes according to the evidence so taken, but leaving the statement of the annual value of the two to remain as before: Held, that the sessions were not warranted by the notice of appeal in so amending the rate.

Upon appeal by the churchwardens and overseers of the poor of the parish of Whitstone, in the county of Devon, against such parts of the county rate as affected their parish and the parish of Blackawton, the sessions ordered the rate to be amended in the manner hereinafter stated, subject to the opinion of this

Court on the following case:-

More than fourteen days before the entry of this appeal at the Epiphany sessions, a notice, of which the following is an extract, was served by the appellant parish upon the churchwardens and overseers of the poor of the respondent parish, the clerk of the peace for the county, and the hundred constables:— "Take notice that we, the undersigned, the churchwardens and overseers of the parish of Whitstone, within the hundred of Wonford, in the county of Devon, do intend to enter an appeal at the next general quarter sessions of the peace to be holden at the castle of Exeter in and for the said county of Devon, against the rate for the said county; and that our objections to the said rate, and the reasons for our appealing therefrom, are, that the said county rate is unequal and defective, in as much as our said parish of Whitstone is charged and assessed in the said rate at a higher proportion of the pound sterling, according to the *7021 fair annual value of the *rateable property therein, than the said parish of Blackawton is charged and assessed in such rate, in proportion to the fair annual value of the rateable property in such parish." More than fourteen days before the Easter sessions a second notice, signed by the churchwardens and overseers of the poor of the appellant parish, was served upon the churchwardens and overseers of the parish of Blackawton, the clerk of the peace for the county, and the hundred constables. This notice recited the delivery-of the former, and the entry of the appeal at the Epiphany sessions; it then recited that at the said Epiphany sessions an application had been made to the Court to appoint certain persons to enter upon, go over, and survey the whole of the said parishes of Whitstone and Blackawton, for the purpose of ascertaining the fair annual value of the said parishes respectively, and of giving evidence thereof to the Court on the hearing the said appeal, and that the Court refused to make such order, being of opinion they had no authority so to do. The notice then proceeded as follows:—"Now we, the undersigned, the churchwardens and over-seers of the poor of the parish of Whitstone aforesaid, do hereby give you this further notice that we intend, at the next general quarter sessions of the peace to be holden at the castle of Exeter in and for the said county of Devon, to prosecute and try the said appeal against the said rate for the said county of Devon, upon the grounds and for the reasons set forth or mentioned in the hereinbefore recited or mentioned notice. The notice further stated, that the parish officers of Whitstone had appointed two surveyors (who were named) to survey the property in their parish, as well as that of Blackawton, chargeable to the county *794] rate, in order to prove, on the trial of the appeal, the fair annual *value in which the parishes ought to be respectively charged in the said rate; and it required the parish officers and others of the latter parish to permit the said surveyors to enter their premises for that purpose, and called upon them also to appoint surveyors on their part. When these notices had been read, an objection was taken on the part of the respondents, on the ground that it did

not appear on the notices that the appellant parish was aggrieved. overruled the objection, and directed the appellants to proceed. They then tendered the rate in evidence, for the purpose of showing the sums at which the contending parishes were respectively assessed, the title of which was as follows: -" Devon new county rate of 943l. 14s. 81d., being one furthing in the pound on the annual value of the county, amounting to 905,981l. 12s. 41.d, as returned by the several parishes in the county pursuant to the 55 G. 3, c. 51, settled and approved of at Epiphany sessions 1817, and then ordered to be printed." And the assessment in respect of the said parish of Whitsone was 31. 3s. 10d. on an annual value of 3064l.; and in respect of that of Blackawton was 2l. 11s. 5d. The appellants then called as witnesses the two on an annual value of 2468l. surveyors named in the notice. They had accurately surveyed the appellant parish. The one valued the estates and rateable property within that parish at 3736L, the other valued them at 3680L per annum. With regard to the value of the estates in the respondent parish, one of these witnesses in the years 1824 and 1825 had been employed to survey the greater part of the parish by two or three private individuals, with a view to the sale of some property therein; and he valued the whole parish at 6315l. per *annum. The other witness had surveyed the parish as well as he could, by riding through the lanes [*795] and roads which intersect it, and he valued it at 6952l. per annum.

No evidence being offered on the part of the respondents, the Court took middle sums between those fixed by the two surveyors as the annual value of the respective parishes, and amended the rate by equalizing the assessments according to the proportions of the sums so taken (but leaving the annual value on the rate to stand as before), by reducing the sum assessed on Whitstone to 24 11s. 4d. on an annual value of 3064l., and by raising the sum assessed on Blackawton to 3l. 13s. 11d. on an annual value of 2468l. The questions for the opinion of this Court were, first, Whether the notice of appeal was sufficient? secondly, Whether the court of quarter sessions had any power to make the amendment above mentioned in the rate, and whether they should not have required the fair annual value of the respective parishes to be returned to them in the mode pre-

scribed by the statute 55 G. 3, c. 51?

Crowder and Escott in support of the order of sessions. It is objected to the notice of appeal in this case, that it does not state that the appellant parish is aggrieved; and the authorities relied on to support that objection are Rex v. Justices of Essex, 5 B. & C. 431, and Rex v. Justices of West Riding of York, 7 B. & C. 678. Those were cases of appeal against the diverting and stopping up of roads. And the clauses of the several acts giving the right of appeal in those cases differ from that which gives the right of *appeal in this case, inasmuch as they do not require the appellant to set out in his notice the cause and matter of his appeal, nor are any particular grounds of appeal mentioned in them. By the fourteenth section of the act for the regulation of county rates, (a) several grounds of appeal are specified, and it is sufficient if it appears from the notice that the appellant relies upon any one of those grounds, from which it must necessarily follow that he is aggrieved though he does not state it in terms, Rex v. Justices of Somerset, 7 B. & C. 681. As to the second point, it is said, that the justices had no power to make the alteration they have done in the assessment, leaving the statement of the annual value of the two parishes to remain as it was before. But all the clauses of the statute, in which any reference is made to the annual value of the rateable property in the different parishes, relate to the making of an entirely new rate, and not to the determination of questions upon appeal. All that the justices have to do, upon appeals brought before them, is to see that the assessments on the contending parishes are just, in proportion to the value of those parishes. It is said, that if it were shown that the assessments had been made upon a wrong estimate of the value of the parishes, the justices should require the value to be returned to them by

the churchwardens and overseers of the respective parishes, in the manner pointed out by the second section of the act. But to what purpose would this be done? Suppose an appeal were brought upon the express ground that an improper value had been returned by the churchwardens and overseers, it would be referring *797] back the question to the very *persons against whose determination upon it the appeal is made. Neither have the appellants the power of calling on the parish of whose assessment they complain, to make a new return of the value of their rateable property. It would therefore be impossible and useless to complain of the estimate of that value. They are aggrieved by the assessment, and the appeal is, therefore, properly made against the assessment.

Praed and Kekewich, contrd. . It does not necessarily follow that every person who can point out an inequality in the county rate, or an objection to it on any of the grounds mentioned in the fourteenth section of the act, is aggrieved by such inequality, or by the existence of such a ground of appeal. Now, by the statute, an appeal is given only to persons who are aggrieved; and, therefore, upon the principle of the cases cited on the other side, it is necessary that a party appealing should state that he is aggrieved, and go on to show the nature of that grievance. The present case is an illustration of this position. It appears upon the case, that the annual value of the rateable property in the appellant parish is, according to the lowest estimate supplied by their own evidence, 3680l. The assessment upon them supposes the annual value to be only 3064/.. and they are rated upon that value: then, whatever be the assessment on other parishes, they are not aggrieved, because the assessment on themselves ought, at all events, to be higher than it is. On the second point, the justices could not make the alteration they did, looking to the ground of appeal stated That ground is, that the appellant parish is rated at a higher in the notice. *798] proportion of the pound sterling, according to the annual *value of their rateable property, than the respondent parish. Looking at the annual value of the two parishes, as returned upon oath to the sessions, it will be seen that the assessment upon them is at one farthing in the pound respectively, which, it appears, is the basis fixed by the sessions for the whole rate. appellant, therefore, fails in making out the ground of appeal stated in the notice. The appeal should have been on the ground that the value of the rateable property in the respondent parish is greater than that upon which the assessment has been made; and if it be held that that ground can be sufficiently collected from the terms of the notice, then the sessions should have first ascertained the real value in the manner pointed out by the act, and altered the assessment with reference to the real value so ascertained. The statute is not confined to the making of a new rate in the clauses requiring returns of the annual value, for it empowers the justices to call for returns from time to time, as often as they shall deem it expedient, and from such and so many parishes as they shall deem expedient; whereas, to make an entirely new rate, they must have returns from all the parishes within the county. They have, therefore, the power of calling for these returns, as well for the purpose of correcting inequalities, as of making a new assessment on the whole county.

BAYLEY, J.(a) As to the first point, I think that the appellant ought, in his notice, either to state in terms, that he is aggrieved, or to state that, from which *799] it follows of necessity, that he is so. Here, the parties *appealing have not brought themselves within any of the matters which are specified in the appeal clause of the 55 G. 3, c. 51, s. 14, as grounds of appeal. By that clause, the parties may appeal against the rate, on account of the proportion assessed on the respective parishes being unequal. That is, not unequal as between parish A. and parish B. by reason of the rateable property having been valued too high or too low, but on the ground of general inequality, or of no certain rule having been adopted in assessing the sums to be paid by the different

parishes in the district. It is not pretended that that was the true ground of appeal here. The next ground is on account of some one parish being wholly omitted from the rate. That was not here the ground of appeal. Then follow the grounds on which the notice is in some measure founded, viz. on account of such parish being rated in a higher proportion in the pound sterling, according to the fair annual value of the rateable property therein, or on account of some other parish being rated at a lower proportion of the pound sterling, according to the fair annual value of the rateable property therein than has been fixed and declared by the justices of the peace of the said county in sessions assembled, as the basis of the rate of the said county. The notice only specifies a part, not the whole of this ground of appeal mentioned by the statute. It does not say that either parish is rated at a higher or lower proportion in the pound sterling, according to the annual value of the rateable property, than has been fixed by the justices as the basis of the rate, but that the appellant parish is rated at a higher proportion of the pound sterling than the respondent parish. It may happen that each of the two parishes may be rated lower than they ought to be, *yet the proportion of the pound sterling assessed upon them may not be unequal, with reference to the sums assessed upon all the other parishes in the district. It was the object of the statute, that the assessment should be in an equal proportion of the pound sterling with reference to the rateable property of all the parishes in the district. That object would not be attained if an alteration could be made upon appeal in the assessment upon one parish, because the valuation of the rateable property therein was higher than that of the rateable property in another. If the justices at sessions lower the assessment on the appealing parish under such circumstances, they do not do the general justice that should be done. A parish is not aggrieved merely by reason of being rated on a higher valuation of the rateable property than another parish; for it may happen that both the parishes are rated at a less sum than they ought to be. No parish has a right to make a partial complaint of this nature. The effect of doing what the magistrates have done, is to make the assessment upon Whitstone lower than it ought to be, and so to give to every other parish a ground of appeal. Upon the statement of the case, I cannot see that Whitstone was aggrieved.

LITTLEDALE, J. I am of the same opinion. Whitstone would undoubtedly be aggrieved if it was assessed in a higher proportion in the pound sterling than Then, as to the notice of appeal, the fourteenth section mentions several grounds of appeal, and the question is, whether there is any ground of appeal according to the notice given. The ground specified in the notice falls within the third clause of appeal *mentioned in the appeal clause, viz. the parish being rated at a higher proportion of the pound sterling according to the fair annual value of the rateable property. Then, what was the rate here, and was there any ground for such an appeal? In the rate, Whitstone was assessed at 3l. 3s. 10d., and Blackawton at 2l. 11s. 5d. That was in an equal proportion of the pound sterling according to the annual value of the rateable property returned to the justices. Therefore there was no pretence for the appeal on the ground stated in the notice. The ground of complaint at the sessions was, that the valuation of the rateable property in the appellant parish was too high, and that in the respondent parish too low; but that not being the ground stated in the notice of appeal, the justices were not authorized to enter into the inquiry they did. If the appellants' notice had entitled them to try that question, I think the justices would have had power to alter the annual

PARKE, J. This rule must be discharged. I think the notice of appeal would be sufficient if it could be collected from it that the party intending to appeal was aggrieved by the rate. But I am of opinion that the notice was not sufficient to entitle the defendants to go into the matters which, at the sessions, were made the ground of this appeal. Assuming that one parish may appeal, because it is rated upon a higher valuation of its rateable property than it ought to be, it

appears to me that that objection is not properly stated in the notice of appeal. The appellants state that an improper proportion of the pound sterling has been *802] taken with reference to the rateable property. That is not *true; for assuming the valuation of the rateable property returned to the sessions to be correct, each of the two parishes is assessed in the same proportion in the pound sterling. I think the sessions might, pursuant to s. 14, correct an inequality in the annual value of rateable property. If the appeal had been properly brought before them, I should have thought the sessions had done right; but, instead of altering the basis of the calculation, they have altered the assessment itself; they have, therefore, done what they were not authorized to do.

Order of sessions quashed.

The KING v. The Inhabitants of SOUTH KILLINGHOLME.

A pauper hired himself for a year, at 5l. wages, to his aunt, who occupied six acres of land; when she had no work for him, he was to work for anybody for his own benefit: Held, this was an exceptive hiring, and that service under it did not confer a settlement.

UPON an appeal against an order of two justices, whereby R. Robinson and his wife and family were removed from the parish of South Killingholme, in the parts of Lindsey and county of Lincoln, to the parish of Elsham in the said parts and county; the sessions quashed the order, subject to the opinion of this Court on the following case:—The respondents proved a prima facie case in the appellants' parish of Elsham. The appellants proved that the pauper being unmarried and without child in 1823, hired himself for a year for 5l. wages, and 5s. earnest, to his aunt, who resided in the parish of North Killingholme, and occupied six acres of land and kept two cows there: when his aunt had no work for him, he was to work for anybody else for his own benefit. The pauper entered the service. *resided, and worked with his aunt during the whole year, except that in harvest time he worked for a fortnight with another person at 2s. per day, which he received for his own benefit, sleeping every night at his aunt's, and doing all the work she had for him to do every morning before he went to work, . and generally in the evening when he returned, unless it was too late. He received his wages at the expiration of the year. The next year he was hired to another master at 91. wages.

N. R. Clarke and Whitehurst, in support of the order of sessions. In Rex v. The Inhabitants of Chertsey, 2 T. R. 37, the party hired was to do the offices of a servant for a year, and was to have her board and lodging, and such profit as she could make by keeping fowls, and what she could earn by her own labour, and that was held to be a good hiring for a year. That case is expressly in point, and has never been overruled. But this case is still stronger in favour of the settlement: for there it was manifestly in the contemplation of the parties that there would be some portion of the year when the father would not require the services of his daughter, since he expressly undertook only to pay so much wages as, in addition to those she got by her own labour, would be equivalent to her earnings in her last place. Here the wages were certain, and the aunt might have insisted upon the pauper serving her every moment of the year, as he was only to work for his own benefit when she had not work for him to do. Suppose when he was working for any one else, some-*8041 thing had *occurred on his aunt's farm which required his attendance,

he could not have refused to come. The aunt's title to his service was paramount to that of every other person; and, in fact, it appears he did work for the aunt every day in the year, and on those days when he was absent at larvest, most probably got up sooner and did all the work for the day before he went. Rex v. Polesworth, 2 B. & C. 715, materially differs from this case. There the wages were a certain sum per day, and not to be paid when the master

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had no work. Here the wages were to be paid by the year, whether the pauper worked or not. There the master expressly told the pauper at the time of hiring he should not have work for him all the year, here nothing of the sort passed, but the aunt merely said, if it should happen that she had no work, he might work for others, as a matter of indulgence. The ground of that decision as stated by Abbott, C. J., was, that the master had control over the pauper only so long as he had work for him; here the aunt had control over the servant every moment of the year, though she might dispense with his services. At the sessions Rex v. Edgmond, 3 B. & A. 107, was cited, but that was a hiring at weekly wages, and an engagement to work so many hours a day, and has no bearing on this case. In Rex v. Lydd, 2 B. & C. 754, it was expressly found that the duty of looker never did nor was understood to occupy the whole of the pauper's time, and he, therefore, was only under the master's control so much of each day as that duty required; besides, there the pauper continually during the service made fresh bargains with his master *for other work at other wages, which showed that the master had not the control over the pauper the whole year by the first bargain. This is quite the reverse in the present case, where there is but one bargain for the whole time, and at one sum for wages. therefore rightly decided that the pauper gained a settlement at Killingholme.

Fynes Clinton, and Hildyard, contrd. It is a well established rule, that in order to confer a settlement by hiring and service, the contract must be such as to give the master the absolute control over the servant during the whole period of service. Here the mistress of the pauper could not have had any such control over him, for the pauper was bound to serve her so long only as she had work for him, Rex v. Edgmond, 3 B. & A. 107, Rex v. Polesworth, 2 B. & C. 715, and Rex v. Lydd, 2 B. & C. 754, are in point. In Rex v. Polesworth the agreement was, that the servant should serve for three years at 1s. per day, when the master had work to do, and when he had no work the servant was not to be paid. At the time when the agreement was made, &c., the master told the servant that he should not have work for him during the whole year, and particularly during the winter, and that when he had not work for him he might get work for other people; and that was held to be an exceptive hiring, and that no settlement was gained by serving under it.

Lord Tenterden, C. J. The decisions certainly are not very distinguishable

Lord TENTERDEN, C. J. The decisions certainly are not very distinguishable from each other, but I think this case comes nearer to Rex v. Edgmond, 3 B. & A. 107, Rex v. *Polesworth, 2 B. & C. 715, and Rex v. Lydd, 2 B. & C. 754, than to the more early ones. The parties to the contract must have contemplated some portion of the year when the aunt would not have employment for the pauper; and if that be so, the contract did not include the whole year, but only such part of the year as she would have work for the pauper.

BAYLEY, J. The fair meaning of the contract was, to limit the service of the party hired to that portion of the year during which the aunt might have occasion for it.

LITTLEDALE, J., concurred.

PARKE, J. If the meaning of the words be taken to be that the aunt, when she did not choose to employ the pauper the whole year, might decline doing so, the contract of hiring was not for a year. And construing the words of it according to their natural import, I think that was the fair meaning, and that this was an exceptive hiring. In Rex v. Chertsey, 2 T. R. 37, the pauper was hired for a year, and was to "have her board and lodging, and such profits as she could make by keeping fowls, and what she could earn by her own labour." The latter words were considered by Ashhurst and Grose, Js., to give her liberty to do such work as she could consistently with the service which she was in the first instance bound to perform for her master. Order of sessions quashed.

*807] *The KING v. The Inhabitants of UPTON GRAY. May 12.

A parish certif sate, dated the 16th of April, 1748, purported in the body of it to have been granted to a pauper and his family by two churchwardens and two overseers. It appeared that on the 27th of May, 1747, five overseers had been appointed, two of whom had signed the above certificate; and an indenture of a parish apprentice of that date recited, that the said five persons were at that time overseers, and that four persons were named churchwardens, two of whom signed the certificate; and that on the 6th of July, 1748, five overseers were again appointed; that four churchwardens had been regularly chosen from 1633 to 1829. By the visitation books for 1746, it appeared that four churchwardens were sworn in. The visitation books for 1747 were lost. From those for 1748 it appeared that on the 19th of September, 1748, four churchwardens were sworn in for the year ensuing, but that between the years 1633 and 1829 in twelve instances less than four churchwardens had been sworn in. At the sessions it was insisted, that in order to give effect to so ancient a document, it ought to be presumed either that a new and valid appointment of overseers had been made between the 24th of October, 1747, and the date of the certificate, 16th April, 1748, or that at that date there were not four churchwardens sworn in. The court of quarter sessions having refused so to presume, held the certificate to be invalid, and this Court affirmed their decision.

Upon appeal against an order of two justices, whereby T. Woodman, his wife and children were removed from the parish of Upton Gray to the parish of Bishop's Waltham, in the county of Southampton, the sessions quashed the order,

subject to the opinion of this Court on the following case:-

A certificate was produced by the respondents from the parish chest of their parish, signed by two churchwardens and two overseers of the parish of Bishop's Waltham, dated the 16th of April, 1748, by which it was acknowledged to the former parish, that Peter Woodman, the great grandfather of the pauper, was legally settled in the latter parish. The certificate had never been discharged so far as it regards the pauper. On the part of the appellants it was proved from the parish books of Bishop's Waltham, that on the 27th day of May, 1747, five overseers were appointed by the said parish; their names were Harris, Edney, Vernon, Stares, and Cowdery, of whom Harris and Cowdery signed the above *808] certificate, dated the 16th of April, 1748. In an indenture of parish *apprenticeship, dated the 24th of October, 1747, it was recited that at that time the said five persons, viz., Harris, Edney, Vernon, Stares, and Cowdery, were overseers; and that at the same time four persons named Homer, Barefoot, Hellyer, and Wateridge (of whom Homer and Wateridge signed the above certificate), were churchwardens of the parish of Bishop's Waltham. proved on the part of the appellants, from the parish books, that a church rate for the said parish for the year 1747 was signed on the 8th of May, 1748, by four churchwardens, whose names were there stated to have been Horner, Barefoot, Hellyer, and Wateridge. It was also proved on the same part from the same books, that on the 6th of July, 1748, five overseers were again appointed for the same parish, whose names were there stated to have been Lacy, Parker, Trodd, Edney, and Suet. It appeared also by the said parish books, that from the year 1633 to 1829, four churchwardens had been regularly chosen every year of the said parish. By the proper visitation books for 1746, it was proved that four churchwardens were sworn in for the parish of Bishop's Waltham, for the year ensuing the date of such swearing in. The visitation books for the year 1747 were lost. By the visitation books for 1748, it was proved that on the 19th of September, 1748, four churchwardens were sworn in for the said parish for the year ensuing that date. By the same books it appeared, that in twelve or thirteen different years, between the years 1683 and 1829, four churchwardens had not been sworn in for the said parish, but that in those instances less than four had been sworn in. It was contended on the part of the *appellant parish, that under the circumstances above stated, the certificate granted by the appellant parish was bad, it having been signed by two out of five persons, whose appointment as overseers was void as to all (inasmuch as by the stat. 43 Eliz. c. 2, s. 1, not more than four overseers can be appointed), and on the ground that the majority of the parish officers had not signed it. On the part of the respondent parish it was contended that after so long a period (being more than

eighty years), any possible case by which the certificate might be supported ought to be presumed. Hence, as it might be presumed, either that a new and valid appointment of Cowdery and Harris as overseers, had been made for the appellant parish in the interval between the 24th of October, 1747 (when it is recited as above that there were five overseers), and the date of the certificate 16th of April, 1748; or that at that date there were not four churchwardens sworn in, in either of which cases the certificate would be signed by a majority of the parish officers, such presumption should now be made.

Selwyn and Poulter in support of the order of sessions. The certificate was not signed by a majority of the parish officers, for it is manifest, from the evidence produced on the trial of the appeal, that there were five overseers and four churchwardens. Then if the certificate was originally void, the maxim applies quod ab initio non valet tractu temporis non valebit. It will be said that the sessions ought to have presumed a new and valid appointment of overseers between the 24th of October 1747 and the date of the certificate, the 16th of *April, 1748; but such a presumption would be inconsistent with the other facts found, that on the 6th of July, 1748, five overseers were again Besides, this was a presumption of fact, and not of law, and therefore it was for the sessions to draw their conclusion from the particular circum-

stances of the case, and they have so done.

Dampier and Sir George Grey, contrà. Every reasonable intendment ought to be made in favour of so ancient a document. It ought to have been presumed, therefore, that there was a re-appointment of four overseers between the 24th of October 1747 and the 16th of April 1748, or that at that time two churchwardens only had been sworn in. Such a presumption would be well warranted according to Rex v. Catesby, 2 B. & C. 814, Rex v. Whitchurch, 7 B. & C. 573. It must be conceded that the presumption to be made in this case is one of fact, and not of law; but it ought to have been made, even if it be probable that the fact necessary to give validity to the certificate never existed. In Hillary v. Waller, 12 Ves. 252, where the question was, whether a reconveyance of a legal estate ought to be presumed, Sir W. Grant states the ground on which such presumption proceeds to be, that what ought to have been done should be presumed to have been done; and he adds, that presumptions do not always proceed on a belief that the thing presumed has actually taken place; grants are frequently presumed, as Lord Mansfield says, "merely for the purpose and from the prin-

ciple of quieting possession." Eldridge v. Knott, Cowper, 215.

*BAYLEY, J. This is an attempt to carry the cases of Rex v. Catesby and Rex v. Whitchurch to a most unreasonable extent. In the last of those cases in the certificate four persons were described as churchwardens and overseers of the parish, but it purported to be signed by three of them only; by one Piper as churchwarden, and by two others as overseers. It was proved by the visitation books that in the year 1758 the two churchwardens were sworn in after the date of the certificate; and it was therefore contended that Piper, the party who signed the certificate as churchwarden, was not at that time churchwarden de jure, and therefore that it was not binding on the parish. It appeared further by the visitation books that no churchwardens were sworn in from 1751 to 1758, but the parish who had granted the certificate had, from the year 1758 to the time when the order of removal was made, treated it as valid, for it had relieved the pauper while he was residing in another parish. The sessions having found in favour of this certificate, the Court held that it might reasonably be presumed that Piper, after his nomination in 1758, and before he did any act as churchwarden, had gone to the commissary and had been sworn into office before him; and, under the circumstances of that case, such a presumption was not unreasonable, for it was not inconsistent with any other fact. In Rex v. Catesby, 2 B. & C. 814, the certificate which the law required to be signed by a majority of the parish officers, purported to be signed by one churchwarden and one over-If, therefore, there were two churchwardens and two overseers, it was not

valid. The sessions having presumed in tayour of the certificate, it was for the Court to say whether there could be any state of facts to make it a valid certificate, and they decided that it might be valid on two grounds. By custom there might have been only one churchwarden in the parish, and therefore the sessions might have presumed that one only was appointed; or two overseers might have been originally appointed, and one of them have died before the certificate was granted. Then what is the state of facts here? Can the Court say that the justices at sessions have done wrong in refusing to make the presumption which they were called upon to make? It is conceded that the presumption is one of fact, which in an ordinary case it would be for a jury to decide; but it is said that a jury ought to draw such a presumption whether they believe the fact really did exist or not; and a dictum of Sir W. Grant to that effect has been cited. To that, as a general proposition, I cannot agree. I would not direct a jury to presume that which they believe to be contrary to the fact. Here the fact which we are called upon to presume is not only highly improbable in itself, but wholly inconsistent with other facts which existed about the same time. We are first to presume that the four churchwardens were not sworn in. That would be presuming that they committed a breach of duty when we ought to presume rather that they discharged their duty. It is then said that we may presume that one of the churchwardens died. Such a presumption, if made at all, ought to have been made by the sessions, and not by us. The other ground is still more unreasonable. It is said there was a bad appointment of *813] overseers, and that we ought to presume a new appointment.

before the certificate was granted. In the next year, however, it appears that five overseers were again appointed.

We must, therefore, presume, that the overseers, and that we ought to presume *a new appointment of overseers error as to the number of overseers was discovered between October 1747 and April 1748, although the ancient erroneous practice was again adopted in October 1748. I think there was nothing in this case to warrant any presumption of fact necessary to give validity to this certificate, and I cannot say that the sessions ought to have drawn from the facts stated any of the conclusions which it has been insisted they ought to have drawn.

LITTLEDALE, J., concurred.

PARKE, J. I am of the same opinion. The doctrine attributed to the Master of the Rolls in Hillary v. Waller may be true as applied to the particular subject-matter which he was then discussing. A jury would probably be directed to presume, after a lapse of time, the reconveyance of a legal estate by trustees, without any specific evidence of a deed of conveyance, provided there be no fact to rebut such presumption.

Order of sessions confirmed. (a)

(a) See Doe d. Fenwick v. Reed, 5 B. & A. 232.

*814] *COLLINS, Gent., one, &c., v. WRIGHT. May 13.

On an attachment of privilege without an ac etiam clause, the defendant may be compelled to give bail in 40L

A RULE had been obtained calling upon the plaintiff to show cause why the bail-bond should not be delivered up to be cancelled, on the ground that the defendant was arrested on an attachment of privilege, not containing an ac etiam clause.

Campbell showed cause. The stat. 13 Car. 2, stat. 2, c. 2, s. 2, enacted, that no person arrested by any sheriff, &c., by force or colour of any bailable writ, bill, or process issuing out of K. B., wherein the certainty and true cause of action is not expressed particularly, shall be compelled to give security for his appearance in any penalty or sum of money exceeding the sum of 40l. But sect. 4 provided, that it shall not extend to arrests made upon certain writs, and

amongst others, attachments of privilege at the suit of any privileged person.

They, therefore, remain as before the statute.

Comyn, contra. In Davison v. Frost, 2 East, 307, a rule of court is mentioned to have been made in 1729, which requires the insertion of an ac etiam clause, and which extends equally to all bailable process, whether the amount be above or under 401. [BAYLEY, J. The rule of court cannot affect the writs excepted by the statute.]

Lord TENTERDEN, C. J. The stat. 13 Car. 2, stat. 2, c. 2. s. 2, enacted, that no person arrested on process, *not mentioning with certainty the true cause of action, shall be compelled to give security for his appearance in any penalty exceeding 40l. With a view to that section, the practice of inserting the ac etiam clause was introduced. But sect. 4 excepts, out of the former enactment, all attachments, and amongst others, attachments of privilege, and provides that, upon the said writs of attachment "such lawful course be taken for security for appearance therein as hath been heretofore used." We are not informed what practice did prevail in this Court before that time, but we learn, that on attachments out of the Courts of Chancery and Exchequer, the practice was, to take bail for 40l. and no more. That is a rule by which we may construe this fourth section, viz. that on an attachment of privilege, bail may be taken for 40l. This does not interfere with the subsequent statute, which requires an affidavit of debt. Inasmuch, then, as the stat. 13 Car. 2, c. 2, s. 2, does not apply to this case, the bail-bond can only be delivered up on the defendant putting in bail for 40l. Rule absolute on those terms.

*DOE dem. J. GRUBB v. E. GRUBB. May 14.

r*816

In ejectment for lands in B., it appeared that in 1788, E. G. purchased the estate in fee, of which he died seised and intestate in 1790, leaving two sons, J. G. and E. G., and in 1812 J. G. died intestate, leaving a son J., the lessor of the plaintiff. In 1788 W. C. was tenant in possession, and so continued until the time of the trial. From the death of E. G. the purchaser, W. C., paid his rent (with the exception hereinafter mentioned) to E. G., the younger son, until 1817, when he died, leaving two sons, J. G. (who received the rent from 1817 until the time of his death in 1825) and E. G. the defendant. J. G., the eldest son of the purchaser, received in 1804, a half year's rent from W. C., and in 1805 sold and cut down timber on the estate. In June, 1813, J. G. (the lessor of the plaintiff) employed an agent to demand of W. C. the rent in arrear, when he answered that his connexion as tenant with J. G. had ceased for several years. In 1820 this action of ejectment was commenced, and the demise was laid on the 1st of May, 1813: Held, 1st, that there was no adverse possession to bar the recovery of the lessor of the plaintiff in ejectment; and, 2dly, that the answer of W. C. in June, 1813, was evidence of an antecedent disclaimer which would suffice to sustain the demise laid on the 1st of May, 1813, without proof of any notice to quit.

This was an ejectment brought for the recovery of an estate called Little Horsendon, situated in the parish of Horsendon and Princess Risborough in the county of Bucks. At the trial before Garrow, B., and a special jury, at the Lent assizes in the year 1828 for the county of Buckingham, a verdict was found for the plaintiff with 1s. damages, subject to the opinion of this Court on the following case:—

Edward Grubb the elder, now deceased, formerly of Fishmonger's Hall, London, gentleman, purchased the estate in question in 1788, and the same was duly conveyed to him and his heirs by indentures of lease and release dated the 30th and 31st of January, 1788. The said E. Grubb, the elder, died seised of the estate in question, intestate, on the 30th of October, 1790, leaving two sons, John, the father of the lessor of the plaintiff, and Edward, the father of the defendant, him surviving. John Grubb, the eldest son of the purchaser, died 1st of September, 1812, leaving the lessor of plaintiff his only son and heir at law. Edward Grubb, the second son of the purchaser, died in July 1817, leav-

ing two sons, John and Edward, the present defendant; and John, the estates to his brother Edward, the defendant. At the time of the purchase in 1788, one William Cowdery was tenant in possession of the estate, and so continued until the time of the trial of this ejectment. From the death of the first purchaser, with the exception hereinafter mentioned, the said William Cowdery paid his rent for the premises to Edward Grubb, the father of the present defendant, until his death in July 1817; from that time to Jacob Grubb, defendant's eldest brother, until his death in July 1825; and from that period till the time of the trial, to the defendant. The acts upon which the lessor of the plaintiff relied as acts of ownership, in support of his claim, were exercised by John Grubb, the eldest son of the first purchaser, as follows; viz. by demanding and receiving by his agent from William Cowdery, the tenant, about the end of 1804, half a year's rent, from which the land tax was deducted; and by cutting down timber, chiefly fire-wood, on the estate in question, mostly round the hedges, which timber was marked at the end of 1804, and felled in the beginning of 1805. It appeared that at the same time the said Mr. John Grubb wanted to raise a sum of money, for which purpose a general fall of timber was made upon his other estates, as well as upon the estate in question. He himself accompanied the surveyors employed to mark the timber intended to be cut down, and the same, including that taken from the estate in question, was afterwards sold by auction. About the same time, by the said John Grubb's order, a valuation was made of his property, in which the estate in question was in-After the death of the said John Grubb, the father of the lessor of the *818] plaintiff, Mr. *Tindal, as agent of the lessor of the plaintiff, addressed and sent a letter to William Cowdery, the tenant, of which the following is a copy: —"Aylesbury, 18th of June, 1813. Sir, —As Captain Grubb has employed me to collect all moneys due to his late father, I have to request that you will call on me and pay the arrears of rent due to the late Mr. Grubb, and that you will at the same time bring with you the last receipt for rent. Sig Thomas Tindal. Addressed, Mr. William Cowdery, Little Horsendon." answer to which Mr. Tindal received a letter, of which the following is a copy: -"Bledlow, June 26th, 1813. Sir,-In consequence of having received a lctter from you as yesterday respecting the rent of Little Horsendon estate, by the desire of my father, I have to inform you that his connexion as a tenant with the late John Grubb, Esq., has ceased for several years, and that he now pays his rent to his brother. Signed, William Cowdery, junior. Addressed to T. Tindal, Esq., Aylesbury, Bucks." This letter was signed by the son of the said William Cowdery, the tenant, who wrote, signed, and sent it to Mr. Tindal, by the direction and under the authority of his father. In 1814 the present lessor of the plaintiff commenced an action of ejectment for the recovery of the premises in question. The declaration in that action, with the usual notice to the tenant in possession to appear and plead, was served upon William Cowdery, the tenant in possession, who did not appear thereto; but Edward Grubb, the father of the present defendant, as landlord, entered into the common consent rule, and pleaded the general issue.

In this action, which was sent down for trial at the Spring assizes, 1814, the *819] record was withdrawn. In *the month of January, 1820, the lessor of the plaintiff served a new declaration in ejectment upon the said William Cowdery, the tenant in possession, with the usual notice to appear and plead, the demise being laid on the 1st of May, 1813, in the name of the present lessor of the plaintiff. The notice at the foot of the declaration required the tenant in possession to appear in the then next Hilary term. To this declaration the tenant in possession did not appear, whereupon a rule for judgment against the casual ejector was obtained, but John Grubb the elder, brother of the present defendant, appeared as landlord, entered into the common consent rule, and pleaded the general issue. The proceedings in this ejectment were delayed in consequence of a suit in equity, and in 1825, the then defendant John, the elder

brother of Edward, the present defendant, died in the East Indies; on which, under a rule obtained in the last-mentioned action, Edward, the devisee of his brother John, appeared as landlord, entered into the common consent rule, and pleaded the general issue, and was made defendant in the place of his brother, whereupon issue was joined; and by an order of Mr. Justice Holroyd, dated the 28th day of February, 1828, it was ordered that the said issue should be entitled as of Hilary term 1820, and that an imparlance should be entered up to the time of the plea of the said now Edward Grubb; whereupon the said last-mentioned issue was amended accordingly, and carried down for trial.

At the trial before Mr. Baron Garrow, evidence was given on the part of the lessor of plaintiff of the aforesaid acts, and of sending the letter which has been before set forth, to William Cowdery, dated June 18th, 1813, and of the answer thereto. On the part of the defendant *it was objected, that by the demand and receipt of rent in 1804, Mr. John Grubb, the father of the lessor of plaintiff, had acknowledged William Cowdery to be his tenant, and that such tenancy not having been determined by any notice to quit, an ejectment could not be sustained on the demise laid in the declaration; and, secondly, that the lessor of plaintiff was barred from bringing any ejectment in this case, for that his ancestor, the eldest son of the purchaser, had not made a sufficient entry within the time prescribed by the statute of limitations. The learned Judge reserved these questions, and left the case to the jury upon the evidence on both sides. If the jury thought there was an adverse possession on the part of the defendant's ancestor which defeated the present lessor of the plaintiff of his title, then to find for the defendant; if not, for the plaintiff. The jury found a verdict for the plaintiff. The case was now argued by

Taunton for the lessor of the plaintiff. There was a sufficient entry by John Grubb, the father of the lessor of the plaintiff, to prevent the statute of limitations from operating as a bar to this action. John Grubb, the purchaser, died in 1790; on his death the estate descended on John Grubb, the lessor's father; and it was said that between 1790 and 1810 there was no sufficient entry by him. But it appears by the case that the question of adverse possession was left to the jury; it was a question proper for their decision, and the Court will not disturb the verdict found for the plaintiff. In Doe v. Clarke, 8 B. & C. 717, a similar course was pursued and approved *by the Court. But supposing the question not to be concluded by the verdict, there is sufficient in the case to show that John Crubb, the father of the lessor, died seised of the estate. It is stated as a fact that in 1804 he claimed and received half a year's rent; and the acts of ownership relating to the timber are clear and unequivocal. Secondly, notice to quit was not necessary. The defendant is not in a situation to take this objection, for he defends as landlord. Now that must be as landlord of the tenant in possession; he cannot, therefore, say that the lessor of the plaintiff was bound to give notice to quit to his (the defendant's) tenant. But if Cowdery had defended as tenant, he could not have insisted on the necessity of notice, for in 1813 he disclaimed holding under the lessor of the plaintiff, Doe dem. Calvert v. Frowd, 4 Bingh. 557. But it may be urged that, as this letter was written in June 1813, and the demise in the declaration laid on the 1st of May, 1813, the disclaimer does not support this ejectment; but the letter states that he (Cowdery) had not for several years been tenant to the lessor's family; it is therefore evidence of a previous disclaimer.

Follett, contrd. The defendant is not concluded by the finding of the jury, for it appears that before any point was submitted to them, the learned Judge had reserved, for the opinion of this Court, the question whether the ancestor of the lessor of the plaintiff had made a sufficient entry to avoid the operation of the statute of limitations. The case of Doe v. Clarke is very different from this: the question there was not as to the making *an entry, but whether the relation of landlord and tenant had always existed. Now the question here is, whether the father of the present claimant made an entry between 1790 and 1810. The facts relied on to prove it are the demand and receipt of rent

and the acts relating to the timber. The first is not sufficient, for it does not appear in what right the rent was claimed or received. The acts relating to the timber are of no value, because, supposing them to constitute an entry, it was never followed up by any other proceeding. The stat. 21 Jac. 1, c. 16, enacted. that no entry shall be made but within twenty years after the title of the party has first accrued; and the 4 & 5 Ann. c. 16, s. 16, enacted, that no entry shall be sufficient within the former statute, "unless upon such entry or claim an action shall be commenced within one year next after the making of such entry or claim, and prosecuted with effect." [BAYLEY, J. The acts done in this case were not a mere entry, but taking part of the profits.] That is so, but as the party entering did not continue in possession, he should have followed up his claim by an action. Then, secondly, it was part of the lessor's case that Cowdery was his tenant; unless that were so he clearly could not recover, and Cowdery's tenancy had never been determined. It may be admitted that the letter was a disclaimer; but the plaintiff was bound to show a title on the date of the demise, and this letter could not operate by relation: it was a disclaimer, therefore, from a time after the demise.

Taunton in reply. The real question is, whether there ever was an adverse possession for twenty years. Now, on the death of E. Grubb, the purchaser to *823] whom *Cowdery was tenant, the law gave the reversion to J. Grubb, the father of the lessor of the plaintiff, as heir-at-law. In Gilb. Ten. 28, it is laid down, that "where a person dies seised in fee, leaving two sons, if the younger brother enters he does not enter to get a possession distinct from that of the elder brother, but to preserve the possessions of the father in the family." So that even had the younger brother in this case entered (which he did not do), there would not have been an adverse possession. Again, that which was afterwards done by J. Grubb, in receiving rent and cutting timber, was sufficient to constitute a possessio fratris. So also it would have been a sufficient seisin to support a fine. Then the possession of Cowdery was the possession of J. Grubb, and of the lessor until the disclaimer. [Lord Tenterden, C. J. That was by letter dated in June 1813, but your demise is laid in May 1813.] The letter is evidence of a preceding disclaimer.

Follett. The passage cited from Gilb. Ten., as to entry by a younger brother, applies to the case of a possession vacant on the death of the ancestor. Here there being a tenancy, the elder brother was immediately seised; but there was a subsequent attornment by the tenant to the younger brother, whereby the elder was disseised. Co. Lit. 242. Litt. ss. 396, 397, and an adverse possession

created.

Lord TENTERDEN, C. J. I am of opinion that the lessor of the plaintiff is entitled to recover. All the acts done between the time of the death of the purchaser and 1804 are of an equivocal nature. The *receipt of rent by the younger son might be on behalf of his elder brother, or it might be on his own behalf claiming adversely. In 1804 the elder brother did not merely make an entry, but the tenant paid rent to him, and allowed him to mark and cut the trees. These were acts done by a person claiming to be landlord, and the submission to them by the tenant was an acknowledgment of the title of the claimant. If, then, the elder brother was landlord in 1804, what is there to divest his estate? The defence now made is by a person claiming under the younger brother, and as landlord. It is clear that in that character he has no title; but then he claims a right to defend under Cowdery the tenant. If the defence is rested on that ground, whatever would be evidence against Cowdery is evidence against the defendant. Against Cowdery, there is his letter of June 1813, in which he does not say that he never was connected with J. Grubb as his tenant, but that the connexion had ceased for several years. If so, it must have ceased before the month of May 1813, and, consequently, that disclaimer is sufficient to entitle the lessor of the plaintiff to recover.

BAYLEY, J. I am of the same opinion. On the death of E. Grubb in 1790, Cowdery was in possession of the estate which descended on J. Grubb the father

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of the lessor of the plaintiff. J. Grubb did not then receive the rents, they were paid to E. Grubb, the younger brother; but whether he received them as agent, or for his own use adversely or by permission of John, was not proved. Are we bound as matter of law to say that the receipt of rent was adverse? I think not. Then was there evidence to that effect? No. In 1804, John *received 1*825 half a year's rent, and the legal effect of that would be to remit him to 1 his original right, and Cowdery would again become his tenant, if he had previously renounced him as landlord. Again, Edward at that time made no complaint of the rent being paid to John, and that again was evidence of an acknowledgment by him that his receipt of the rent was by permission of John. Then, again, the cutting the timber was a clear act of ownership; and, together with the receipt of rent, entirely removes the case from the operation of the statute 4 & 5 Ann. c. 10, which applies only where there is a naked entry or claim, and no receipt of the rents and profits. As to the second point, I think it clear that the act of Cowdery in June 1813 is referable to a preceding time.

LITTLEDALE, J., concurred.

PARKE, J., having been counsel in the cause, gave no opinion.

Postea to the plaintiff.

*DUVERGIER v. FELLOWS. May 14.

[*8<u>2</u>6

(In Error.)

Where a bond was given for payment of 10,000L, with a condition that the money should be paid on the obligee's procuring subscriptions for 9000 shares in a company to be formed of many porsons, for the purpose of becoming assignees of a patent, and carrying on the patent process; and the patent contained a proviso, that it should be void if assigned to more than five persons: Held, that the obligee must be presumed to know of that proviso, and as the bond was subject to a condition for the performance of an illegal act, it was void.

DEBT on bond for 10,000l. The defendant craved over of the bond and condition, which was for payment of 10,000l. to the plaintiff in the event of his procuring subscribers for 9000 shares in a company to be formed for becoming assignees of two patents in which the defendant was interested, and for carrying on the patent process; and then pleaded amongst other things, that the patents contained a proviso that they should be void if they were assigned to or in trust for more than five persons. Demurrer and joinder. The pleadings are set out at length in 5 Bing. 248, and on the argument of the demurrer the Court of Common Pleas gave judgment for the defendant. A writ of error was brought,

and now the case was argued by

Follett for the plaintiff in error. There is nothing on the face of these please to render the bond void in reference to the proviso in the patents, nor is there anything to show that the intended company would be illegal, or at least that it was the intention of the parties to do such an illegal act as would render the bond void. The right of the plaintiff to sue is founded on the obligatory part of the bond. The condition is introduced for the benefit of the obligor, and there is a fallacy in supposing that the performance of that is a condition precedent to the right of the obligee to sue on the *bond. The defendant, in order to get rid of the action, must show that the condition was illegal. Now the illegality relied on is, that the thing agreed to be done was in contravention of a proviso in the patent. But to make the bond void, the thing to be done must It is not sufficient to avoid be shown to be malum prohibitum, or malum in se. the bond, that the condition is impossible or repugnant, or against some maxim of law, Shep. Touch. 372. [BAYLEY, J. Monopolies are against the law, and are declared so to be by 21 Jac. 1, c. 3. Patent rights are an exception out of the statute, but unless you keep within the patent you act illegally.] Upon this record there is nothing to show that the plaintiff was about to do any illegal act.

If anything of that kind was to be done, the defendant was the guilty person. [Lord TENTERDEN, C. J. The recital is, that the plaintiff consented and agreed to form the company.] Unless it can be shown that he knew the act to be illegal, he cannot be affected by it. Nothing of that kind appears in the bond and condition, nor are there any averments to show that the plaintiff was to participate in any fraud by getting up a company to receive patents which could not lawfully be assigned to them. It should have been averred that the plaintiff knew the contents of the patents, which does not appear, nor was it necessary for him to have that knowledge in order to do that which it was incumbent on him Suppose the plaintiff had actually succeeded in forming a company, and that then, when they came to receive the patents, it had been discovered that they could not be assigned to a company consisting of so many persons: that would not have furnished any answer to this action. *As the case now stands, there is nothing illegal in that which the plaintiff has done, nor is there any proof that the defendants intended to do anything illegal. defendants might lawfully assign the patents to any number, and so preclude themselves from objecting to the use of the patent principle, although the assignees might not acquire an exclusive right to the use of it. [BAYLEY, J. plea avers that the thing was to be done under pretence of carrying on the exclusive process.] That pretence was not illegal, and if the condition was impossible, that fact must have been known to the obligors, and cannot be set up by them as an answer to the action.

Lloyd, contrd, was stopped by the Court.

Lord TENTERDEN, C. J. I am of opinion that the proviso in the patent has the effect of rendering the bond altogether void. The condition of the bond comes to this, certain persons being possessed of two patents, and desirous of assigning them to a large number of persons, and it being supposed that the plaintiff was connected with persons able to form such a company, it was agreed that if he succeeded in procuring subscriptions for 9000 shares he should receive a certain sum of money. The plaintiff was to be active in promoting the scheme, and the persons who subscribed could not derive any benefit from it. Now it is said that the plaintiff might be ignorant that such a consequence would follow; but on this record we cannot find grounds for supposing that he was ignorant. If he was not cognisant of the terms of these particular *patents, he must be presumed to have known the general law of the | *829] | Testents, no must be presumed to large land. By that all monopolies are illegal, but there is an exception in favour of patent rights, and if he knew that the monopoly proposed to be created could only be justified by the patents, he was bound to know their contents. We cannot presume that he was ignorant of that which it was his duty to know, and presuming that he knew the terms of the patents the bond is void, and the judgment of the Court below must be affirmed.

BAYLEY, J. The plaintiff was to receive the instalments on certain payments to be made by the owners of 9000 shares. He was bound to know that these

persons were doing a legal act.

LITTLEDALE, J. I am of the same opinion. All monopolies are illegal unless allowed by a patent, which cannot be assigned at all unless power to that effect is given by the crown. The plaintiff, therefore, was bound to see and ascertain that these patents might be assigned in the manner proposed.

Certain that these patents might be assigned in the manner proposed PARKE, J., having been counsel in the cause, gave no opinion.

Judgment affirmed.

^{*830] *}DAUBNEY, Gent., One, &c. v. COOPER and Others. May 14.

Trespass for assaulting, beating, and turning plaintiff out of a room, whereby he was prevented from exercising the business of an attorney there. Plea, not guilty; verdict for the plaintiff, damages 1s.: Held, that he was not entitled to more costs than damages.

TRESPASS for assaulting and beating the plaintiff, and turning him out of a

justice room, whereby he was prevented from exercising his business of an attorney. (a) Plea, not guilty. A verdict having been found for the plaintiff with 1s. damages, and the Judge not having certified, the Master allowed 1s. costs only. A rule nisi having been obtained for reviewing the taxation,

Adams, Serjt., showed cause, and relied on the statute 22 & 23 Car. 2, c. 9, s. 136, as decisive that the plaintiff could not have any more costs than damages, the Judge who tried the cause not having thought fit to grant a certificate.

the Judge who tried the cause not having thought fit to grant a certificate.

Denman and Fynes Clinton, contrd. The plaintiff is entitled to full costs. The action was brought not only for the assault and battery, but for preventing the plaintiff from exercising his profession. [BAYLEY, J. That is only laid as a consequential damage.] Where the consequential damage is of such a nature as to constitute by itself a separate ground of action, the party is entitled to full costs without any certificate, according to Anderson v. Buckton, 1 Str. 192. That was trespass for entering the plaintiff's close with diseased cattle, whereby the plaintiff's cattle were infected. Plea, not guilty. Verdict for the [*831 distinction is where the matter alleged by way of aggravation will entitle the party to a distinct satisfaction, he is entitled to full costs." And in Carruthers v. Lamb, Barnes, 120, which was trespass for an assault and tearing the plaintiff's clothes, it was held that he was entitled to full costs, although the damages were under 40s.

Lord Tenterden, C. J. In that case, tearing the clothes was charged as a distinct trespass, and not as an aggravation of the assault. I certainly was not aware of the case of Anderson v. Buckton, nor can I consider it as good law. It has never been quoted in modern books of practice, nor acted on by the Court. There is hardly any action of trespass without a per quod the plaintiff was put to expense, &c., &c. The general opinion has been, that where the consequential damage is laid as an aggravation of the trespass sued for, and the verdict is under 40s., the plaintiff can have no more costs than damages, and I concur in that opinion.

BAYLEY, J. In actions for slander with special damage, if the words are actionable in themselves, and the damages are less than 40s., the costs cannot exceed the damages; but if the words are only actionable by reason of the special damage, the plaintiff is entitled to full costs whatever may be the amount of damages. In like manner, in an action for a trespass which produces special damage, if the verdict is under 40s., the costs must be measured by the verdict.

*LITTLEDALE, J. I am of the same opinion. The case of Bannister v. Fisher, 1 Taunt. 357, is not unlike this case, and recognises the rule now adopted by the Court.

Rule discharged.

(a) Vide supra, 237.

The KING v. The Inhabitants of ST. NICHOLAS, HEREFORD. May 17.

The office of town crier and bellman is a public annual office within the 3 W. & M. c. 11, a. 6, by the execution of which a settlement may be granted; and if the town comprises several parishes, the settlement will be gained in that parish in which such officer has last resided forty days.

UPON an appeal against an order of two justices, whereby Sophia Hall, widow, and her six children were removed from the parish of St. Peter, in the county of Hereford, to the parish of St. Nicholas, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

Thomas Hall, deceased, the husband of Sophia Hall, the pauper, gained a legal settlement in the parish of St. Nicholas, Hereford, by renting a tenement. He quitted that house 28d of November, 1827, and lived in the parish of All Saints,

Hereford, till the 23d of June, 1828, when he removed to St. Peter, Hereford, and resided in that parish till the time of his death, 29th of December, 1828. On Monday the 2d of October, 1826, he was appointed by the corporation of Hereford to the annual public office of town crier and bellman for the city of Hereford, and also sworn in a constable of the city of Hereford. He was reappointed and re-sworn on the 1st of October, 1827, and 16th of October, 1828, and he executed the office of town crier and bellman in the city of Hereford, of which the parish of St. Peter forms a part, from the time of his first appointment, on *the 2d of October, 1826, up to the time of his death, 29th of December, 1828; he was also liable and ready to execute the office of constable when called on, but never had acted as constable. There were other persons sworn in as constables, who acted as such in the city. Thomas Hall resided forty days and upwards, namely, from the 23d of June, 1828, to the 29th of December, 1828, in the parish of St. Peter's, Hereford. The question for the opinion of this Court was, Whether the residence of Thomas Hall in St. Peter's parish for forty days and upwards (while executing the annual public office of crier and bellman in all the parishes in the city of Hereford, namely, from the 23d of June, 1828, to 29th of December, 1828), was sufficient to gain a settlement? if it be, his widow, Sophia Hall, and family, have gained a settlement in St. Peter's parish; but if that residence be not sufficient, their settlement is in St. Nicholas's parish.

This case was argued on a former day in this term by

Justice in support of the order of sessions. No settlement was gained in St. Peter's, because the pauper resided there for a less period than a whole year. It is stated in 1 Nolan's Poor Laws, 629, that it has never been determined whether a residence for forty days in the parish in which an office is executed is sufficient to confer a settlement, or whether the party should reside for the whole year; and it is there doubted whether the appointment to the office must not be before the party came to reside in the parish.(a) The statute 3 W. & M. *c. 11, s. 6, enacts, that "if any person who shall come to inhabit in any town or parish shall for himself, and on his own account, execute any public annual office or charge in the town or parish during one whole year, or shall be charged with and pay his share towards the public taxes or levies of the said town or parish, then he shall be deemed to have a legal settlement in the same." The inhabitation must be co-extensive with the service of the office, and that is required to be for a year. The words "during one whole year" over-ride the whole clause. It is remarkable that in the number of cases with respect to settlement by serving an office, this question never seems to have been discussed or decided. Hence it would afford the inference that the service and inhabitation have been hitherto considered to be necessarily co-extensive. It has been decided that to confer a settlement by the payment of rates, the inha-

bitation and charging with taxes must be in the same parish.

Campbell and M Lean, contrd. The pauper having on the 1st of October, 1827, been appointed to an office the duties of which were to be discharged in a district extending over the parish of St. Peter's, and having executed that office for a whole year, and resided in that parish forty days, thereby gained a settlement. By the statute 13 & 14 Car. 2, c. 12, any person coming to settle in a parish might be removed within forty days, but such person gained a settlement by residing there forty days. Then the statute 1 Jac. 2, c. 17, s. 2, enacts, "that the forty days' continuance should be accounted from the time of his delivery of notice in writing (which they were required to do) of the house of his *835] abode, &c., &c., to one of the parish officers. Then, 3 W. & M., *c. 11, after enacting that such forty days' continuance shall be accounted from the publication in the church of the notice, by section 6, introduces an exception to the operation of the preceding statutes. It enacts, "that if any person shall execute any public annual office or charge in the said town or parish during one

whole year, he shall be deemed to have good settlement though no such notice in writing be delivered and published." The execution of the office, therefore, for a year, was substituted by the legislature for the notice which was required to confer a settlement in the case of a person coming to settle in a parish. Now, in such a case, it is clear that a person who came to settle on a tenement of the requisite value would have gained a settlement by residing on it forty days after the publication of the notice. The seventh section enacts, that if any unmarried person, not having child or children, shall be lawfully hired into any parish for one year, such service shall be deemed a good settlement therein, though there be no notice in writing. By that clause the hiring and service were substituted for the notice in writing, and a party gained a settlement in a parish by residing forty days, provided there was a hiring for a year, Brightwell v. Westhalley, 2 Bott, 251, pl. 315 (5th edit.). The subsequent statute, 8 & 9 W. 3, requires that there should also be a service for a year; but even since that statute, where there has been hiring for a year, and a service for a year in several different parishes, the party is settled in that parish where he resided the last forty days. So here, the pauper, having executed a public annual office in several parishes, must *be taken to be settled in that parish where he resided the last forty days. It is not necessary that the appointment to the office should be subsequent to the coming to inhabit in the parish; the hiring need not be subsequent to the party's coming into the parish. Then, as the pauper executed the office for a year in every parish of the city, he must, by analogy to the cases of coming to settle upon a tenement, and of hiring and service, gain a settlement in that parish where he resided for the last forty days. The very appointment to the office is equivalent to the publication of notice required in other cases. Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court; and, after stating the facts of the case, proceeded as follows:-

We are of opinion that the pauper did gain a settlement in the parish of St. Peter's, Hereford. The question turns entirely on the statute 3 W. & M. c. 11, s. 6, which enacts, "that if any person who shall come to inhabit in any town or parish during one whole year, shall on his own account execute any public office in the town or parish during one whole year, then he shall be judged to have a legal settlement in the same, though no such notice in writing be delivered and published as is hereby before required." Now, the office of crier is undoubtedly an office within the meaning of the statute; it need not be confined to a particular parish; but an office in a city containing several parishes will confer a settlement. By the statute 13 & 14 Car. 2, c. 12, a party coming into a parish to settle gained a settlement by forty days' residence. The statute 1 Jac. 2, c 17, *s. 3, enacted, "that the forty days' continuance in the parish intended by the former statute to make a settlement, should be accounted from the delivery of a notice in writing of the house of abode, &c., to the churchwarden or overseer of the poor." The effect of that statute, therefore, was, to prevent a party gaining a settlement until forty days after the delivery of the notice required to the parish officers. Now, the statute 3 & 4 W. & M. c. 11, after enacting that the forty days shall be accounted from the publication in the church of the notice in writing required to be delivered to the parish officers, substitutes the executing of a public annual office for the notice required in the case of coming to settle upon a tenement; and as in that case a party would be settled in a parish by residing therein forty days after the publication of the notice, by analogy he will gain a settlement by the execution of a public annual office during a year, in any parish where he has last resided for forty days. Here the husband of the pauper did execute a public annual office in the town or parish during one whole year. He comes, therefore, within the very words of the section, and it is a safe rule of construction to adhere to the words of a statute. The seventh section throws some light on the subject. It enacts, "that if any unmarried person, not having child or children, shall be lawfully hired into any parish or town for one year, such service shall be deemed a good settlement therein,

though no notice in writing be delivered and published." Now, although the subsequent statute 8 & 9 W. 3, requires that there shall be a service as well as a hiring for a year, yet, it is clear that a party will gain a settlement by a year's service under a yearly hiring in that parish wherein he has resided for the last *838] *forty days; and it is immaterial, in that case, whether the party be hired before or after he comes into the parish. By analogy to the case of hiring and service, it appears to us that the husband of the pauper having been appointed to the office before he came to reside in the parish; and having served that office for one whole year for this as well as for the other parishes of that town, and having resided there for the last forty days during which he executed the office, gained a settlement in the parish of St. Peter's, Hereford. The order of sessions must, therefore, be quashed.

The KING v. The Inhabitants of SOUTH NEWTON, WILTS. May 15.

A pauper was hired as shepherd, by the tenantry farmers of a manor, for a year, to keep the tenantry flock; he was to receive 14s. per week, and to have a piece of land called The Shepherd's Croft, which was to make up money as good as 16s. a week; and he served a year under this hiring. The tenantry farmers were leaseholders and copyholders of the manor. By agreement made in 1799, between the then lord of the manor and his lessee of the manor, and the leaseholders and copyholders of that manor, arbitrators were appointed for dividing and allotting the open fields within the manor, amongst the lessees for life of the manor, and the several leaseholders and copyholders, in respect of the land which they had in the manor; and the allottees were to be possessed of the lands allotted to them, for the same estate and interest as they had in the lands, in lieu whereof the allotments were made. The arbitrators by their award allotted to W. B., the lord and farmer of the manor, in trust for the shepherd or keeper of the flock, in lieu of lands in the common field, held by custom by the shepherd, the land which the pauper took when he was hired as shepherd, and he let part of this land to a tenant: Held, that the pauper took the land in his character of gervant in lieu of wages, and not under the award, and consequently that he gained no settlement by estate.

Upon an appeal against an order of two justices, whereby Thomas Brown, his wife and three children, were removed from the parish of Woodford, in the county of Wilts, to the parish of South Newton in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper in 1823, while single, was hired as shepherd by the tenantry *839] farmers of the manor of Lower *Woodford, for eleven months at 14s. per week, and was to have a piece of land called The Shepherd's Croft, which was to make up money as good as 16s. a week, to keep certain sheep belonging to them called the Tenantry Flock. Payment of his moneyed wages was made quarterly by the tenantry farmers. The pauper, after serving eleven months, was hired again for one month. Before the end of the month, the pauper was hired "to go on again upon the same terms." He served a year under this last hiring, and slept the last forty nights at South Newton, the appellant parish, having married in the course of that year. The tenantry farmers above mentioned are leaseholders and copyholders of the manor of Lower Woodford. By an agreement under seal, made June the 12th, 1799, the parties to which were the bishop of Salisbury, lord of the manor of Lower Woodford, the leaseholders and copyholders of that manor, and Wm. Beckford of Fonthill Gifford, Esq., who then held the manor under the bishop for three lives, reciting among other things, that the leaseholders and copyholders were entitled to divers lands within the manor, by virtue of the several leases and copies to them thereof granted, arbitrators were duly appointed for dividing and alloting the open and common fields, and common downs within the said manor. The powers of these arbitrators were, "to set out, ascertain, and allot the said open and common fields and common downs so intended to be divided and allotted as aforesaid, unto and amongst the said W. Beckford, in respect of such lands as he had in hand

or at rack rent, and the several leaseholders and copyholders entitled to or interested in the same, in proportion to their several and respective shares, interest, and properties in and over the said open or *common fields or downs.

They were also empowered to set out ways, and in some respects to direct [*840 the course of husbandry. And it was agreed that the persons to whom allotments should be made, should be possessed of them for the same estates, terms, and interests, and subject to the same rents and services as the several lands in lieu whereof such allotments should be made, were then subject to. Neither the shepherd of the tenantry farmers at that time, nor the pauper Thomas Brown, was a party to the agreement.

The arbitrators appointed by the agreement, made an award dated the 10th

of October, 1818, which has been acted on ever since.

By the award, among other allotments, they allotted to W. Beckford, Esq., lord or farmer of the manor of Lower Woodford, in trust for the shepherd or seeper of the common sheep flock of Lower Woodford, for the time being, in lieu of lands in the common fields, held by custom by the said shepherd, "two allotments of land (that is to say), one piece of enclosed pasture marked V, containing thirty perches, and one piece of enclosed arable land marked V, containing three roods and twenty-four perches; the shepherd for the time being keeping the fences of the same in repair."

This was the land which the pauper took when he was hired as shepherd as above, and which had been possessed by former shepherds since the time of the award. The pauper let part of the land to a tenant from year to year for about 5!., and received the rent; a part he always occupied himself, but never paid rates. He is still shepherd, and at the time of his removal was resident in

Woodford, and had been so, more than forty days.

Becoming chargeable, he was removed by order of *two justices to [*841 South Newton, without any objection on the part of his masters, or any interruption to his service, or his possession of the said Shepherd's Croft, both

of which he still retains.

Bingham and Awdry in support of the order of sessions. The hiring after the eleven months, and during the one month's service, to go on again upon the same terms, was a general hiring, Rex v. Macclesfield, 3 T. R. 76. Secondly, the pauper did not gain any settlement by occupying the field in Woodford. He either occupied it as a servant or as tenant, and in neither character was the occupation such as to confer a settlement. According to the policy of the law, the occupation ought to be considered as referable to his character of servant, per Abbott, C. J., in Rex v. Kelstern, 3 M. & S. 136. The test of occupation in the character of servant is, that the occupation shall be necessarily connected with the service, and its conducing to the performance of the service, though s general, is not the only criterion of such necessary connexion. In the present instance, the occupation was necessarily connected, because the pauper could not otherwise have obtained the land. Unless he served as shepherd he could not enter. If, however, he did not occupy as servant, he must have occupied as tenant, and it is immaterial whether he paid rent in money, or service. In fact, he paid rent in service of the value of 2s. per week. That shows the land was not his own, and that some other person had a beneficial interest in it. It is also immaterial whether that other person were the lord of the manor, or the *copyholders. The pauper could have no interest exceeding that of a tenant from year to year. The reversioner, whoever he might be, may be considered as having offered to let the land by the year at 2s. per week of shepherd's service, and the pauper as having taken the land on those terms That was a coming to settle on a tenement under the statute 13 & 14 Car. 2. It implies a voluntary act on the part of the pauper, and excludes the supposi-tion, that the land devolved on him by operation of law. In such a case the recipient is passive; the property comes to him. Here the shepherd came to • the property; and the rent paid being less than 101. a year, he obtained no settlement.

Merewether, Serjt., and Everett, contrd. As to the yearly hiring, the only point to distinguish this from the cases cited, is, that here the pauper was hired to go again upon the same terms. Now, if all the terms of the former agreement were incorporated in the second, it would not be a hiring for a year, but for eleven months only. [Lord TENTERDEN, C. J. The time for which he was formerly hired was not a term within the meaning of the parties. This was a hiring for a year.] Secondly, assuming that to be so, the pauper was irremovable; and the question will be, what sort of interest he took under the agreement and award. If he had an interest in the property in his own right, that would make him irremovable. The use of the land in this case was not of necessity It was not necessary for the performance of that connected with the service. service, and that is the distinction pointed out in Rex v. Minster, 3 M. & S. 276. The pauper might have maintained an action *of trespass in respect of *843] his occupation. The interest which he took under the award existed before he came to settle on the land. He took a defeasible estate, which was to be determined upon his ceasing to act as shepherd. Rex v. Owersby Le Moor, 15 East, 356, is an authority to show that the pauper here took an equitable estate in the land. He was resident on it at the time of the removal, and was Here the pauper let part of the land, a circumstance therefore irremovable. which was strongly relied upon in Rex v. Lakenheath, 1 B. & C. 534, by Abbott, C. J., and Holroyd, J., to show that the pauper enjoyed a house as his own. Besides, the pauper in this case kept the fences in repair, which, as a servant, he would not have been bound to do.

Lord TENTERDEN, C. J. I am of opinion that the pauper took no interest in the land by virtue of the award or allotment. The award itself was void for many reasons. The shepherd, therefore, could derive no legal interest from it. All the interest which he had he took in his character of servant from year to year. He was tenant to those with whom he made the bargain, and his enjoyment of the land was in lieu of wages, which would otherwise have been paid

for his service.

I am of opinion that the pauper was settled in South Newton BAYLEY, J. by virtue of the hiring and service for a year. It appears that he was hired for eleven months, and afterwards for a month, and then he was hired to go on again on the same terms: that was an indefinite hiring, and, therefore, a hiring for a *844] year; and *as he resided in South Newton the last forty days, he was settled in that parish. The agreement made the 12th of June, 1799, was binding upon those persons who were parties to it. The effect of it was, that whenever a shepherd should be appointed, he should have an allotment for his own use; it did not operate as a conveyance, but merely as an agreement between the several parties who signed it. As soon as the shepherd was appointed, he took the land, not by virtue of the articles of agreement, but by virtue of the contract of hiring. He was hired upon terms and conditions which were pointed out to him: one of them was, that he should have Shepherd's Croft, which, with the wages of 14s. a week, was to make it as good as 16s. per week. The persons who hired him, therefore, did confer upon him the right to occupy the land for such period of time as he should faithfully perform the office of shepherd. This right to hold the land was founded on his contract with them. The settlement, therefore, was in South Newton.

LITTLEDALE, J. It appears there was a custom to appoint a shepherd to attend the flocks, and that person was usually allowed the use of some land. By the agreement of 1799, arbitrators were appointed to divide the waste land, and the allottees were to hold their allotments for the same estates and interests as the lands in respect of which the allotments hould be made; but as the lord of the manor, his lessee, and the copyholder and leaseholder, were in the habit of allowing the shepherd a piece of land, I think the pauper did not acquire, in this case, an interest sufficient to confer a settlement. Suppose there had been an agreement in writing to take care of *flocks, and that, in lieu of wages, the exclusive use of the land should be given to the shepherd, his inte-

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rest in the land would be co-extensive with the time during which he was to remain shepherd. During one year, therefore (the period for which he was hired), he would be entitled to the exclusive use of the land; but that was not such an interest as would give him a settlement by estate. For that purpose,

he must be the substantial owner of the property.

PARKE, J. The sessions have come to the right conclusion. It is said that the pauper took either a legal or equitable estate by virtue of the award. He took neither. The parties to the submission were the Bishop of Salisbury, the lord of the manor, and his lessees of the manor, the leaseholders and copyholders. Now the shepherd was not a leaseholder or copyholder of the manor, nor lessee of the manor. The arbitrators, therefore, had no power whatever to allot to him, and pro tanto, therefore, the award is bad. He had a right to occupy the land for part of the year; that was not a settlement by estate, but a coming to settle on a tenement under 101. a year, and, therefore, no settlement was gained.

Order of sessions confirmed.

*The KING v. The Inhabitants of WOOBURN. May 15. [*846

The husband of a pauper being settled in parish A., in 1800 enclosed a small piece of waste land in parish B. from a common, and held and cultivated it until Christmas 1827, when he sold it and conveyed it to a purchaser. From the year 1800 to 1825 he resided out of parish B.; but in the year 1825 he removed to that parish, and in 1826 built a hut on the land and lived in it a year and a half. In the years 1806, 1811, and 1817, the parish officers and freeholders perambulated the parish for the purpose of marking their boundaries, and asserting their rights of common. On those occasions they pulled up a portion of the fence to the land so enclosed, and dug up part of the bank, and rode through the enclosure. In 1820 or 1822 a like perambulation was made by the direction of the lord of the manor, when similar acts were done. No acknowledgment was paid to the lord of the manor for the land: Held, that there was an adverse possession, and that the husband of the pauper gained a settlement by estate in B.

Upon appeal against an order of two justices, whereby Hannah Beal and her four children were removed from the parish of Wooburn, in the county of Bucks, to the parish of Chipping Wycombe, in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case:—

In the spring of 1800, Dennis Beal, the husband of the pauper Hannah Beal, and the father of the other paupers, being settled in the parish of Wooburn, enclosed a small piece of waste land from a common in the adjoining parish of Chipping Wycombe, and surrounded it by a bank, on which he planted a quick fence: he held and cultivated this land, subject to such interruption as after mentioned, until Christmas 1827, when he sold it for 101., and conveyed it by deed to the purchaser. From the year 1800 to the year 1825 Dennis Beal resided out of the parish of Chipping Wycombe. In the year 1825 he removed to a cottage in that parish, but not on the land in question. In the year 1826 he built a hut on the said land, and was provided with straw to thatch it by one of the overseers of the parish of Wooburn; and up to the time of his building the hut he continued to receive relief from the parish officers of Wooburn. lived in the hut a year and a half. In the years 1806, 1811, and 1817, *the parish officers and freeholders perambulated the parish for the purpose of marking the boundaries, and asserting their rights of common, by throwing open encroachments on the waste. In the first year they pulled up a large portion of the fence to the said land enclosed by Beal, dug up part of the bank, and rode through the enclosure. In the two subsequent years they made a large gap in the fence, and again rode through the enclosure with the same In the year 1820 or 1822, but to which of those years in particular the witness could not speak positively, a similar perambulation was made by direction of the lord of the manor when similar acts were done for the like purposes.

It did not appear that Dennis Beal was present on either of these occasions, nor did it appear that any acknowledgment was paid by him to the lord of the manor, or any other person, during his occupation of this enclosure, nor that either the commoners or the lord of the manor commenced any action, or did any other act to assert their rights, except as before mentioned The question for the opinion of this Court was, whether, notwithstanding the interruptions before stated, Dennis Beal, by his occupation and residence upon the land in question, gained a

settlement in Chipping Wycombe? D. Pollock and B. Monro in support of the order of sessions. The pauper did not gain any settlement by estate, for there never was an adverse possession for twenty years. The original taking of the land from the waste was a wrong-The pauper's husband was interrupted in his possession in 1806, 1811. and 1817, by the persons who made the perambulation. The enclosure was in part destroyed. In 1820 or 1822 similar acts were done by persons who made the *perambulation, by direction of the lord of the manor. [BAYLEY, J. There is no proof that the profits of the land were taken by the persons who made the perambulation. The acts done by them would amount to no more than a mere entry, and that, even if made within twenty years, by the stat. 4 & 5 Ann. c. 16, s. 16, not being followed up by an action within a year, is no bar to the statute of limitations. Lord TENTERDEN, C. J. Suppose the lord had brought an ejectment, would these acts of interruption have been sufficient to entitle him to recover in ejectment? PARKE, J. There is great difficulty in saying that the lord could take advantage of the entry made by the parishioners in 1806, 1811, and 1817. It was not made for his benefit but for that of the parish.]

Lord TENTERDEN, C. J. There has been an adverse possession for twenty years, and the husband of the pauper gained a settlement by estate in Chipping Wycombe. The order of sessions must, therefore, be quashed.

Order of sessions quashed.

*849] *JOHN DOE, on the several Demises of CHARLES CALVERT, Esquire, THOMAS STANLEY, SAMUEL MIALL, and ANNE CHAPMAN, v. JOHN REID. May 18.

Where the lessee of a public-house covenanted for himself, his executors, and assigns, with nis lessors (brewers) to take all his beer of them or their successors in their said trade, and the lessors sold their trade and the public-house, with other premises, to third persons, who removed the plant, &cc., to a distance of two miles, and there carried on the business of brewers: Held, that the trade of the lessors was theseby determined, and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer.

EJECTMENT to recover a public-house and premises, in the parish of St. George, in the county of Middlesex. At the trial before Lord Tenterden, C. J., at the adjourned sittings after Trinity term 1828, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—Mary Chapman and Anne Chapman being seised in fee of an estate in the parish of St. George, in the county of Middlesex, of which the premises in question formed part, by indenture dated the 18th day of February, 1803, and made between the said Mary Chapman and Anne Chapman of the one part, and John Phillips and Samuel Miall, therein described of the said parish of St. George, in the county of Middlesex, brewers and copartners, of the other part (in consideration of the expense which the said John Phillips and Samuel Miall had been and would be at in erecting the buildings thereinafter demised, and in finishing the same, and of the rent and covenants thereinafter reserved and contained, and which on the part of the said John Phillips and Samuel Miall were to be paid and performed), demised and leased to the said John Phillips and Samuel Miall the parcel of

ground in the indenture described, with the messuage or tenement and buildings thereon erected, and which were the premises sought to be recovered in *this action, to hold unto the said John Phillips and Samuel Miall, their executors, administrators, and assigns, from Michaelmas day then last past, for the term of ninety-eight years, at the yearly rent of 5l. 5s., payable as therein was John Phillips and Samuel Miall having finished the said messuage and buildings, by an indenture made and executed the 18th day of January, 1805, by and between the said John Phillips and Samuel Miall of the one part, therein described as of the Star brewhouse, Wapping, and John Reid, the defendant, of the other part, in consideration of the sum of 500% to them paid by the said John Reid, and also for and in consideration of the yearly rent, and of the covenants, provisoes, and agreements thereinafter contained, and which, on the tenant or lessee's part, were to be paid, done, observed, performed, fulfilled, and kept, demised, granted, leased, set and let unto the said John Reid the said parcel of ground, together with the said message or tenement and buildings so lately erected and built, and then standing and being upon the said ground, to hold unto the said John Reid from the feast day of St. Michael the Archangel, hen last past, and which was in the year of our Lord 1804, for the term of pinety-six years, wanting ten days, at the yearly rent of 5t. 5s., payable as therein was mentioned. And the said John Reid, for himself, his executors and administrators, did thereby covenant, promise, and agree, to and with the said John Phillips and Samuel Miall, their executors, administrators, and assigns, and to and with each and every of them, amongst other things, that he the said John Reid, his executors, administrators, or assigns, should and would at all times during the said term so thereby granted or demised, if a license for *such purpose could be had or obtained, keep and use the said demised premises as a public or victualling house, and should and would from time to time, and at all times during the said term, purchase and take of and from the said John Phillips and Samuel Miall, their executors, administrators, or assigns, or their successors in their late or present trade as brewers, all the porter, ale, and twopenny, or amber, or such of the said liquors respectively as by them should be brewed for sale, as should be sold or disposed of in or upon the said premises or any part thereof; provided and on condition nevertheless that they the said John Phillips and Samuel Miall, their executors, administrators, and assigns, or their successors as aforesaid, should furnish and supply him the said John Reid, his executors, administrators, under-tenants, or assigns, with such liquors or articles respectively of a good quality and in sufficient quantities, at fair and reasonable prices, with such allowances as are usual and customary on such occasions. And the last-mentioned lease contained a proviso for re-entry for breach of any of the convenants therein. At the time of the making of the last-mentioned lease the said John Phillips and Samuel Miall carried on trade as brewers in copartnership, and were landlords of a number of other public-houses, which they supplied with beer. Their trade was at that time carried on at a place called the Star brewhouse, at the New Crane, Gravel Lane, Ratcliffe Highway. The said John Reid entered into and was possessed of the demised premises under the lease of 1805, and by his under-tenants purchased of the said John Phillips and Samuel Miall the beer consumed upon the premises in question, until by an indenture bearing date the 1st day of November, 1805, and *made between John Phillips the elder of the first part, and the said John Phillips therein described as John Phillips the younger, and Samuel Miall of the second part, Thomas Taylor of the third part, and Thomas Stanley and John Cass of the fourth part, for the considerations therein mentioned, all and singular the premises in which the brewery of the said John Phillips and Samuel Miall was then carried on, and all the stock in trade, goods, effects, and things whatsoever belonging to the said trade, together with the said trade or business of the said John Phillips and Samuel Miall, were assigned, transferred, and set over to the said Thomas Stanley and John Cass; and by another indenture of the same date and made between the same parties, all the estate and interest of the said

John Phillips and Samuel Miall of, in, and to all the public-houses of which they were landlords, and amongst others the public-house and premises sought to be recovered in this action, were assigned to the said Thomas Stanley and John Cass. By virtue of these two several assignments the said Thomas Stanley and John Cass entered upon and became possessed of or interested in all and singular the premises comprised therein respectively, and from the date thereof they carried on the business which had been before carried on by the said John Phillips and Samuel Miall; and the under-tenants of the defendant Reid, and the other customers of the old firm continued to deal with the said Thomas Stanley and John Cass, until by articles of agreement made the 31st day of May, 1806, between the said Thomas Stanley and John Cass of the one part, and Charles Calvert, for and on behalf of Felix Calvert and company, of the other part (reciting that the said Felix Calvert and company had contracted and agreed with the said Thomas Stanley and John Cass for the purchase of the said brewery plant, stock, and business, and for the messuages, tenements, or victualling houses belonging to the said trade, and also for the debts due and owing to the said trade), it was agreed that the said Thomas Stanley and John Cass should immediately upon the execution of the said articles of agreement deliver possession to the said Felix Calvert and company of all and singular the said brewery plant, stock, and business, stables, messuages, and premises, and also all the leases of the victualling houses belonging to the said trade, and the several assignments thereof; and it was further thereby agreed that the said Thomas Stanley and John Cass should, upon the request of the said Felix Calvert and company, well and sufficiently assign and set over unto Robert Calvert and Charles Calvert, two of the partners in the said house of Felix Calvert and company, for the use of themselves and their partners, all and every the said brewery plant, stock, and business, messuages and premises, utensils and other things, with the aforesaid leases, assignments, and other instruments. The said Felix Calvert and company took possession according to the terms of the said agreement, and afterwards (John Cass having died in the mean time), by an indenture bearing date the 9th day of January, 1816, and made between the said Thomas Stanley of the first part, George Cass the elder, Thomas Waller and Elizabeth Cass, executors of the said John Cass of the second part, and the said Robert Calvert and Charles Calvert of the third part, all the said brewery plant, stock, trade, and business, messuages and premises, and all the aforesaid leases, assignments, and other instruments, including, amongst others, the lease of the public-house *and premises now sought to be recovered, were well and sufficiently assigned and set over to the said Robert Calvert and Charles Calvert, for the benefit of the said Folix Calvert and company. Robert Calvert died in 1821.

The firm of Felix Calvert and company, after the said purchase, and after taking possession under the articles of agreement, removed the plant, &c., of the Star brewhouse, New Crane, to a brewery in Thames Street, and they have from thence hitherto carried on there the said trade, and the premises at New Crane have been converted to other purposes, and have not since been used as a brewery. The premises at the New Crane and the brewery in Thames Street are nearly two miles apart. The public-house sought to be recovered in this action is situate between them, but nearer by two thirds to the New Crane than to The brewery in Thames Street is at a distance sufficiently near Thames Street. and convenient for serving the said public-house with beer, and the occupiers thereof have regularly dealt with Felix Calvert and company from the time they purchased as aforesaid, until the 19th of December, 1827, when the present occupier took possession. He has not purchased any beer of Felix Calvert and company; but from the time of his taking possession he has purchased the porter sold upon the premises from Messrs. Hoar and company, alleging that he has connexions in that house.

Campbell for the lessors of the plaintiff. The question in this case is, whether the assignee of a lessor can recover against the assignee of the lessee, upon the

breach of such a covenant as that now in question. Perhaps it may be said that the covenant to take beer from a *particular house is illegal, but the [*855] legality of such covenants has never heretofore been doubted, although they have several times been brought under the consideration of the Court, Holcombe v. Hewson, 2 Campb. 391, Jones v. Edney, 3 Campb. 285, Cooper v. Twibill, 3 Campb. 286, n. Then it will be contended that this covenant does not run with the land; but it clearly does so, for it touches and concerns the use and enjoyment of the land. Sampson v. Easterby, 9 B. & C. 505. [Lord TENTERDEN, C. J. Suppose the original lease were assigned to persons who had no interest in the brewery.] At present there is a unity of title to the lease and the brewery, the case is therefore within that of Vyvyan v. Arthur, 1 B. & C. 410. This covenant is for something to be done on the demised premises, in which both parties have an interest; it is therefore stronger than the covenant to sing in a chapel (cited in Vyvyan v. Arthur, from the Year Book, 43 Ed. 3, s. 3), which was to be performed by a person who had no interest in it, and yet it was held to run with the land. The thing to be done in the present case is in the nature of a covenant to pay rent; for the rent actually reserved is doubtless fixed after taking into consideration the profit that the landlord would receive from the sale of the beer. In Jourdain v. Wilson, 4 B. & A. 266, a covenant to supply water was held to run with the land. So also a covenant to insure, Vernon v. Smith, 5 B. & A. 1, and a covenant to reside on the demised premises, Tatem v. Chaplin, 2 H. Bl. 133. In Purefrey's Case, Moore, 243, Goldb. 120, the covenant to account, and in the Mayor of Congleton v. Patteson, 10 East, 130, the covenant not to employ particular *persons, did not, in any way, concern or affect the thing demised. Now as to the question of trading, it is stated as a fact in the case, that the trade was assigned, and that the purchasers now carry on the said trade in another place; but sufficiently near for the convenient supply of the defendant's premises. If that removal puts an end to the covenant, it must be held that it would equally have been determined if the business had been removed to new premises merely across a street.

Pollock, contrd, was stopped by the Court.

Lord TENTERDEN, C. J. The covenant whereof the breach is insisted on as a forfeiture requires that the lessee should at all times during the term purchase and take of and from the lessors, their executors, administrators, or assigns, or their successors in their late or present trade as brewers, all the beer consumed on the premises. Now, whatever might have been the effect of that covenant if the trade had still been carried on by Phillips and Miall, or their assigns, it does not entitle the lessors of the plaintiff to recover in this action; for my opinion is, that the trade formerly carried on by Phillips and Miall has, by the events that have occurred, been absolutely put an end to and determined. It appears that Phillips and Miall assigned their premises and trade to Stanley and Cass, who again assigned to Calvert and company, and these latter assignees removed the plant, &c., to a distance of two miles, and converted the old premises to other purposes. Now I cannot understand what is meant by the assignment of a trade generally; and the assignment of a trade in a particular place means the good-will of that trade. To that, I think, *the covenant in question must be held to apply, and Calvert and company have put an end to the trade whereof the good-will was assigned to them. The covenant, also, must therefore be at an end; and the lessors of the plaintiff cannot recover in this ejectment.

BAYLEY, J. It is not necessary to say whether the covenant in question did or did not run with the land, but I think it would be very difficult to show that the Mayor of Congleton v. Patteson does not govern this case. As to the other point, I am of opinion that the successors of any party in business are they who

carry on the same business in the same place.

LITTLEDALE, J. I am of the same opinion. The lessors of the plaintiff cannot maintain this action, unless they are assignees not only of the premises but of the business of Philips v. Meats, which the facts show not to be the case. If

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in Vyvyan v. Arthur the mill had been removed to another place, I apprehend the covenant would not have applied; and in Richardson v. Capes, 2 B. & C. 841, where the tenants and resiants within a manor were bound by custom to grind their malt at one or other of two mills, and the lord removed one, it was held that the custom was suspended, if not extinguished.

Postes to the defendant.(a)

(a) PARKE, J., having been counsel in the cause, gave no opinion.

*HUNTER and Others v. LEATHLEY.

A broker who has effected a policy, and has a lien on it for his premiums, may be compelled by the assured to produce it on the trial of an action against the underwriters, and he is a competent witness (notwithstanding his lien) to prove all matters connected with the policy.

A policy was effected "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Europe, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, &c., upon goods in certain vessels, beginning the adventure from the loading thereof aboard the said ships as above." The ship took in part of her cargo at Batavia, then went to Sourabaya, another port in the East Indies (not in the course of a voyage from Batavia to Europe, and not specified by name in the policy), and took in other goods, then returned to Batavia, whence she afterwards sailed for Europe, and was lost by perils of the sea: Held, that going to S. was not a deviation, and that the goods there taken on board were protected by the policy.

Assumpsit on a policy of assurance at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port or ports of discharge in Great Britain, or to any port or ports in the United Netherlands, or to Altona or Hamburg, or all or any, with leave to touch, stay, and trade at all or any ports and places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, as well beyond as at and on this side of the Cape of Good Hope, in port or at sea, at all times and in all places, and until safely arrived and landed at the ship's final port or place of discharge, upon any kind of goods and merchandise, and also upon the body, &c., of, and the good ship or vessel called the Albion, Bolivar, Java Packet, and Blosa, beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ships as above, with leave to call at or off any ports or places in Great Britain, and wait for orders, &c. And it should be lawful for the said ship, &c., in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever, in any direction, and for any purpose necessary or otherwise, particularly Singapore, Penang, Malacca, Batavia, the Cape of Good Hope, and St. Helena, with leave to take on board, discharge, reload, or exchange goods and passengers, without *859] being *deemed any deviation from and without prejudice to that insu-And by a memorandum the said policy was declared to be on goods as interest might appear, with leave to declare the same thereafter. Averment, that afterwards, to wit, on, &c., the interest on the said goods and merchandise so intended to be insured by the said policy, was duly declared to be all in the Java Packet on coffee, and that the defendant subscribed the policy for 300l., at a premium of 6l. 6s. per cent. And that afterwards, to wit, on, &c., at Batavia in the policy mentioned, coffee to the value of 10,000l. had been and was shipped and loaded in and on board the said ship called the Java Packet, to be carried therein on the voyage in the policy mentioned, to wit, toward and unto Antwerp, being a port in the United Netherlands; and that also afterwards, to wit, on, &c., to wit, at Sourabaya, being a certain port or place which the said ship or vessel proceeded and sailed to, and touched and stayed at, under and by virtue of the said policy to take on board goods, divers other goods, to wit, 10,000 peculs of coffee, and 10,000 bags of coffee, of great value, had been shipped and loaded, in and on board the said ship or vessel, to be carried and conveyed therein to Antwerp aforesaid. Averments of interest, and a total loss

by perils of the sea. Money counts and account stated. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the Guildhall sittings, after Hilary term 1828, the broker who effected the policy was called as a witness for the plaintiff, and required to produce the policy. This he objected to do, claiming to have a lien on it for premiums advanced by him. But it appearing that he had been served with a subpoena duces tecum, ordering him to bring the *policy into Court, Lord Tenterden held that he was bound to produce [*860] it, inasmuch as he would not thereby be deprived of his lien. It was then objected by the defendant's counsel, that the witness, having a lien, was interested, and ought not to be examined. Lord Tenterden overruled this objection, the witness was examined, and the jury found a special verdict in substance

as follows:-

That the policy of insurance in the declaration mentioned was effected by John Macallam, as agent to the said plaintiffs, and was subscribed by the said defendant for the sum of 300l., as in the declaration mentioned, and that the interest intended to be insured was duly declared to be all in the Java Packet, on coffee, as in the declaration mentioned, and that the said vessel being at Batavia, in the policy mentioned, a certain quantity of coffee, of the value of 9231. 3s. 6d., and no more, was there loaded in and on board the said vessel by the plaintiffs, with the intention that the said coffee should be carried in the said vessel to Antwerp, in the said policy mentioned, and that Batavia is a port in the Island of Java, one of the islands in the East Indies; and that the said vessel having taken in the said coffee at Batavia, in the prosecution of the adventure, proceeded from thence with the said coffee on board her to Sourabaya, which is another port in the said Island of Java, and the plaintiffs there loaded a certain other quantity of coffee of the value of 5865l. 16s. 6d. on board the said vessel, with the intention that the same should be carried in the said vessel to Antwerp, and the value of the coffee loaded on board the said ship or vessel at Batavia and Sourabaya, amounted in the whole to the sum of 62921. 5s., and no more; that the amount insured by the policy was 7500%, *and that no other goods or merchandise were shipped by the plaintiffs on board the said vessel, in respect of the insurance effected by the said policy; that the premium paid on the sum of 300l., at and after the rate of 6l. 6s. per cent, amounted to the sum of 18l. 18s., and that, according to the rate aforesaid, the said sum of 18t. 18s. exceeds the just proportion of the value of all the said goods by the sum of 3l. 17s. being 11. 0s. 4d. per cent., and exceeds the just proportion of the value of the said goods shipped at Batavia alone, by the sum of 16l. 11s. 6d., being 5l. 10s. 6d. per cent. And the jurors further found, that the said vessel returned from the port of Sourabaya to the port of Batavia, with the coffee so shipped on board her at Batavia and Sourabaya as aforesaid, and that the said vessel afterwards sailed therewith from Batavia to Antwerp aforesaid; and the jurors further found, that Sourabaya, to which place the said vessel proceeded from Batavia, and where she took in coffee as aforesaid, is not in the direct course from Batavia, Singspore, Penang, or Malacca, to Europe, nor in the direct course from any one of those four places to any other of those four places, but the said port of Soursbaya is directly out of the course from each of the said four places to Europe, and from each of the said four places to any other of them, and is distant from Batavia 400 miles eastward, and that Singapore, Penang, Malacca, and Batavia are not according to the order in which the said four places are mentioned in the policy in the direct course of a voyage therefrom to Europe, but that the direct course of a voyage from the said four places to Europe is according to the following order, viz., Penang, Malacca, Singapore, and Batavia, and further, that any port or place in Persia is more than *1000 miles out of the course from any one of the said four places to Europa. And the jurges further from any one of the said four places to Europe. And the jurors further found that the whole of the said coffee was the property of the plaintiffs, and that the plaintiffs were interested therein as in the said declaration mentioned, and lastly, that the said vessel was, before her arrival at the port of Antwerp,

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wholly lost by the perils of the sea, and thereby the said coffee was wholly lost

to the plaintiffs. In Easter term,

Pollock, on behalf of the defendant, moved for a rule nisi for a new trial on two grounds, first, that the broker ought not to have been compelled to product the policy, for which he cited Lord v. Wormleighton, 1 Jacob, 480; and secondly

that the broker was not a competent witness.

Lord Tenterden, C. I. We are all of opinion that the broker was compellable to produce the policy. The case cited was an application for the exercise of a discretionary power vested in the Lord Chancellor; in the present case the witness came into court under a subpœna duces tecum, a writ to which the party has a right, and he may insist on its being obeyed. The policy being thus brought into court, if we allowed the broker to withhold it on account of his lien, we should permit that which would work great inconvenience, and we should enable brokers to assist the underwriters in defeating the just claim of the assured. We do not by this decision deprive the party of his lien, he still has the policy in his possession, and has the same right of lien as before. Upon the question of the broker's competency, there may be a rule to show cause.

*863] The Attorney-General, Campbell, and Joshua Evans, showed cause. The only question now before the Court is, whether the broker, having a lieu on the policy, was a competent witness. Every attorney has a lieu on the judgment obtained by his client, and yet that does not render him incompetent. Now the broker's lieu is only on the policy, and not on the judgment, his interest is therefore more remote; he has not any direct legal interest in the event of the suit, and is therefore competent. In all cases, agents and servants are witnesses ex necessitate, Benjamin v. Porteous, 2 H. Bl. 590, Barker v. Macrae, 3

Campb. 144.

Pollock, Maule and Patteson, contrd. The witness was not called to prove a mere matter of form necessarily, in his knowledge as agent, but to prove the declaration as to interest. In Gevers v. Mainwaring, Holt, N. P. C. 139, a broker called to prove a matter collateral to the mere contract was rejected. [Parke, J. There the verdict would have been evidence against him.] The lien claimed in this case was not of the ordinary nature, and the witness admitted that he looked for payment exclusively to the funds to be derived from the action. [Lord Tenterden, C. J. Suppose an attorney admitted that his client could not pay his costs, would he on that account be incompetent?] It is not every witness ex necessitate that is competent if interested. The interest must be of a nature that the plaintiff cannot get rid of without a release. But where the interest may be determined by payment of money due, the party is bound to *864] do that, ex. gr., if a servant be incompetent on the ground of *wages being due to him, the master should pay them, and so destroy the interest; so here, if the plaintiff had paid the broker that which was due, there would no longer have been any objection to his testimony.

Lord TENTERDEN, C. J. I am of opinion that the witness was competent to produce, and prove the matters connected with the policy. I cannot distinguish this from the case of an attorney who has a lien on the judgment. He was, moreover, a witness ex necessitate, for he made the contract between the parties. In Benjamin v. Porteous a factor was, under such circumstances, admitted to prove the contract, although he was to be paid according to the price obtained

for the goods.

BAYLEY, J. It is true that the plaintiff by paying off the broker's demand might have removed all objection to him; but I think that the broker being a witness ex necessitate, the plaintiff was, notwithstanding the interest, entitled

to his evidence so far as the necessity extended.

LITTLEDALE, J. I am of the same opinion. Both the plaintiff and defendant put the management of this policy into the hands of the broker; neither therefore ought to be allowed to object to his competency to prove matters relating to the policy.

PARKE, J. I think that the witness was competent. The first objection is, that he was a creditor of the plaintiff; but it seems to me that the defendant has nothing to do with that. If it be said that he is interested as agent, it is clear that an agent is admissible ex necessitate to prove all matters connected with a *contract made by himself. But then it is said that he had a special interest in the policy. That might have been a sufficient objection if he had been assignee or mortgagee of the policy, but that did not appear to be the case; he had a mere lien, and an attorney although he has a lien on the judgment is competent; and I take the reason of the rule to be, that, whatever be the result of the action, his legal rights remain the same. If he looks to the judgment alone for payment, that may affect his credit, but not his competency. Rule for a new trial discharged.

The case on the special verdict was now argued by

Joshua Evans for the plaintiffs. Two objections will be made to the plaintiffs' right to recover. First, that going to Sourabaya was a deviation; and, secondly, that the goods taken on board there were not protected by the policy. Whatever opinions may formerly have prevailed on the subject, it is now settled that policies of insurance are to be construed, as all other instruments, according to the plain, ordinary, and popular meaning of the language in which they are expressed, Robertson v. French, 4 East, 135, Lang v. Anderdon, 3 B. & C. 500. Now the policy in question was "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Great Britain, &c., with leave to touch, stay, and trade at all or any parts and places whatever and wheresoever in the East Indies, Persia, or elsewhere, as well beyond as at and on this side of the Cape of Good Hope;" that is a description of the voyage which proves that the parties manifestly contemplated a *seeking voyage; and, independently of decided cases, it is difficult to understand how a doubt could be raised as to the trip to Sourabaya being permitted by the policy. But, secondly, the goods there laden were protected by the policy. After enumerating the places at which the vessel might touch, stay, and trade, it goes on, "beginning the adventure upon the said goods and merchandise from the loading thereof aboard the ships as above; that is, at the ports and places at which the vessel was above authorized to touch, stay, and trade." It may be said that the vessel ought to have gone to the several places in the policy mentioned, in their geographical order, and could only touch at other places in so doing; but the answer is clear, the special verdict finds that it is impossible to go to those places in the order in which they are set down in the policy. Without cases, then, the plain construction of the policy is clearly in favour of the plaintiffs. authorities are also in his favour. In Bragg v. Anderson, 4 Taunt. 229, a policy "at and from Martinique, and all and every the West India islands," was held to warrant a course from Martinique to islands not in the homeward track. So, in Lambert v. Liddard, 5 Taunt. 480, Mellish v. Andrews, 2 M. & S. 27, and Metcalfe v. Parry, 4 Campb. 123, it was held, that vessels touching at places not in the direct course of their voyage from the place where the policies attached, were protected by those policies; and that now under consideration is as comprehensive as any of those referred to. Again, there is no doubt that the vessel went to Sourabaya for a purpose connected with the voyage insured; she was therefore *protected. Warre v. Miller, 4 B. & C. 538, Bottomley v. Bovill, 5 B. & C. 210. Secondly, the goods taken on board at Sourabaya were covered by the policy. The case of Hodgson v. Richardson, 1 Bl. 463, will, perhaps, be relied on for the defendant. There, a policy "at and from Genoa," was held not to cover goods previously laden at Leghorn; but the decision turned altogether on a question of concealment. In Spitta v. Woodman, 2 Taunt. 416, it was held, that if a policy is effected on goods on a voyage from A. to B., the risk to commence "at and from the loading thereof on board," not saying where, it must be intended a loading at the place where the voyage commenced. And this precedent was followed in Mellish v. Allnutt, 2 M. & S. 206. But here, after the various places at which the vessel might touch had

been described, the policy declared that the risk should attach on goods from the loading thereof as above, manifestly meaning at any of the places before described. It is not, in this case, a mere liberty to do certain things without prejudice to the insurance; it is a description of the voyage insured. Moreover. in Bell v. Hobson, 16 East, 240, Lord Ellenborough speaks of the construction put upon the policy in Spitta v. Woodman as very strict, and not to be favoured, still less to be extended. Any circumstance, however slight, is sufficient to take a case out of the rule there laid down. In Gladstone v. Clay, 1 M. & S. 418, the word "wheresoever" introduced after "from the loading thereof," was held to be sufficient for that purpose. Then, Violett v. Allnutt, 3 Taunt. 419, is *868] expressly in point for the plaintiffs. There it was held, *that liberty to touch at a port for any purpose whatsoever, included liberty to touch for the purpose of taking on board part of the goods insured; and that was confirmed by Barclay v. Stirling, 6 M. & S. 6.

Patteson, contrd. There are three objections to the plaintiff's right to recover in this action. First, the vessel never sailed on the voyage insured; secondly, if she did sail on that voyage, going to Sourabaya was a deviation; and, thirdly, the policy does not cover the goods taken on board at that place. The voyage insured was, "at and from Singapore, Penang, Malacca, and Batavia." It is true, that those places are not mentioned in their geographical order; but the policy immediately goes on, "all or any, to the ship's port of discharge in That is the whole description of the voyage, and although the subsequent words, "with leave to touch," &c., may prevent the going to other places being deemed a deviation, it was essential that the voyage to Europe should commence from one of the four places named. If those places were not to be placed on a different footing from the others included in the general words, there could be no reasoning for mentioning them at all. Now, the vessel did not sail from any one of the places named on a voyage to Europe, but to Sourabaya for the purpose of procuring a cargo. This brings the case within Wooldridge v. Boydell, Doug. 16, and Way v. Modigliani, 2 T. R. 30. This is not one of the class of cases to which Bottomley v. Bovill, 5 B. & C. 210, belongs. That was a policy on a voyage from London to New South Wales and back, with leave to go to certain *869] places in the *East Indies. The vessel did sail from London to New South Wales, and the question in the cause arose on a subsequent loss. This is not an insurance on a voyage to the East Indies and back, but at and from four places named, or any of them, to Europe. [BAYLEY, J. If the vessel had gone to Persia, which is particularly named, would the policy have protected her?] Certainly not, unless she had previously taken her departure for Europe from one of the four places specified. The words of the policy are, "with leave to touch, &c., at any port or place in Persia," &c.; that merely excuses a deviation, and does not make it part of the description of the voyage insured pose the vessel had taken in the whole of her cargo at Sourabaya, and had never gone to any one of the four places named, the argument on the other side, if valid, would show that the policy nevertheless attached; for, in effect, it is, that all the places included in the leave are embodied in the description of the voyage insured. If that be not so, and if in such case the policy would not attach, then it makes no difference that the vessel had been at Batavia before she sailed for Sourabaya, for she did not sail thither with a view of proceeding to Europe, but to take in goods and then return to Batavia. To protect such a course, the policy should have been "at and from Java." Secondly, if the policy ever attached, going to Sourabaya was a deviation. The leave given to touch at ports and places in the East Indies, &c., applies only to touching at those places in the progress of the voyage insured, viz. of and from Singapore, Penang, Malacca, and Batavia, all or any, to Europe. Now the vessel, when going to Sourabaya, was not on a voyage from Batavia to Europe, but from Batavia to Sourabaya, *870] and back to Batavia. Thirdly, *the policy does not cover the goods taken on board at Sourabaya. The expression, that the adventure on goods

should begin from the loading thereof as above, refers to the description of the voyage, and the goods to be protected must be laden at one of the four places In Spitta v. Woodman, the insurance was at and from Gottenburgh specified. to the ship's port of discharge in the Baltic, on goods, beginning the adventure upon the goods "from the loading thereof on board the said ship;" and it was held only to cover goods laden at Gottenburgh. The words "as above" in this case do not extend the operation of the policy. It would have been as extensive if it had stated in general terms, that "the adventure on the goods should commence from the loading thereof on board the said ship" and then Grant v. Paxton, 1 Taunt. 463, Spitta v. Woodman, 2 Taunt. 416, Constable v. Noble, 2 Taunt. 403, and Mellish v. Allnut, 2 M. & S. 106, are direct authorities for the defendant. Nor is Gladstone v. Clay, 1 M. & S. 418, in point for the plaintiffs, for there goods not laden at the terminus a quo were held to be protected, only because the policy was made to attach on them wheresoever laden. In Grant v. Delacour, 1 Taunt. 466, a policy on a voyage from England to the East Indies and back, beginning the adventure on goods, "from the loading thereof on board the said ship at London," was held to cover goods not laden at London; but it would have been absurd there to hold the contrary, for that would have been to decide, that the same goods should be carried to India and brought back again. The only cases in point for the plaintiff are Violett v. Allnutt and Barclay v. Stirling, but the *former of those cases underwent very little consideration, and, moreover, the goods were taken on board in the prosecution of the voyage insured; Barclay v. Stirling proceeded entirely on the authority of Violett v. Allnutt, and there, too, the question arose respecting goods taken in at a port while the vessel was prosecuting the voyage insured. Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court; and after

stating the facts detailed in the special verdict, proceeded as follows:-

It is obvious, on the perusal of this policy, in which so many places of departure and four ships are mentioned, with liberty to declare and specify the particular ship and goods afterwards, that at the time of the insurance the assured must have been ignorant of the particular port in the East at which goods for him would be shipped, as well as of the name of the ship and the species of goods; and must, therefore, have intended to protect himself against loss, whatever might be the sort of goods, by whichsoever of the four ships they should be sent, and at whatsoever place or places in the East they might be put on board; and the defendant, by subscribing such a policy, must be understood to have intended to afford a protection equally extensive, if the terms of the policy will admit of such an effect being given to the instrument.

The rule for the construction of marine policies is very well laid down by Lord Ellenborough in the case of Robertson v. French, 4 East, 135, viz., that "they are to be construed according to their sense and meaning, as *collected, in the first place, from the terms used in them, which terms, are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usages of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."

Such being the object of the assured and the rule of construction, we are to look at the policy in order to gather from thence whether or no the whole or any part of the plaintiff's interest can, consistently with such decisions as have taken place on similar subjects, be considered as protected. The plaintiff contends that his whole interest, as well in the goods shipped at Sourabaya as in the goods shipped at Batavia, is protected. The defendant insists that no part is protected; or, supposing the goods shipped at Batavia to be protected, that the shipment at Sourabaya is not. The grounds upon which it was contended that no part was protected were, first, that the policy did not attach, the goods shipped at Batabeing, as it was urged, shipped, not for a voyage to Antwerp, but for a

voyage to Sourabaya and back to Batavia; from whence a distinct voyage to Antwerp commenced. Secondly, supposing the policy to have attached on those goods while the ship remained at Batavia, yet the voyage to Sourabaya was a The ground on which it was contended that the goods shipped at Sourabaya were not protected was, that Sourabaya could not be considered as a port of loading, or terminus a quo within the meaning of this policy. We are of *opinion, however, that goods shipped at Batavia were in reality shipped for a voyage to Antwerp by way of Sourabaya, and that the ship's first departure from Batavia was on such a voyage. And considering the very extensive powers given by this policy both in the first and last clauses, we think the sailing to Sourabaya was not a deviation; it could not be so deemed without a direct contradiction to the terms of the policy, it being clear that the ship sailed to Sourabaya for the purpose and in the prosecution of the original adventure contemplated by the policy. And upon these points the principle of the decision in Mellish v. Andrews, 2 M. & S. 27, is applicable to the present policy; the only difference between the two cases being, that in Mellish v. Andrews the places of discharge or termination of the voyage, and the course of sailing for that purpose, were left undefined, by reason of the uncertain state of commerce in the Baltic, and in the present case the places of shipment or commencement of the voyage, and the course of sailing for that purpose, are left undefined, by reason of the ignorance of the assured as to those particulars. The order in which the four places named stand in the policy, shows plainly that a voyage in the direct geographical or nautical course was not thought of, it being clear that it was thought possible that goods might be laden at each of those places.

With regard to the goods shipped at Sourabaya, the question is, whether that place can be considered as a loading port or terminus a quo within the meaning of the policy. Sourabaya is certainly a place in the East Indies, and so within the meaning of the words used in that part of the policy wherein the voyage is described. But it is *said, that the words "ports and places in the East Indies, Persia, or elsewhere," not following directly after the four places first named, as the termini a quibus, but after the places named as the termini ad quos, and being introduced by the words "with leave," &c., cannot be understood to designate places of shipment of the plaintiff's goods, but only places to which the ships might be permitted to sail for some other purpose. On the other hand, it was contended that those words might, according to two decided cases, which I shall presently mention, be considered as places of shipment, and that in this particular policy they must be so considered, because the places to which the ships might sail without deviation or prejudice to the insurance, are afterwards mentioned and provided for by the policy in a distinct clause, of which the language is more loose and comprehensive than the language of the Now, if we suppose that a shipment of goods by the plaintiff in some place that might be imagined, as, for instance, on the coast of Brazil, would not be a shipment within the first clause, and so not be protected by the policy; but that nevertheless, if the ship, after receiving the plaintiff's goods, had sailed for that coast for some other lawful purpose, the benefit of the policy would have been saved by virtue of the latter clause; the two clauses will each have a distinct and appropriate sense. And without determining what effect the latter clause might have on a question as to the places of shipment of the plaintiff's goods, we are clearly of opinion that the words "ports and places," &c., in the first clause may and ought to be understood as such places. And the two *875] cases of Violett v. Allnutt, 8 Taunt. 419, and Barclay v. *Sterling, 5 M. & S. 6, are plain authorities to show that a place mentioned after the words "with liberty to touch," &c., may be considered as a loading port. first of those cases was an insurance on goods by a ship named the Lion, at and from Plymonth to Malta, with liberty to touch at Penzance, or any port in the Channel to the westward, for any purpose whatever. The ship, after receiving some of the plaintiff's goods at Plymouth, sailed to Penzance, and there received other goods of the plaintiff, after which a loss happened; the only question was,

whether the insurance attached on the goods shipped at Penzance? The verdict had been taken in respect of those goods; and the Court was clearly of opinion that the insurance did attach upon them, and refused even a rule nisi for setting aside the verdict.

The case of Barcley v. Sterling arose out of an insurance on freight. The voyage described in the policy was, "at and from port or ports of loading in Jamaica to her port or ports of discharge in the United Kingdom, with leave to call at all, any, or every one of the British and foreign West India islands, to seek, join, and exchange convoy, beginning the adventure upon the goods from the loading thereof aboard the said ship as aforesaid." And in a subsequent part of the policy, after the usual declaration that it should be lawful for the ship in that voyage to proceed and sail to and touch and stay at any ports whateoever, the following words were introduced :-- "And wheresoever, with leave to discharge, exchange, and take on board goods at any ports or places she may call at or proceed to, without being *deemed any deviation from, and without prejudice to this insurance." That was an insurance not on the goods of a particular person, but on the freight to be earned by conveying the goods of any person; but the question is the same as on a policy on goods. The ship took in a cargo at Jamaica, got on shore off the island of Cuba, and great part of the cargo was there lost. She was afterwards, however, taken to the Havannah and repaired, and there took in some fresh goods for London; and a question was made, whether the freight of these latter goods were protected by the policy. The Court held that it was protected, considering the policy to attach on the freight of goods laden at an intermediate place in the course of the voyage, and not to be confined to the freight of goods received at Jamaica. For these reasons, and upon these authorities, we think the plaintiffs entitled to recover in respect of all their goods. No question was made as to the short interest, the actual value of the goods being less than the value mentioned in the policy; and therefore the judgment will be, that the plaintiffs recover the sum of 254l. 14s.

Judgment for plaintiffs.

*MANN v. LENT. May 22.

F*877

In an action by the endorsee of a bill of exchange against the acceptor, the latter proved that his son had been bound apprentice to the drawer in 1827 by indenture, and that a premium of 301. was agreed to be paid, for which the bill in question was given. The indenture had a 11. stamp impressed upon it. The apprentice served his master for five months, and a difference arising between the master and father, and it having been discovered that the stamp was insufficient, the apprentice left his master's service: Held, that as the apprentice was maintained and instructed by his master for five months, and might have compelled him to continue that maintenance and instruction, by causing the indenture to be properly stamped, pursuant to the statute 20 G. 2, c. 45, s. 5, there was not a total failure of consideration for the bill, and, therefore, that the circumstances would not be an answer to an action by the payee against the acceptor.

Quære, whether even if the acceptor had proved a total failure of consideration as between him and the drawer, it would have been incumbent on the plaintiff, the endorsee, even after notice,

to prove that he gave consideration for it.

This was an action brought by the plaintiff, as endorsee, against the defendant, as acceptor of a bill of exchange drawn by J. Pullman, for 281., bearing date the 22d of October, 1827, payable two months after date. At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term 1828, the plaintiff proved the handwriting of James Pullman as drawer and endorser, and that of the defendant as acceptor of the bill. The defendant then proved, by way of answer, that on the 2d of December, at half past nine at night, a notice was served at the office of the plaintiff's attorney, whereby he was required, on the trial of the cause, to prove the time when he received the bill of exchange, and the consideration paid or given by the plaintiff to Pullman for the same. But the plaintiff did not adduce any evidence either as to the

time when he obtained possession of the said bill or of the consideration given

by him for the same.

The defendant further proved that his son had been bound apprentice to Pullman by an indenture bearing date on the 19th of October, 1827; that a premium of 30l was agreed to be paid as an apprentice fee, of which 2l was to be taken out in liquor; and the bill of exchange *in question was accepted by the defendant, and handed over to Pullman in payment of the residue. The indenture of apprenticeship was in the usual form, and was upon a 1l stamp, the premium expressed in it being 30l, and the apprentice was to serve seven years.

The apprentice entered into his master's service, and served, in pursuance of the indenture of apprenticeship, for the term of five months and a little more, when a difference arising between the master and the father, and it having been discovered that the stamp on the indenture being but a twenty shilling stamp,

was insufficient, the boy left his master's service.

Upon this state of facts, the defendant contended that the said indenture, according to the statute 55 G. 3, c. 184, sched. 1, tit. Apprentices, ought to have been stamped with a 2l. stamp; and that not being so stamped, the consideration for the bill failed.

That the statute 8 Anne, c. 9, s 38, requires that indentures of apprentice-ship executed within fifty miles of London, shall be brought to be stamped at the head office within three months after the date thereof. That the thirty-ninth section of the same act directs that unless the duties payable are paid within the time aforesaid, the indentures shall be void, and not available in any court or place, or to any purpose whatsoever. That the 5 G. 3, c. 46, s. 19, requires the duty to be paid in one month, or the indentures will be void; and the master forfeits a penalty, and the apprentice can acquire no right under the same.

That the proper duty on the indentures in the present case was not paid within three months after the date thereof, nor had at the time of the trial been *879] impressed *on the indenture. That the statute 42 G. 3, c. 23, s. 7, authorizing the stamping indentures of apprenticeship after the proper time, was a temporary act no longer subsisting.

That the 9 Ann. c. 21, s. 66, and 18 G. 2, c. 22, s. 23, 24, make it the duty of the master, and not of the apprentice, to get the indentures stamped in due

time.

The plaintiff, on the other hand, contended that the statutes of the 12 Ann. stat. 2, c. 9, s. 25, of the 20 G. 2, c. 45, s. 5 & 6, of the 37 G. 3, c. 136, s. 2, and of the 44 G. 3, c. 98, s. 24, modify the operation of the statutes relied on by the defendant, and that the bill was not to be considered, even as between the drawer and the acceptor, as altogether without consideration; and even if it were so, the plaintiff contended that he was still entitled to recover, not being shown to be cognisant of the supposed want of consideration, or to have received the bill otherwise than in the ordinary course of business, and not being bound by law upon so insufficient a notice as he received to prove the consideration. Lord Tenterden directed the jury to find for the plaintiff, subject to the opinion of this Court in a case stating the facts above set forth. On a former day in this term, the case was argued by

Coltman for the plaintiff. The stamp impressed on the indenture in this case is sufficient; for the consideration was but 28l., the two pounds said to be taken out in liquor not appearing to be for the use of the master. But even if the stamp impressed on the indenture is insufficient, it does not follow that the bill *880] of exchange is not capable of being enforced; even as between the *drawer and acceptor. For it is a settled principle not to be disputed, that a partial failure of the consideration on which a bill or note is given, is no ground of defence to an action on the bill or note. Jackson v. Warwick, 7 T. R. 121, will be relied on as showing, that in this case, there is a total, not a partial failure of consideration. Admitting that case to be well decided, there is a material

distinction between it and the present. In that case there was an incurable vice in the indenture, for there was no mention of the premium paid. defect which could not be cured. In this case the defect is but in the stamp impressed. The premium itself is correctly set out in the body of the indenture, and the master may still procure the indenture to be properly stamped, by virtue of the statute 20 G. 2, c. 45, s. 5(a) *(not printed in the common edition of the statutes), and the indenture will be thereby rendered valid, or if he refuses to do so on the application of his apprentice for that purpose, the apprentice may pay the rates and penalties, and recover from his master double the consideration contracted to be paid, and the apprentice shall have the same benefit of his service as if he had served under an assignment. It is, therefore, very difficult to maintain that the consideration has failed in toto; considering, moreover, that the apprentice was fed and taught for five months. But, thirdly, admitting for the sake of argument that the drawer could not have recovered against the acceptor, still the endorsee may recover. Every endorsement, prims facie, imports a consideration. It is not enough for the acceptor to prove that the bill was without consideration as between himself and the drawer to cast on the endorsee the burden of proving the consideration he gave for it. In case of a bill or note having been stolen or obtained by fraud, the burden of proving consideration is cast upon the holder, but the cases have not gone beyond that *point, if we except some cases, said to have been decided at Nisi Prius, which never came under the revision of the Court above. It will be a great additional clog to the circulation of common bills, if such a doctrine be It is a main advantage of these instruments for purposes of commerce, that they do of themselves import a consideration. This it is which gives facility to the transfer of them; but if the rule now contended for is to prevail, no one will be safe in taking a bill, unless he has a clerk at his elbow to prove the consideration. The rule which requires a holder to prove a consideration has been admitted in the case of stolen bills, in order to check the nefarious system of plunder to which bankers have been subjected; but it is an exception to the general rule, and it is incumbent on those who seek to extend the exception, to make out a case of necessity. The present case is to furnish the rule in all cases of accommodation bills. Why is any additional protection to be thrown over those who manufacture that description of paper? They are not entitled to any special favour; on the contrary, the policy of the law ought to discourage them.

Gurney, contrd. The endorsee of a bill is under many circumstances in the same situation as the drawer, and is compellable to show that he or some

⁽a) Section 5 enacts, "that from and after the 24th day of June, 1747, if any master, &c., who, by reason of such neglect as aforesaid, shall become liable to pay the double rates and duties as aforesaid, shall respectively pay the double rates and duties to the person to whom the same ought to be paid; and tender the indentures, &c., to be stamped at any time within two years after the end of the apprenticeship, and before any suit shall have been commenced for recovery of the penalties inflicted by the former acts, or any of them, the indentures shall be good, and available at law or in equity, and may be given in evidence in any court whatsoever, and the clerks, &c., shall be capable of following their respective trades as fully as if the said rates had been duly paid within the respective times in the said former acts limited and appointed; and all and every person who shall have incurred any penalty shall be acquitted and discharged from the said penalties."

By sect. 6. "if any master shall by reason of such neglect become liable to pay such double."

By sect. 6, "if any master shall by reason of such neglect become liable to pay such double rates as aforesaid, and any such clerk, apprentice, or servant shall and do at any time after such forfeiture incurred, in the presence of one or more credible witness or witnesses, or in writing under his hand, signed in the presence of one or more credible witness or witnesses, require his master to pay the said double rates or duties so incurred as aforesaid, and such master shall not within three months after such request pay the same; and any such clerk, &c., shall at any time within two years after the end of the clerkship, apprenticeship, &c., pay the said double rates or duties so forfeited and incurred, and not paid by his master, &c., then the apprentice, within three months after payment, may demand of his master double the sum, or other consideration given or contracted to be paid to such master, &c., in respect of such clerkship, apprenticeship, &c. (mode of recovery pointed out); "and every such clerk, apprentice, or servant so paying such double rates and duties as aforesaid, shall and may, immediately after payment thereof respectively, and upon signifying by writing under his hand that he desires to be discharged from his apprenticeship, &c., be discharged from the same respectively, and from all penalties, &c., for not serving the time, &c., contracted for," &c.

preceding party took the bill or note bona fide, and for value, as in the case of a bill or note originally given without consideration, and whilst the person giving it was under duress, Duncan v. Scott, 1 Campb. N. P. C. 100; or in the case of a bill or note obtained by fraud, Rees v. The Marquis of *Headfort, 2 Campb. N. P. C. 574; or which has been stolen or lost, Solomons v. The Bank of England, 13 East, 135. Now here the apprentice served for five months, and it then being discovered that the stamp was insufficient, left his master's service. The indenture being void, there was no consideration for the bill as between the drawer and acceptor, and that being so, it was incumbent on the plaintiff (the endorsee) after notice to prove that he gave consideration for it. The onus of proof must lie on the plaintiff, for the defendant cannot prove In Thomas v. Newton, 2 Carr. & P. 606, Lord Tenterden held that under the circumstances, it lay on the endorsee to show want of consideration. Now, here the drawee could not be sued on this bill, because there was a total failure of consideration, the indenture being wholly void, and treated as such by the parties at the expiration of five months. Assuming even that at one time a sufficient stamp might have been impressed on the indenture, it cannot now be done; and that being so, there was no consideration for the acceptance. In Jackson v. Warwick, 7 T. R. 121, it was held, that no action could be maintained by the plaintiff on a note given to him by the defendant as an apprentice fee, if the indenture executed was void; Scott v. Gillmore, 4 Taunt. 226, shows, that if a bill or note is in part upon a consideration which the law has made illegal, and in part upon a good consideration, the illegality will taint the whole bill or note; and that the holder, if barred at all by such illegality, will be barred in toto as to his *claim on the bill or note. Rex v. Chipping Norton, 5 B. & A. 412, is an authority to show that an indenture executed before the passing of the 44 G. 3, c. 98, must be stamped with the premium stamp within the time prescribed by the statute 8 Ann. c. 9. Here, undoubtedly, the indenture was executed long after the 44 G. 3, c. 98. Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court; and,

after stating the facts of the case, proceeded as follows:-

We are of opinion that there was not, in this case, a total failure of consideration for the bill. If the father had paid the premium instead of having given the bill for it, he could not, under the circumstances of this case, have recovered it back; for the son was not only maintained by the master for a time, but might have compelled the latter to continue his maintenance and instruction, by causing the indenture to be stamped. There was not, therefore, a total failure of consideration for the bill, and that being so, the circumstances proved would not even constitute a defence in an action brought by the drawer against the acceptor; and, consequently, they are no answer to an action brought by the endorsee.

^{*885] *}DOE on the several Demises of WILLIAM JACKSON and Others
v. ROGER HILEY. May 22.

The statute 59 G. 3, c. 12, s. 17, vests in the churchwardens and overseers of the parish all buildings, lands, and hereditaments belonging to such parish, not merely where the profits thereof are applicable to the relief of the poor, but where they are applicable to those purposes for which church rates are levied; and that although such buildings, lands, and hereditaments had originally been vested in trustees for the benefit of the parish.

EJECTMENT to recover certain premises situate in the parish of St. Michael on the Mount in the city of Lincoln. The declaration contained several demises: one by William Jackson on the 2d of November, 1826; a second demise on the same day, by Seth Brandham, churchwarden of the parish of St. Mark in the said city, Job Cartledge, churchwarden of the same parish, and Samuel Carr Vol. XXI.—47

and Jonathan Davison, overseers of the said parish of St. Mark; a third demise, on the same day, by the said parish officers, Seth Brandham, Samuel Carr, and Jonathan Davison (omitting Job Cartledge); a fourth demise on the same day, by the aforesaid churchwardens (omitting the overseers); and a fifth demise, on the same day, by Seth Brandham, churchwarden aforesaid. At the trial before Holroyd, J., at the Lincolnshire Spring assizes 1827, the following facts were proved on the part of the lessors of the plaintiff:—By indenture of lease, bearing date the 2d day of January, 1786, Richard Gibson, the elder, Luke Hutchinson, Charles Metham, John Jackson, Thomas Stones, John Wilkinson, Joseph Lund, Ralph Bowring, and Jonathan Glenn, described in the said lease to be inhabitants, parishioners, and feoffees of the parish lands and church lands of and belonging to the parish of St. Mark in the city of Lincoln, and Joseph Smith, churchwarden of the said parish, demised, granted, and leased to Robert Holmes, as well in consideration of the surrender of the former lease, as for divers other good causes and considerations therein described, as surviving *executor and trustee named in the last will and testament of John Lamb, late of the city of Lincoln, gentleman, deceased, two messuages or tenements, and ground thereto adjoining, situate in the said parish of St. Michael on the Mount, to hold the same to the said Robert Holmes and his assigns from the 26th day of December then last past, for and during the term of forty years thence next ensuing, upon such trusts nevertheless as were mentioned and expressed of and concerning the said premises in and by the last will and testament of the said John Lamb, deceased, paying yearly during the said term the rent of 30s. and two fat crammed capons, reserved by the said lease to the said Joseph Smith and his successors, churchwardens of the said parish of St. Mark for the time being. Part of the said tenements so demised to Robert Holmes were in the occupation of the defendant, and were sought to be recovered in the said action. He came into possession of the premises in 1815, and paid rent for them to Christmas 1825, when the said term expired. The said Seth Brandham and Job Cartledge were sworn in as churchwardens for the parish of St. Mark on the 5th of April, 1826, and Samuel Carr and Jonathan Davison were overseers of the said parish for the year commencing at Easter Thomas Sweeting was tenant of the said demised premises under the lessee, Holmes, and always paid the reserved rent for the said premises to the churchwardens of St. Mark for the time being; and the defendant, Roger Hiley, in the year 1823, paid his proportion of the said rent for that part of the said premises in his occupation, which was sought to be recovered in this action, to William Atkinson, churchwarden of the said parish of St. Mark, at the same time inquiring of the said Wm. Atkinson whether he was *churchwarden of the parish. There was a churchwardens' book and an overseers' book. The rents were always received by the churchwardens for the time being, and credit given for them in the churchwardens' book. Upon the production of this book, the disbursements stated in it were payments usually made by the churchwardens; and the receipts stated were various reserved out rents received by the churchwardens, a sum of 5l. 17s. 3d. collected as a church-rate, and a sum of 61. received from the overseers of the poor.

In the latter part of April, 1826, possession of the premises, in the occupation of the defendant, was demanded in the name and on behalf of the said church-wardens and overseers of the parish of St. Mark, when the defendant refused to deliver up possession, denying that he held any property belonging to the said parish. All the lessors mentioned in the said lease died before the year 1826. John Jackson survived the rest, and died on the 27th of March, 1825. John Jackson, by his will, dated the 14th of February, 1825, previous to the death of one of the said lessors, devised all his lands, tenements, and hereditaments and premises to his brother William Jackson, who is not his heir at law, being of the half blood, who is one of the lessors of the plaintiff, his heirs, executors, administrators, and assigns, subject to the payment of his just debts. The jury found a verdict for the plaintiff, subject to the opinion of this Court on the facts above stated. If the Court should be of opinion that the plaintiff was entitled

to recover, the verdict was to stand. If the court should be of opinion that the plaintiff was not entitled to recover, then a nonsuit was to be entered against him.

*Amos for the plaintiff. The facts stated in the case support the second *888] The words of the 59 G. 3, c. 12, s. 17, vested all parish lands It will be contended that the statute in the overseers and churchwardens. related only to lands held for the benefit of the poor, and not to lands applied in aid of a church-rate. But the enacting words of the seventeenth section ought not to be controlled by the preamble and the early clauses of the statute, unless the mischief to be remedied were different in the case of these two species of parish property. The mischief, however, was the same in both instances. And moreover, the language of the act in question, as contrasted with that used by the legislature in the 22 G. 2, c. 83, s. 21, explains the force of the general expressions. It may be urged, that the Court ought not to construe the statute as interfering with trust property; as to which it may be answered, that it does not appear from the facts of the case that the donor of the lands in dispute had ever appointed trustees; for the parties to the lease in 1786 are described as feoffees of all the parish lands. Assuming, however, that the lands in dispute had been originally vested in trustees, it appeared from the statement of the case that all the trustees were dead. At all events, in cases where the trustees are dead, there is a very sufficient reason for not giving a construction to the act more limited than the obvious meaning of the words. For the difficulty of finding the heir of a surviving trustee of parish property was a very just ground for the interference of the legislature. It appears from the Year Books, 12 H. 7, 29 b, 13 H. 7, 10, that trustees for similar purposes were often created so early as in the reign of Henry VII.; the heirs of the survivor of whom it would, at *889] the present day, *be very difficult to trace. Secondly, the first demise may be supported. The case of Swift dem. Neale v. Roberts, 3 Burr. 1488, 1 Bl. 476, Ambler, 617, which has generally been considered as determining that the devise of a joint tenant was inoperative, even though he survived, was maintained by the Court on several grounds applicable to the circumstances of that case, but inapplicable to the present. Under the first statute of wills, 32 H. 8, c. 1, the power of devising such a valuable, though contingent interest, would be, apparently, indisputable. Then the stat. 34 & 35 Hen. 8, c. 5, of wills, was only an explanatory act, and ought to be construed liberally, and with reference to the antecedent customs of boroughs, which customs were the models according to which the statutes of wills were framed. The custom in this particular was recorded in Perkins, 500. The principle of the decision in Jones v. Roe, 3 T. R. 88, and the opinions of the Judges in that case, were unfavourable to the narrow and certainly most inconvenient construction of the statute of wills, which, it has been supposed, was countenanced by the decision of Swift v. Roberts. The Judges in the case of Jones v. Roe were of opinion, that the plain meaning of the statute of wills was, that every person who had a valuable interest in lands, should have the power of disposing of it by will. And in Bac. Abr. Joint Tenant, it is expressly laid down, that a joint tenant may devise the interest which is contingent on his survivorship. Then, with respect to this devise being subject to the payment of the testator's debts, from which it may be argued, that trust property will not pass by such a devise, it was necessary *890] for the defendant, in *order to bring this case within the authorities on which he must rely, to show that the testator had other lands besides trust lands, on which the devise would operate.

N. R. Clarke, contrd. The first demise cannot be supported. Roe v. Reade, 8 T. R. 121, Lord Braybroke v. Inskip, 8 Ves. jun. 433, and Duke of Leeds v. Munday, 3 Ves. jun. 348, are express authorities to show that property, which a testator has in trust, will not pass to his devisee under a general devise of all his property, subject to the payment of debts. With respect to the second demise, it appears clearly from the facts stated in the case, that the proceeds of this property were not applicable to the maintenance of the poor or to the general

purposes of the parish, but solely to those purposes for which church-rates are levied; and if so, the statute 59 G. 3, c. 12, under which it is contended this devise may be supported, will not apply. It seems clear that that statute does not affect any parish property, except such as is applicable to the relief of the poor, nor any parish property vested in specific feoffees or trustees. First, it relates only to property applicable to the relief of the poor. The preamble recites, that it is "for the better and more effectual execution of the laws for the relief of the poor;" the eighth section enables the parish officers to alter or enlarge any messuage or tenement "belonging" to the parish, for the purpose of making it a workhouse; the ninth section enables them to sell and dispose of any houses or tenements, with the site thereof, "belonging" to such parishes (which are incapable of being enlarged into workhouses), and to apply the *proceeds in purchasing new workhouses. By the twelfth section they are [*891 empowered to take into their hands any land or ground which shall "belong" to the parish, or to the churchwardens and overseers thereof, or to the poor of the parish, and to employ the poor in cultivating it on account of the parish: by the thirteenth section they may let any portion of "such parish lands as aforesaid" to any poor inhabitant. The legislature could not have intended to authorize the diverting from the use for which it was given to the parish, property in which the parishioners have an interest, but which was never applied or intended to be applied to the use of the poor; such a construction of the statute would be productive of great injustice and great inconvenience. Many parishes have large funds applicable to specific public objects, such as repairing churches, building and repairing bridges, supporting schools, &c. Can it be contended that the legislature intended to authorize the seizing these funds and applying them in ease of the poor-rate? If not, the words "belonging to such parishes" must mean belonging to them for the use of the poor; but the seventeenth section, upon which the plaintiffs rely, only vests in the parish officers property "belonging to such parishes," that is, therefore, belonging to them for the use of the poor. An argument has been built upon the wording of the seventeenth section. It vests in the parish officers, as a corporation, "all such buildings, lands," &c., and "all other buildings, lands," &c., belonging to the parish; but upon referring to the early part of the section, it will be seen that all such buildings mean all buildings, &c., "which shall be purchased, hired, or taken on lease" by the parish officers; and all other buildings, &c., will therefore mean *all which belong to the parish which were neither purchased, hired, or taken on lease by the parish [*892] officers, and do not affect the question whether the words "belonging to the parish" relate only to such property as is applicable to the use of the poor.

Secondly, the statute does not apply to property vested in feoffees; for, in the first place, it would be an interference (not to be presumed), with the will or intention of the donor, who has selected the persons whom he chose to be the trustees of his bounty; and, secondly, the object of the statute was to obviate the inconvenience which was frequently experienced where persons were in possession of parish houses or land, to which no one could make a legal title, and who could not, therefore, be dispossessed. In this case there would be no difficulty in finding the heir at law of the surviving feoffee, and bringing an ejectment in his name.

Cur. adv. vult.

Lord Tenterden, C. J., now delivered the judgment of the Court.

We are of opinion that the lessors of the plaintiff are entitled to recover on that count of the declaration in which the demise is laid to have been by the churchwardens and overseers of the poor of the parish of St. Michael on the Mount, in the city of Lincoln. The premises in question were undoubtedly held for parish purposes. It was contended by the counsel for the lessors of the plaintiff, that the premises were vested in the parish officers by the 59 G. 3, c. 12, s. 17. On the other hand it was insisted, on the part of the defendant, that the statute did not apply to this case for two reasons, first, because the persons in whom the legal *estate was vested were trustees only; and, secondly, [*893] because the profits of the premises sought to be recovered were applicable

not to the relief of the poor, but solely to those purposes for which the church rates were levied. As to the first of these objections we are of opinion that there is nothing in the act of parliament to prevent property held by trustees for the benefit of a parish vesting in the churchwardens and overseers, and it would be very inconvenient that it should be so. It is often difficult for persons who claim under an ancient trust (where the trustees are numerous), to ascertain who was the survivor of those trustees; and even if they succeed in ascertaining that fact, it will not be less difficult to show who is the heir at law of that survivor. Property vested in trustees for the benefit of the parish seems equally within the mischief contemplated by the legislature as well as property not so vested.

Upon the second point, whether the statute 59 G. 3, c. 12, s. 17, extends to tenements, the profits of which are applicable to the purpose for which a church rate is levied, or is confined to those which are applicable merely to the relief of the poor, it is undoubtedly true that the primary object of the statute (as appears from the title and preamble, and the early sections) was the better and more effectual execution and amendment of the laws for the relief of the poor. The seventeenth section goes much further. It enacts, that all buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority, and for any of the purposes of that act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, *and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments belonging to such parish. The latter words are most general, and comprehend all buildings, lands, and hereditaments belonging to the parish; and although the poor may be the primary object of the statute, we think the safest course for us to adopt, in constructing this section of the act, will be to give full effect to that generality of expression, there being nothing to show that lands or buildings which are applied in aid of the church rate do not require the aid of this provision as well as those which are applied to the relief of the poor. In both cases there is the same difficulty of finding out in whom the legal estate in the premises belonging to the parish is vested, and that was the mischief which, by the seventeenth section, the legislature intended to remedy; and we can see no reason to doubt that the operation of that clause was intended to be co-extensive with the mischief. The postea must, therefore, be delivered to the plaintiff. Postea to the plaintiff.

*895] *WILLIAMS and Wife v. GOODTITLE, on the demise of DAVID. (In Error.)

EJECTMENT for lands in Glamorganshire. Plea, not guilty. At the trial at the Spring great sessions for the county of Glamorgan, 1828, the jury found a special verdict, the material parts of which were as follows:—That David Thomas, being seised in fee of certain real estates, on the 24th of April, 1795, made his will in writing, duly executed and attested, for passing real estates; whereby, after various other devises, he gave and devised "all the rest of his

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Testator by will devised certain lands to his wife for life, and after certain other devises, introduced a residuary clause in favour of his wife, in fee. He afterwards purchased other lands, and then made a codicil; whereby, after reciting that he had made a will, disposing of all he was then possessed of, he ratified and confirmed the will; he then gave his wife a life estate in part of his newly-purchased estates, and devised the other part in a manner that could not take effect: Held, that the effect of the codicil was to make the residuary clause in favour of the wife applicable to the after-purchased lands.

real estate, whatsoever and wheresoever situate, not therein before particularly devised, unto his wife Elizabeth Thomas, her heirs and assigns, absolutely for ever." That afterwards the testator purchased other real estates (part of which formed the subject-matter of this ejectment), and afterwards made a codicil in writing, duly executed and attested, to pass real estates as follows:-- "Whereas I did by my last will and testament in writing, duly executed and attested, give, devise, and bequeath all the real and personal estate I was then possessed of in the manner therein mentioned, and which said will I do hereby ratify and confirm." The testator then recited, that since the date of his said will he had purchased other property, including that now in question, and devised the same to his wife for life, and after her death he devised the part thereof now in question to trustees upon trusts that were bad in law, *and the residue specifically to certain persons in fee. The testator died on the 19th July, 1814, leaving his wife him surviving, and the defendant Elizabeth Williams his heiress at law. Elizabeth Thomas, the widow of the testator, died, before the date of the demise in the declaration, intestate, leaving John David, the lessor of the plaintiff, her heir at law. Upon this verdict the court of great sessions gave judgment for the plaintiff, whereupon a writ of error was brought and the common errors assigned; and now the case was argued by

Taunton for the plaintiff in error. The codicil did not pass all the lands purchased after the execution of the will, and which were not specifically devised by the codicil. In terms the codicil republished the will as to all the lands which the testator had at the time when the will was made. It is contended, on the other side, that the republication has the effect of making the residuary clause in the will operate on the after-purchased lands; but the devise of a particular estate in those lands to the wife shows that the testator did not intend to apply to them the residuary clause in the will, which would have the effect of giving the wife a fee. It must be admitted, that where a testator gives a particular estate to A., and then makes him residuary devisee, the two clauses may stand together, Ridout v. Payne, 3 Atk. 486. But this is a mere question of intention; and the devise of a particular estate to the wife in the after-purchased lands is decisive to show that the testator did not intend the republication to apply the residuary clause to those *lands. After the passing of the statute of frauds, it was held that there could be no implied republication of a will, and that after-purchased lands could only be passed by a new instrument, executed in the manner required by the fifth section of that statute, Penphrase v. Lord Lansdown, Vin. Abr. Devise, (Z 1), pl. 22, Lytton v. Viscountess Falkland, Ibid. pl. 24. In Acherly v. Vernon, Com. Rep. 381, the rule was laid down, that a codicil republishing a will should make it speak from the date of the codicil; but there, the testator evidently had in view all that he was possessed of at that time. That was followed by Barnes v. Crowe, 1 Ves. jun. 486, and Pigott v. Waller, 7 Ves. 98; wherein the Master of the Rolls lamented the introduction of the rule established in Acherly v. Vernon, and said that it was still a question of intention whether the testator intended by republishing to make the provisions of his will operate on after-purchased lands. present case, the testator in his codicil recites that he had at a former time made a will devising all that he was then possessed of, and then ratifies and confirms that will, which must mean that he ratified and confirmed the disposition which he had made of the property affected by the will; and then he goes on and disposes of his after-purchased property. This is according to the case of Lady Strathmore v. Bowes, 7 T. R. 482. [Lord TENTERDEN, C. J. There the testator by the codicil referred to the devise in the will, and having revoked it as to certain trustees, devised "his said lands;" and it was held that the word said confined its operation to *the lands mentioned in the will.] This case is [*898] the same in principle, although not in words.

Reynolds, control. It is clear that the codicil was a republication of the will, and that the general effect of republication is to make the will speak from the time when it is republished. The only question is, not whether the testator

meant to republish, but whether he meant to exclude that which would follow as the legal consequence of such republication. (He was then stopped by the Court.)

Lord Tenterden, C. J. I am of opinion that the will and codicil are to be considered as one instrument made at the date of the codicil. Then it appears that there is a devise to the wife for life, then certain other devises follow; and, lastly, there is a general residuary clause in favour of the wife. It is admitted, that if all that were in a will, the particular devise and residuary clause might well stand together, and the wife would take under the residuary clause. Now I think that the expression at the commencement of the codicil in question shows the intention of the testator to have been to ratify his will as to all that he was possessed of at the time of the ratification, and that being so, the lessor of the plaintiff below, as heir at law of the widow, was clearly entitled to recover.

Judgment affirmed.

*899] *The KING v. The Inhabitants of LANGRIVILLE. May 22.

A pauper in 1800 was hired, as a confined labourer, at thirty guineas a year. He was to have a house, two gardens, and a rood of potatoes. After the bargain was made, his master said he might have the milk of a cow; and shortly after going into the service, he had the milk of a cow, which was fed on his master's close during that part of the year when cattle are pasture-fed. The value of the house, gardens, and the rood of potatoes was less than 10L a year, but, with the keep of the cow upon the land, amounted to more than that sum: Held, that the pauper did not gain a settlement by the occupation of a tenement of the yearly value of 10L; first, because it was no part of the contract that the paper should have the milk of a cow; and, secondly, assuming that it was so, it was not part of the contract that the cow should be pasture-fed.

Upon appeal against an order of two justices, whereby E. Ewerby and his wife were removed from the parish of Langriville, in the parts of Lindsey in the county of Lincoln, to the parish of Stickney, in the said parts and county, the sessions quashed the order, subject to the opinion of this Court on the following case:—

In the year 1800 the pauper became a confined labourer to a Mr. Dickenson in the parish of Langriville; he was to have thirty guineas a year, a house, two gardens, and a rood of potatoes. After the bargain was made, his master said he might have the milk of a cow; and shortly after going into the service he had a cow, which was fed upon a close of his master's during that season of the year when cattle are pasture-fed. The value of the house, gardens, and the rood of potatoes was under 10l. a year, but with the addition of the keep of the cow upon the land amounted to more than that sum. The court of quarter sessions were of opinion that the pauper gained a settlement in Langriville by residing there more than forty days, and occupying as above stated This case was argued on a former day in this term by

*N. R. Clarke and Hildyard in support of the order of sessions. Rex v. Benneworth, 2 B. & C. 775, is in point. It was decided by the Court upon consideration, and was not overruled in Rex v. Thornham, 6 B. & C. 738; for Rex v. Benneworth is not alluded to in that case. But if Rex v. Thornham overrules Rex v. Benneworth, it may be conceded that it must be part of the contract that the cow should be pasture-fed; but it is not necessary that that should be expressed in the contract. The contract must be taken to have been made with reference to the usage of the country; and it is the usage of that part of the country that during a certain portion of the year cattle should be pasture-fed, as appears by the words in the case, "during that season of the year when cattle are pasture-fed." In hiring a servant, it need not be expressed that he is to be fed in his master's house, for that is taken to be understood, because it is customary. For the same reason, it is no more necessary to stipulate where the cow should be fed.

Fynes Clinton and Waddington, contrd. In order to acquire a settlement of this nature the pauper must be in the enjoyment of some interest arising out of land of the requisite value. Here the value was insufficient; for the permission to have the milk of a cow was a mere act of favour on the part of the master, and might have been withdrawn at any moment. In Rex v. Benneworth the two heifers were merely substituted for the cow, which the pauper was to depasture on the land by agreement, and that sufficiently distinguishes that case from the present. Besides, there is nothing here to *show that the cow was produce. Rex v. Sutton St. Edmunds, 1 B. & C. 733, are authorities to show that there must be an agreement, or at least an undertaking to that effect, and this defect is not supplied by the fact found, that the cow was actually so fed.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

The question in this case is, whether a settlement was gained by the occupation of a tenement of the yearly value of 10l. in the parish of Langriville? In order to constitute this species of settlement under the 13 & 14 Car. 2, o. 12, it is necessary that the pauper should have an interest in the subject of the occupation (such subject being of the requisite yearly value), as tenant or occupier; though it is not necessary that he should be under an obligation to pay rent, or that he should have more than an estate at will, Rex v. Fillongley, 1 T. R. 458. It has also been established, by a series of cases which were considered and confirmed in that of The King v. Benneworth, 2 B. & C. 7-5, that it was a sufficient occupation of a tenement if the pauper had an interest in a part of the profits of the land, by perception by the mouths of his cattle. But it is essential, whether the subject of occupation be the land itself, or a part of its profits, that the pauper should have an interest as tenant or occupier,—a possession by mere license without that interest is not enough. If a person were permitted by the owner of a *pasture to feed his cow or sheep upon it, for a time, without any valuable consideration, and without reference to any contract between [*902] them, but by a mere act of charity or favour, no settlement would be gained by such a permissive enjoyment of the produce of the land.

But if there had been a contract with the owner for a sufficient consideration, by which the pauper had a right to part of the profits of the soil, to be taken by his cattle, he would have an interest; and his occupation with that interest (if those profits were of the requisite annual value) would confer a settlement after

a residence of forty days.

In the case of The King v. Benneworth, which was so much relied upon, in the argument of this case, by the counsel for the appellants, as an authority that a gratuitous occupation was sufficient, it appeared that two heifers were substituted by the consent of the master for the cow, which the pauper had a right by his contract to feed on the master's land. The pauper, therefore, may be considered as having had, by the act of the owner of the soil, as much interest in the land by the feeding of the heifers as he had before by the feeding of the cow. The perception of the larger portion of the profits by the former was equally referable to an interest in the land, as that of the smaller portion by the latter.

In the present case, however, the sessions find that the master gave permission to the pauper to have the milk of a cow, after the bargain was completed; and though it be taken that the cow was fed on the land, and that he meant at the time that the cow should be fed on the land (which, however, does not distinctly appear, *nor is there anything to show that he would not have kept his promise, and even performed his contract, if the milk formed part of the bargain, by allowing the milk of a cow fed otherwise than on the land), we think this must be considered as having been done in consequence of a mere act of kindness or favour of the master, not referable to any contract, and that no interest was thereby acquired by the pauper in the profits of the land; consequently no settlement was gained by him in the respondent parish of Langriville. The order of sessions must therefore be quashed.

Order of sessions quashed.

The BRITISH LINEN COMPANY v. GEORGE HARLEY DRUMMOND, Esquire.

In an action of debt, it was averred, that before the making of the instrument and obligation thereinafter mentioned, the plaintiffs carried on business in Scotland, and that one A. B. and the defendant were resident and domiciled therein; and that by a certain instrument and obligation in writing (which was set out), the said A. B. and the defendant became bound, and obliged themselves conjointly and severally to pay to the plaintiffs the sum of 400L sterling. It was then averred, that by the law of Scotland at the time of making such instrument and thence hitherto in force, the time for bringing any suit or instituting any legal proceeding by the plaintiffs against the defendant upon the instrument, and the cause and right of action accruing thereon, had not yet elapsed, that is to say, by virtue of the said law, the plaintiffs had the right and privilege of suing and bringing any action thereon, at any time within forty years from the time of making and signing the bond. Plea, that the cause of action did not accrue within six years: Held, upon demurrer, that the plea was an answer to the action

DECLARATION stated that before and at the time of making the instrument and obligation thereinafter mentioned, the British Linen Company carried on business in Scotland, and one James M'Culloch and the defendant were resident and domiciled therein, to wit, at, &c., and thereupon on the 18th September, 1823, in Scotland, to wit, at, &c., by a certain instrument and *obligation in writing there to wit, in Scotland aforesaid, made and signed by the defendant as thereinafter mentioned and expressed, and which said last-mentioned instrument and obligation in writing the company brought into court, the date The instrument was then set forth, whereof was the day and year last aforesaid. and after reciting that a court of directors of the company had agreed to allow James M'Culloch and the defendant a credit upon an account current, to be kept in the books of the company in the name of James M'Culloch, to the amount of 4001. sterling; upon their granting the last-mentioned obligation, therefore, the said James M'Culloch and defendant thereby bound and obliged themselves conjointly and severally, their heirs, executors, and successors whatsoever, to content and pay the company the said sum of 400% sterling, or such part or parts thereof as the said James M'Culloch should draw out value for, or be due to the company, by orders or drafts on the company, &c., &c. The declaration, after stating the mode in which the bond was executed, averred that by virtue of the law and customs of Scotland aforesaid, then and at the time of making such instrument, and thence hitherto in force, the time for bringing any suit or instituting any legal proceeding by the company against the defendant upon and in respect of the said last-mentioned instrument, and the cause and right of action accruing thereon had not yet elapsed, that is to say, by virtue of the said law and customs, the said company had the right and privilege of suing and bringing any action thereon at any time within divers, to wit, forty years from the time of making and signing the same as aforesaid. It was then stated that the company, by virtue of the instrument and obligation last aforesaid, at the *request of the defendant, gave and allowed credit to the said James M'Culloch and the defendant, upon an account current, kept in the books of the company in the name of the said James M'Culloch, to the amount of 400l., and that that credit had expired, and that there was due to the company 228l. as a balance; that M'Culloch died insolvent; that in his lifetime he had wholly refused and neglected to pay the said sum of 2281. or any part thereof, or any interest thereon, although payment was demanded in his lifetime, of which the defendant had notice, whereby an action accrued, &c. Plea, that the supposed causes of action did not, nor did either of them, accrue to the company at any time within six years before the exhibiting of the bill of the company against the defendant in manner and form, &c. General demurrer and joinder.

Campbell in support of the demurrer. The plea is bad. It is founded on stat. 21 Jac. 1, c. 16, s. 3, which statute does not apply to the instrument set out in the declaration, the same having been framed in Scotland (which for the purpose of this case must be considered a foreign country), and by the law of

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that country the action may still be maintained. The decisions of both English and Scotch courts show that the construction of personal contracts depends on the lex loci contractus. Therefore if this be a personal contract plaintiff is entitled to judgment, for according to the law of Scotland, he would not be barred by the effluxion of time.

In Innes v. Sir J. Wallace Dunlop, Bart., 8 T. R. 595, it was holden that the assignee of a Scotch bond might maintain *an action of assumpsit here against the obligor in his own name. In Male v. Roberts, 3 Esp. Rep. 163, the money paid for the defendant's use, for which the action was brought, was paid in Scotland, and the action was defended on the ground of the defendant having been an infant when the money was paid. But Lord Eldon ruled that the contract must be governed by the laws of that country where the contract arose. In Inglis and Others v. Usherwood, 1 East, 515, where a question arose touching the right to stop in transitu, the law of Russia with respect to such right appeared to differ from the law of England; but the delivery having been made in Russia, the law of that country was allowed to prevail in this; and that case is supported by the more recent one of Bohtlingk and Others v. Inglis and Others, 3 East, 381. In Melan v. The Duke de Fitzjames, 1 Bos. & Pull. 138, the Court of Common Pleas discharged a defendant out of custody on entering a common appearance, on the ground that the instrument on which he was held to bail was entered into in France, and that by the law of that country his property only, and not his person, was liable. And although Mr. Justice Heath there dissented from the rest of the Court, he did so on the ground that the remedy only was in question, and not the construction of the contract.(a) It was impliedly a part of the contract between the parties in this case that it should continue in full force forty years. For the law of the country (where the contract is made) as to the period during which it is to remain in force, must be *considered as incorporated in the contract itself. If a shorter period had sufficed to bar in Scotland than in England, the defendant would have been discharged; and therefore the converse should be true. The case of Duplein v. De Roven, 2 Vern. 540, will be cited on the other side, where it was holden that if a man recovers a judgment or sentence in France for money due to him, the debt must be considered here only as a debt by simple contract, and the statute of limitations will run upon it; but it does not appear that by the law of France the remedy still subsisted. In Robinson v. Bland, 2 Burr. 1077, it was holden that a bill of exchange drawn by a person on himself payable in England, part of the consideration whereof was money won at play, could not be recovered upon in England: but there England was the locus solutionis. The case of Williams v. Jones, 13 East, 439, will be chiefly relied on by the other side. There, to a plea of the statute of limitations, the plaintiff replied, that the defendant when the cause of action arose was in the East Indies, and that the action was commenced within six years after his first return into this kingdom; and the rejoinder stated that by the king's charter granted in pursuance of the stat. 13 G. 3, c. 63, the supreme court of Calcutta was authorized to exercise the same jurisdiction in civil cases as is exercised by the Court of King's Bench within England by the common law thereof, and that the plaintiff and the defendant were subjects of the king, and were residing at Bengal within the jurisdiction of the said supreme court, and the causes of action wholly accrued there, and the defendant continued resident at Bengal, and within the said jurisdiction, more than six years after their accrual, and no action was commenced within those *six years. On a demurrer to this rejoinder, it was holden that the plaintiff was entitled to recover, although the defendant had resided within the jurisdiction of the court in India more than six years after the cause of action had accrued there. But that decision was founded on the express exception in the statutes 21 Jac. 1, c. 16, and 4 Ann. c. 16, s. 19, as to persons abroad when the cause of action arose.

⁽a) That decision was disapproved of by Lord Ellenborough in Imlay v. Ellefsen. 2 East. 455, and has since been expressly overruled by this Court in De la Vega v. Vianna, 1 Barn. 101. 284.

Undoubtedly the foreign jurists appear at first sight against the plaintiff; but they have not been recognised here, and appear to have been rejected by the House of Lords.

Huber in his Prælectiones Juris Civilis, part ii. lib. i. tit. iii. (De Conflictu Legum), s. 7, says, "Præterea dubitatum est, si ex contractu alibi celebrato, apud nos actio instituatur, atque in ista actione danda vel neganda, aliud juris apud nos, aliud esset ubi contractus erat initus, utrius loci jus servandum foret? Exemplum: Frisius in Hollandia debitor factus ex causa mercium particulatim venditarum, convenitur in Frisia post biennium. Opponit præscriptionem apud nos in ejusmodi debitis receptam; creditor replicat in Hollandia ubi contractus initus erat ejusmodi præscriptionem non esse receptam, proinde sibi non obstare in hac causa. Sed aliter judicatum est, semel in causa Justi Blenkenfieldt contra G. Y. iterum inter Johannem Joneliin Surtorem Principis Arausionensis, contra N.B. utraque ante maynas ferias 1680. Eadem ratione, si quis debitorem in Frisia conveniat ex instrumento coram Scabinis in Hollandia celebrato, quod ibi, none jure commumi, habet paratam executionem, id heic eam vim non habebit, sed opus erit causse cognitione et sententia. Ratio hec est, quod præscriptio et *909] executio non *pertinent ad valorem contractus, sed ad tempus et modum actionis instituendæ, quæ per se quasi contractum separatumque negotium constituit, adeoque receptum est optima ratione, ut in ordidandis judiciis, loci consuetudo, ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet Sandius, lib. i. tit. xii. def. 5, ubi tradit, etiam in executione sententiæ alibi latæ, servari jus loci in quo fit executio, non ubi res judicata est." It does not appear, however, that the Frisian who went and bought goods in Holland was domiciled

Again, John Voet, in lib. xliv. tit. iii. s. 12, says, "Si præcriptioni implendæ alia præfinita sint tempora in loco domicilii actoris, alia in loco ubi reus domicilium fovet, spectandum videtur tempus, quod obtinet ex statuto loci, in quo reus commoratur." Although, however, the lex domicilii is to be regarded, yet it is not adverted to where the domicile was when the contract was entered into. And here both the parties were domiciled in the same country.

Several cases on the subject have been decided in the courts of Scotland. In Graden v. Ramsey, November 1664,(a) the plaintiff was allowed to recover in Scotland on a bond granted in England, although in England the claim would have been barred by time, in respect the creditor and debtor were both Scotch, and the bond was drawn in the Scots form, and bore a clause of registration in Scotland. In Philips v. Stamfield, November 1695,(b) in an action for goods sold in London, the defence of triennial prescription was rejected.(c) There

(a) Morrison's Dict. of Decis. 4503.

(e) Prescription, by the law of Sootland, is a method of extinguishing property as well as of establishing it; and it is either positive or negative. The former is usually defined to be the acquirer for such a time as is described by the law to be sufficient for that purpose, or, more correctly, the establishing or securing to the possessor his right against all future challenge, and was first introduced into the law of Scotland by 1617, c. 12, which enacts, that whoever shall have possessed his lands, annual rents, or other heritages, by himself or others, in virtue of infeftments, for the space of forty years, continually and together, subsequent to the dates of the said infeftments, peaceably and without lawful interruption, shall not be troubled or disquieted therein by his majesty, or any other pretending right to the same.

"The negative prescription is defined the loss or forfeiture of a right, by the proprietors neglecting to exercise or prosecute it during that whole period, which the law hath declared to infer the loss of it. This kind of prescription, by the running of forty years, had been made part of the Scotch law long before the positive, by two statutes, 1469, c. 12, 1474, c. 55, which enacts that all creditors by obligation shall follow forth their right, and take document upon it within forty years; otherwise, that the right shall prescribe. These acts were at first strictly interpreted and confined to simple obligations; but they were soon extended to mutual contracts, to marriage contracts, even where they were supported by subsequent marriage, and to actions concerning movables, though they were grounded on rights of property."—Erskine's Institute of the Law of Scotland, book iii. tit. 7, s. 1, 2, 3, and 8. There are shorter negative prescriptions in other cases, as the triennial prescription, by statute 1579, c. 81, in actions (of spulkie) for taking away or intermeddling with movable goods in the possession of another, without either the consent of that other, or the order of law. Ib. s. 16.

*English merchants had furnished the goods to the defendant's ancestor more than three years before action brought. It was objected, that the debt was prescribed as to the manner of probation by witnesses, not being pursued for within three years after contracting. The answer was, that that being only a local and municipal statute, derogating from the common law of nations, it could not take place against strangers, and the consuetudo loci contractus must be the rule. And the same rule was adopted in the case of the Assignees of Fulks v. Aikenhead, (November 1731).(a) In Grove v. Gordon (b) and Lord Lovat v. Forbes, (c) *November, 1740, a promissory note granted in [#911] London by a Scotsman residing there to another, and payable on demand, was held to fall under the English statute of limitations, if no action were brought within six years. In Delvalle v. The Creditors of the York Buildings Company, 1786,(d) the defence was the negative prescription of forty years; and the question was, how far the Scotch prescription of forty years could be applied to debts contracted in England by an English company, and due to Englishmen. The Court of Session were divided on the point, but a judgment was pronounced, sustaining the objection; which, however, was reversed in the House of Lords. In The York Buildings Company v. Cheswell, February 1792,(e) the same question arose, and it was there decided by the Court of Session, that the Scottish prescription was not pleadable by debtors domiciled in England. (f) On the whole, therefore, it appears that the lex loci contractus must prevail, because the contracting parties knew the law, and must be supposed to embody it in their contract. [BAYLEY, J. There is one *point which you do not touch yet. Should not all this matter respecting the Scotch law be stated in the replication, and not in the declaration? Would it be in issue on nil debet, time and place not being material, unless made so by plea? This ought to have come in the replication.] That would have done no harm; but it is all part of the contract.

Lord TENTERDEN, C. J. Upon the general principle it seems to me, that if the plaintiffs were to amend, they would still have this great difficulty to contend with, that, according to the authority of Huber and Voet, the party suing, and seeking to avail himself of the law of a particular country, must take that law as he finds it. Now, by the law of this country, such an action as the present cannot be maintained after the expiration of six years from the making of the contract. The case of Delvalle v. The York Buildings Company is the only authority which creates the smallest doubt in my mind.

White. The statute of limitations in Scotland applies only to bonds made in

Scotland; and the bond in that case was made in England.

Leave was given to Campbell to amend; but in Michaelmas term 1830, he said he had carefully considered the subject, and had come to the conclusion that, even if he made the proposed amendment, there must be judgment against the plaintiffs, and he therefore declined to amend; and thereupon the Court gave judgment for the defendant. Judgment for the defendant.

(a) Morrison's Dict. of Decis. 4507.
 (d) Ib. 4525.

(a) Morrison's Dict. of Decis. 4507.
(b) Ib. 4510.
(c) Ib. 4512.
(d) Ib. 4525.
(e) Ib. 4528.
(f) It was in that case observed on the Bench: "This is in all respects an English company domiciled in England, and by their charter of erection fixed down to a residence there; so that in every instance of their being sued in this country, citation at the pier and shore of Leith was necessary. If, instead of being thus permanent in England, they had changed their place of residence to Scotland, and continued there during the forty years, it might have been competent to them to plead our prescription, notwithstanding that England was the locus contractus. For it is the lex domicilii debitoris which in this matter is the governing rule; and that law admits not the prescription. It is clear, that in England, actions on those bonds would lie against the company. They are not, therefore, in the words of the statute of 1469, "obligations of nane avail." The debtors surely would not be entitled to say so for having brought their effects over the border. In all cases in which the Court has sustained our prescriptions against English debts, the debtors were considered as having acquired a residence in this country."

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PRINCIPAL MATTERS.

ABATEMENT OF SUIT.

The statute 17 Car. 2, c. 8, which enacted that in certain cases a suit shall not be abated by the death of either party, between verdict and judgment, does not apply to cases of nonsuit. Doubliggin, Administratrix, v. Harrison, H. 10 & 11 G. 4.

ACCEPTOR.

See BILL OF EXCHANGE, 6.

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ACTION ON THE CASE.

- 1. Case by the owner of a house against his lessee for years for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises. Plea, not guilty. The jury found that the lessee did open the door without leave, but that the house was not in any respect weakened or injured by it. The learned Judge thereupon directed a verdict to be entered for the plaintiff with nominal damages, subject to a case: Held, on argument, that the plaintiff was not, at all events, entitled to a verdict; but as the reversionary interest of the plaintiff might be injured, although the house itself was not, and that question had not been submitted to the jury, the Court ordered a new trial. Young v. Spencer, M. 10 G. 4.
- 2. By an act of parliament, a company was established for making and maintaining certain docks and basins, and was authorised to appoint a dock-master, who was to have power to direct the mooring, unmooring, moving, and removing of all vessels into or being in the docks, and to have the control over the space of 100 yards of the entrances into the docks, so far as related to the trans-

porting of vessels coming in or going out; and the company was to be sued in the name of their treasurer; and if any action should be brought against any person for anything done in pursuance of the act, such action should be commenced within six calendar months after the fact committed.

An action having been brought against the treasurer for an injury done to a vessel (within 100 yards of the entrance to the docks) by reason of improper directions having been given by the dock-master in transporting her into the docks; it was held, that the giving of such directions was a thing done in pursuance of the act of parliament, and that the action ought therefore to have been brought within six calendar months after such directions were given. Smith v. Shaw, M. 10 G. 4.

ADVERSE POSSESSION.

See EVIDENCE, 17.

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See PRISONER, 4.

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See QUARE IMPEDIT, 1.

AGREEMENT.

See FRAUDS, STATUTE OF, 4.

By contract A. agreed to sell to B. the two leases and good will in trade of a public house, and shop adjoining, for the sum of 42501., "as he holds the same," for terms of twenty-eight years from Midsummer next ensuing, at the annual rent therein mentioned, and B. agreed to accept a proper assignment of the said leases and premises as above described, without requiring the lease's title; and upon payment of the said sum of 42501. A. agreed to execute an effectual assignment of the said leases, and deliver up possession of all the said premises: Held, that the true meaning of this agreement was, that the vendee was to purchase the two leases without inquiring into the title of the lessor, and could not refuse to complete his purchase on account of an objection to that title. Spratt v. Jeffery, M. 10 G. 4. 249

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AMENDMENT. See PRACTICE, 12.

ANNUITY.

A demise by a parson of his benefice, made subsequent to the 57 G. 3, c. 99, for securing an annuity, is void, it being in substance a charging of the benefice within the meaning of the 13 Eliz. c. 20, which, as far as relates to chargings of benefices, is now in force, having been revived by the 57 G. 3, c. 99. Shaw v. Pritchard and Others, M. 10 G. 4.

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 It is no ground of appeal against a countyrate, that individuals in one parish are rated in a higher proportion than in another.

It is not necessary, in a notice of appeal against a county rate, to specify the grounds of appeal: but if the appellant states in his notice, as causes of appeal, things which are not so, the court of quarter sessions ought to adjourn the appeal, if they think the respondents have been misled by the terms of the notice; or otherwise to hear it. The King v. The Justices of Westmoreland, M. 10 G.

2. In an appeal against a county rate, the party appealing must, in his notice of appeal, state that he is aggrieved, or state that from which it follows of necessity that he is so; and where a notice of appeal against such a rate stated, as the ground of appeal, that the county rate was unequal and defective, inasmuch as the appellant parish was charged and assessed in the rate at a higher proportion of the pound sterling according to the fair annual value of the rateable property, than the respondent parish; and the sessions, upon hearing the appeal, received the evidence of surveyors as to the annual value of the rateable property of both parishes, and amended the rate by altering the assessment according to the annual value of the two parishes according to the evidence so taken, but leaving the statement of the annual value of the two to remain as before: Held, that the sessions were not warranted by the notice of appeal in so amending the rate. The King v. The Inhabitants of Blackawton, E. 10 & 11 G. 4. 792

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ARBITRAMENT.

1. By a Judge's order a cause was referred to an arbitrator, so as he should make his award in writing on or before the 1st day of July then next, or on or before such further or ulterior day as he should appoint in writing, under his hand, to be endorsed on that order, and the Court of King's Bench or a Judge thereof should order. The arbitrator, by endorsement on the order, enlarged the time; but at the time when he made his award no Judge's order had been obtained ratifying that enlargement: Held, that the award was bad. Mason v. Wallis, M. 10 G. 4. 107

2. Where a cause is referred by order of Nisi Prius, either party has power to revoke the submission; and the Court cannot varate that revocation, or compel the party revoking to pay costs to the other party, unless a power to do so is given by the order of reference. Size v. Cozon, H. 10 & 11 G. 4. 483

ARREST.

See BANKRUPT. 7.

1. In order to entitle a defendant to his costs under the statute 43 G. 3, c. 46, s. 3, on the ground that the plaintiff had arrested him for a larger sum than he afterwards recovered, it is sufficient to show that the plaintiff had no reasonable or probable cause for procuring the defendant to be arrested for that sum; it is not necessary to show malice. Donless v. Brett. M. 10 G. 4.

2. A plaintiff had sold goods to defendant to be paid for half in ready money and half by bill at three months. The defendant having refused to pay the half in ready money, the plaintiff arrested him for the full price of the goods: Held, that he had no reasonable or probable cause for so doing, and that defendant was entitled to his costs pursuant to 43 G. 3, c. 46. Day v. Picton, M. 10 G. 4. 120

ASSAULT.

A person may, under particular circumstances, lay hands on another, in order to serve him with process. Harrison v. Hodgson, H. 10 & 11 G. 4.

ASSUMPSIT.

1. A tenant having paid rent to A., was ejected at the suit of a third person, who afterwards recovered from him the mesne profits for the period in respect of which he had paid rent to A.: Held, that the tenant, in an action for money had and received, might recover back that rent from A., he not having set up any title to the premises at all. Newcome v. Graham and Another, M. 10 G. 4.

2. An insurance-broker effected, on behalf of another person, a policy under seal, with a company of which he was a member. The policy recited that the broker, upon his representation that he was duly authorized as owner, agent, or otherwise, to make assurance upon the vessel mentioned in the policy, and was desirous of making such insurance, had covenanted with the company to pay the premium, and then alleged, that, in consideration of the premises and of such covenant, the policy was effected. The broker having become bankrupt, without having paid the premiums to the company; it was held, that his assignees were entitled to recover from the assured the amount of the premium which he had covenanted to pay.

The declaration stated, that the defendants were indebted to the bankrupt before his bankruptcy for work and labour, as an insurance-broker, and for divers premiums of insurance due and payable from the defendants to the bankrupt, for and in respect of his having underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance for the said defendants, at their request. The plaintiffs, by their particulars of demand, claimed to recover for insurance. The company would have allowed the broker, when he paid the premiums, to deduct \$1l.\$ 1s. as commission: Held, that his usignees were entitled to recover that sun

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Held, that the plaintiffs were not entitled to recover such sums under the count for money paid, because the broker had not actually paid the sums, or done anything which was equivalent to payment. Power and Another, Assignees of Fulton, v. Butcher and Another, M. 10 G. 4.

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Where the plaintiff in an action against an attorney recovers less than 40s., the Judge may certify under the stat. 43 Elis. c. 6, and deprive the plaintiff of costs. Wright, Administratrix, v. Nuttall, Gent., One, &c., H. 10 & 11 G. 4.

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BANKRUPT.

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1. In March 1825, a trader committed an act of bankruptcy, upon which a commission might have issued under the statutes relating to bankrupts then in force. On the 1st of May those statutes were repealed; on the 2d of May, the repealing act was repealed, and the former acts thereby revived. In July a commission of bankrupt issued: Held, that it was supported by the act of bankruptcy committed in March. Phillips, Assignes, v. Hopwood and Others, M. 10 G. 4. 39

Where a trader, having a large order from the East India Company, and not having funds to execute it, borrowed money of B., upon an agreement that B. should receive the money for the order from the East India Company and repay himself; and at the time of the loan B. knew the trader to be insolvent, and before the money became due from the East India Company the trader was arrested several times, and was bailed by B., and so avoided committing an act of bankruptcy until after the money became due, when B. received it: Held, that this was not a fraudulent preference. Hunt and Another, Assigness, v. Mortimer and Others, M. 10 G. 4.

3. A., in England, contracted with B. at Petersburgh to send him a cargo of deals, to be paid for by a bill at three months, which he duly accepted. The deals were shipped, and A. effected an insurance. The ship was stranded on the voyage, near Elsinore, and the deals were saved, but so much injured as not to be worth sending for. A., on hearing of the accident, gave the underwriters notice of abandonment the day before the bill became due, which they refused to accept. B.'s agent stopped the goods in transitu at Elsinore. A. having become insolvent: Held, that his assignee, under a commission of bankrupt afterwards issued against him, could not recover on the policy, inasmuch as A., after the stoppage in transitu, had not any insurable interest. Clay, Aseignee, v. Harrison, M. 10 G. 4. 99

4. Where, in an action by the assignees of B.,

a bankrupt, in order to prove the petitioning creditor's debt, they proved that B. was in-debted to one R., that a commission afterwards issued against R., and that his assignees were the petitioning creditors against B., and in order to support the commission against R., produced the proceedings under it: Held, that they were not admissible in evidence, and that the plaintiffs were bound to prove by other evidence R.'s trading, act of bankruptcy, &c.

The plaintiffs also produced an order made by the Lord Chancellor under the 6 G. 4, c. 16, s. 18, whereby, after reciting a petition to him by Muskett, he ordered, that if the commissioners should be satisfied that Muskett had proved under the commission against B. a debt sufficient to support the commission, contracted not anterior to the petitioning creditor's debt, the commission should be proceeded in: Held, that this was not a valid order, inasmuch as it did not find, or call upon the commissioners to find, that the original petitioning creditor's debt was insufficient. Muskett and Others v. Drummond, M. 10 G. 4.

5. By the statute 6 G. 4, c. 16, s. 50, mutual debts and credits may be set off, notwithstanding any prior act of bankruptcy, provided that the party claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed: Held, in an action brought by the assignees of certain bankers, that a party has a right to set off notes of such bankrupts, taken by him after he knew that they had stopped payment, but before he knew that they had committed an act of bankruptcy. Hawkine and Othere, Assign-ces, v. Whitten, M. 10 G. 4. 217

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7. A third commission issued against a trader who had not paid any dividend to his creditors under a first and second commission, is a nullity; and where a bankrupt had obtained his certificate under a third commission issued under such circumstances: Held, that he was not entitled to be discharged out of custody, although the debt for which he was detained was contracted before the issuing of that commission. Fowler v. Coster, H. 10 & 11 G. 4.

8. A witness summoned by commissioners of bankrupt under the 6 G. 4, c. 16, s. 33, was required by the commissioners to read certain entries in a ledger; and on his refusal to do so, was committed by them for refusing to answer a question: Held, that the request to read was neither in form nor substance a question, and that the commitment was illegal. Isaac v. Impey and Others, H. 10 & 11 G. 4.

9. A commission of bankrupt was issued against A. and B. describing them as "bankers, being traders according to the provisions of the statute 6 G. 4, entitled, &c." A. and B. had ceased to be bankers before that act passed; but it was held that the word bankers might be treated as a description of the persons of the bankrupts, and that the commission might be supported by evidence of another trading.

A trader does not commit an act of bank-

ruptoy by absenting himself, unless he absent himself from his place of abode, or place of business, or from some particular creditor. Bernasconi and Others v. Farebrother and Others, H. 10 & 11 G. 4.

10. In April 1826, A. having contracted to purchase an estate from B., and having had the title-deeds delivered to him, agreed to deposit the same with C., as a security for the loan of 50001., and to give him the mortgage as soon as the legal estate was conveyed to him. B. afterwards conveyed the estate to A.; but before such conveyance was made, and after the title-deeds had been deposited with C., the latter refused to complete the mortgage unless A. would agree to pay usurious interest upon the sum of 5000t. A. having so agreed, delivered to C. the deed of conveyance of the estate from B. to A. A. afterwards became bankrupt; and in an action of trover brought to recover the deeds, it was held, that the original possession of the title-deeds being perfectly good, gave C. a right to the estate whenever B. should have conveyed that estate to A.; and that he, and not A.'s assignees, had a right, therefore, to the deed of conveyance from B. to Wood and Another v. Grimwood, B. 10 & 11 G. 4.

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11. Assumpsit by the assignees of a bankrupt against a sheriff, to recover the proceeds of goods seised under a fi. fa. The defendant did not give any notice to dispute. The plaintiffs proved that an act of bankruptey was committed before the levy: Held, that they were not bound to prove that a petitioning creditor's debt existed at that time, per Lord Tenterden, C. J., and Parke, J. Bayley, J., and Littledale, J., control. Norman and Another, Assignees, v. Booth and Another, E. 10 & 11 G. 4.

12. Where a trader being under apprehension of arrest gave directions to his servant to deny him in case A., a sheriff's officer, called: Held, that the sheriff's officer not having called, this of itself was net any evidence of a beginning to keep house.

Semble, that in order to constitute an act of bankruptcy, by departing from the dwelling-house, the departure must be with an absolute intent to delay creditors. If it be only with intent to delay creditors in case a particular event occurs, and that event dees not occur, it is not an act of bankruptcy. Fisher und Another, Assignees, v. Boucher, E. 10 & 11 G. 4.

13. Assumpsit by the assignees of R., a bankrupt, on a promissory note drawn by defendant, payable to G. or order, and by him endorsed to the bankrupt before the bankruptcy. It appeared that in October 1825, G. applied to the bankrupt to discount the note, and took as part of the proceeds a bill of exchange, accepted by the bankrupt, payable to G.'s order. G. endorsed this bill for value to the defendant, and he got it discounted by H., who was the holder when it became due. A commission of bankrupt issued against R. on the 23d of December, and the bill became due on the 24th, when it was presented and dishonoured. On the 26th H. received the amount from the defendant, and returned the bill to him: Held, that he had a right to set off this bill against the demand of the assign-Colline and ees on the promissory note. Others v. Jones, E. 10 & 11 G. 4.

BARM.

See HAWKER AND PEDLAR, 2.

BARON AND FEME.

Where a promissory note is given to a married woman, the husband may sue on it in his own name only, and then a debt due to the maker from the wife, dum sola, cannot be set off. Burrough v. Moss, Gent.. One, &c., H. 10 & 11 G. 4.

BILL OF EXCHANGE.

1. Where, by a memorandum at the foot of a promissory note, it was made payable at a particular place: Held, that this did not constitute a part of the contract, so as to make it necessary for a party suing on the note to aver and prove a presentment there. Williams v. Waring, M. 10 G. 4.

2. A foreign bill of exchange was drawn on C.

and Co. at Liverpool, payable to A. in London; the drawees having refused to accept, it was accepted by B. in London for the honour of the payee, if regularly protested, and refused when due: Held, in an action against the acceptor for honour, that, by the special form of the acceptance, a presentment for payment to the drawee in Liverpool, a refusal by him, and a protest there, were necessary, and, therefore, that the bill was properly presented for payment there on the day it became due. Mitchell and Another v.

Baring and Another, M. 10 G. 4.

3. A. wishing to obtain credit with his bankers, in 1817 prevailed upon three persons to join him in a promissory note, whereby they jointly and severally promised to pay the bankers or order 300l. The bankers gave A. credit in his pass-book for 300l. on account of the note, and charged him with interest for the same yearly. Upon two of the partners retiring from the banking-house a balance was struck between the old and new firm, and the promissory note was delivered to the new firm, but not endorsed to them. A. at one time had in the hands of his bankers a balance exceeding the amount of the note. He paid interest to the banking-house annually.

Held, first, that the note being payable to the five members of the banking-house or order, and being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the

members of the banking-house:

Secondly, that an action on the note (the same not having been endorsed) was properly brought in the name of the payees of the note:

Thirdly, that the note was not discharged by reason of A. at one time having in the hands of the banker a balance exceeding in amount the sum secured by the note:

Fourthly, that the payment of interest within six years by A. on the note was evidence of an acknowledgment by all the joint makers of the note, so as to take the case out of the statute of limitations. Pease and Others v. Hirst and Others, M. 10 G. 4.

4. In an action on a bill of exchange, purporting to be drawn and accepted by a mining
company, wherein the plaintiff, an endorsee
for value, sought to charge the defendant as
a member of that company, it was proved

that the bill had been draws and accepted by order of the directors of the company. It was proved further, that the company had entered into a contract for the purchase of mines, taken a counting-house in London, engaged clerks, and also an agent to reside in the country, and had worked some of the mines; that the defendant having applied to the secretary of the company for shares, some were appropriated to him; that he paid an instalment of 151, per share; that he attended at the counting-house of the contpany, and there signed some deed, and afterwards attended a general meeting of the shareholders: Held, that assuming this to be sufficient evidence of the detendant's being a partner in the company, it was incumbent on the plaintiff to prove that the directors of that company had authority to bind the other members, by drawing and accepting bills of exchange; and that the plaintiff not having produced the deed of copartnership, nor given any evidence to show that it was necessary, for the purpose of carrying on the business of that mining company, or usual for other mining companies to draw or accept bills of exchange, there was no evidence to go to the jury of such an authority to draw or accept any bills, and still less to draw or accept bills in this form, which in effect were promissory notes.

Semble, also, that there was not sufficient evidence to show that the defendant had ever become a complete partner in the company, or that he had held himself out to the world as such partner. Dickinson v. Valpy, M. 10 128

On the 24th of June, 1824, C. agreed to become a partner with A. and B., the business to be carried on in the name of A. and B. for the benefit of A., B., and C.; that the partnership should be considered as commencing on the 18th of May preceding. Before the 24th of June A. and B. had opened an account with certain bankers, which was continued in their names till the 22d of September, when the partnership as to B. was dissolved. All the business with the bankers was transacted by B., and the bankers did not know that C. was a partner till the account was closed. B. used the accounts for the purposes of the firm of which C. was a member, as well as for others. On the 21st of May he endorsed a bill of exchange in the partnership names of A. and B. to the bankers, who discounted it, and placed it to the credit of the account. On the 13th of July he endorsed two others in a similar manner: Held, that as the bankers did not know that the money raised by these bills was intended to be applied to other than partnership purposes, C. was liable on the last two bills, but not on the first, he not having been an actual partner at the time when it was discounted. Vere and Others r. Ashby and Others, M. 10 G. 4.

v. Ashby and Others, M. 10 G. 4. 288
6. The drawee (who was also payee) of a foreign bill of exchange drawn in three parts, accepted and endorsed one part to a creditor to remain in his hands until some other security was given for it; and after wards accepted and endorsed another part for value to a third person. The acceptor substituted another security for the part first accepted, whereupon it was given up to him: Held, that under these circumstances the holder of the

part secondly accepted was entitled to reco-

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ver on the bill against the acceptor, and that the bill being foreign did not require a stamp: Held, also, by Lord Tenterden, C. J., and Parke, J., that the acceptor would have been liable on the part secondly accepted, even if the first part had been endorsed and circulated un onditionally. Holdsworth v. Hunter, H. 10 & 11 G. 4. 449

7. Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer; and, therefore, an endorsee may bring evidence to show that the signatures of the supposed drawer to the bill and to the first endorsement, are in the same handwriting. Cooper v. Meyer and Another, H. 10 & 11 G. 4.

8. Where a promissory note is given to a married woman, the husband may sue on it in his own name only, and then a debt due to the maker from the wife, dum sola, cannot be

set off.

The endorsee of an overdue promissory note is liable, in an action against the maker, to all equities arising out of the note transaction itself, but not to a set-off in respect of a debt due from the endorser to the maker of the note, arising out of collateral matters. Burrough v. Moss, Gent., One, &c., H. 10 &

11 G. 4.

9. In an action by the payee against the maker of a promissory note, the plaintiff proved a joint and several note made by the defendant and another person. The defendant then proved that he was a mere surety, having become a party to the note at the request of the other person, who was indebted to the plaintiff, and that the note not having been paid when it became due, the plaintiff, in Hilary term 1828, brought an action against the principal, which being about to be tried at the Spring assizes 1828, the plaintiff took a cognovit for the debt, payable by three instalments, the first on the 28th of April, the others in May and June; but if the defendant failed in payment of any of these instalments, the plaintiff was to be at liberty immediately to enter up judgment, and issue execution for the whole sum. The first instalment was not duly paid: Held, that as the plaintiff, if he had proceeded in the action, could not have obtained judgment and issued execution before the 28th of April, which was the fifth day of Easter term, the plaintiff did not, by taking the cognovit, give any time to the principal debtor.

Quære, Whether evidence was admissible to show that the defendant was a surety, inasmuch as he appeared by the terms of the promissory note to be a principal? Price v. Edmunds, H. 10 & 11 G. 4. 578

10. Where a promissory note is, on the face of it, made payable on demand, oral evidence of an agreement entered into, when it was made, that it should not be paid until a given event happened, is inadmissible. Moseley, Assignee, v. Hanford, E. 10 & 11 G. 4. 729

11. Assumpsit by the assignees of R., a bankrupt, on a promissory note drawn by defendant, payable to G. or order, and by him endorsed to the bankrupt before the bankruptcy. It appeared that in October 1825, G. applied to the bankrupt to discount the note, and took as part of the proceeds a bill of exchange, accepted by the bankrupt, payable to G.'s order. G. endorsed this bill for value to the defendant, and he got it discounted by H., who was the holder when it became due. A commission of bankrupt issued against R. on the 23d of December, and the bill became due on the 24th, when it was presented and dishonoured. On the 26th H, received the amount from the defendant, and returned the bill to him: Held, that he had a right to set off this bill against the demand of the assignees on the promissory note. Collins and Others, Assignees, v. Jones, E. 10 & 11 G.

12. In an action by the endorsee of a bill of exchange against the acceptor, the latter proved that his son had been bound apprentice to the drawer in 1827 by indenture, and 301. premium agreed to be paid, for which the bill in question was given. The indenture had a 11. stamp impressed upon it. The apprentice served his master for five months, and a difference arising between the master and father, and it having been discovered that the stamp was insufficient, the apprentice left his master's service : Held, that as the apprentice was maintained and instructed by his master for five months, and might have compelled him to continue that maintenance and instruction, by causing the indenture to be properly stamped, pursuant to the statute 20 G. 2, c. 45, s. 5, there was not a total failure of consideration for the bill, and, therefore, that the circumstances would not be an answer to an action by the payer against the acceptor.

Quære, Whether, even if the acceptor and proved a total failure of consideration as between him and the drawer, it would have been incumbent on the plaintiff, the endorsee, even after notice, to prove that he gave consideration for it? Mann v. Lent, E. 10 &

11 G. 4.

BOND.

1. An entry made by a deceased collector of taxes in a private book, kept by him for his own convenience, whereby he charged himself with the receipt of sums of money: Held to be evidence against a surety of the fact of the receipt of such money in an action on a bond conditioned for the due payment of the taxes by the collector, although the parties by whom the money had been paid were alive, and might have been called as witnesses; and that upon the general principle that the entry was to the prejudice of the party who made it. Middleton v. Melton, M. 10 G. 4.

2. Where a bond was given for payment of 10,000l., with a condition that the money should be paid on the obligee's procuring subscriptions for 9000 shares in a company to be formed of many persons, for the purpose of becoming assignees of a patent. and carrying on the patent process; and the patent contained a proviso, that it should be void if assigned to more than five persons: Held, that the obligee must be presumed to know of that proviso, and that, as the bond was subject to a condition for the performance of an illegal act, it was void Duvergier v. Fellows (in error), E. 10 & 11 G. 4.

> BOUNDARY. See EVIDENCE, 1.

BEIDGWATER AND TAUNTON CANAL COMPANY.

See CANAL.

BROKER.

See Bankbuft, 6. Insurance, 5. Principal and Agent, 2.

CANAL.

1. By a canal act, the proprietors of the Oxford Canal were empowered to take a mileage tonnage for coals and other merchandises, excepting that they were not to take a tonnage upon coals for a distance of two miles measured from L. to B. As to those two miles, it was enacted that the proprietors of the Coveniry Canal should take all the rates and duties payable by virtue of that act for all coals carried from any part of the Oxford Canal within those two miles; and the proprietors of the Oxford Canal were to take all the rates, payable by an act for making the Coventry Canal, for all goods, except coals, conveyed upon any part of the Oxford Canal, and afterwards upon the Coventry Canal, within three miles and a half of the junction of the two canals. The point of junction of the Oxford and Coventry Canal was in the parish of F. That parish contains one mile and nine hundred and sixty-three yards of the Oxford Canal, being part of the two miles above mentioned, and also two miles and a quarter of the Coventry Canal, being part of the three miles and a half above mentioned.

By an act, 33 G. 3, c. 80, for making the Grand Junction Canal (reciting that it was apprehended the intended canal would be injurious to the company of proprietors of the Oxford Canal), it was agreed that the compensation thereinafter mentioned should be made to them as an indemnification against such injury. It then authorized the propri-etors of the Oxford Canal to take, for all coals that should pass from the Oxford Canal into and upon the Grand Junction Canal, the sum of 2s. 9d. per ton, without regard to the distance the same shall pass on the Oxford Canal; and for all other goods which shall pass from any navigable canal into or upon the Oxford Canal, and from thence into or upon the Grand Junction Canal, or from the Grand Junction Canal into or upon the Oxford Canal, and from thence into or upon any other canal, the sum of 4s. 4d. per ton, without any regard to the distance the same

shall pass on the Oxford Canal:
Held, first, that the proprietors of the Oxford Canal were rateable to the poor in the parish of F. for the mile tonnage for merchandise, not being coals, passing along the Oxford Canal in that parish:

Secondly, that they were rateable in that parish for the mile tonnage payable to them in respect of tolls collected on the Coventry Canal, in the proportion which one mile nine hundred and sixty-three yards bears to two

Thirdly, that they were rateable in that parish for such a proportion of the compensation tonnage payable to the Oxford Canal Company under the Grand Junction Canal act for merchandise, not being coals, passing from the Coventry Canal along the Oxford Canal to the Grand Junction Canal, and vice

verså, and consequently through the perish of F., as one mile nine hundred and sixty-three yards beers to thirty-four miles and seven eighths, the distance between the points at which the Oxford Canal joins the Coventry and Grand Junction Canals:

Fourthly, that they were rateable in that parish for the same proportion of the compensation tonnage for coals passing along the same portion of the Oxford Canal from the Coventry Canal into the Grand Junction Canal:

Held, further, that in fixing the amount of the rate, the sum paid by the proprietors for the poor-rate, the expense of collecting the tolls, of repairing the banks of the canal, and of supplying it with water, ought to be deducted from the gross profits. The King v. The Oxford Canal Company, M. 10 G. 4.

An act for making the Bridgwater and Taunton Canal, after reciting, that the making of that canal would be very prejudicial to the tolls authorized to be levied and collected from the Tone navigation, authorized and required the company of proprietors of the canal within three calendar months to contract and agree with the conservators of the river Tone navigation and other persons, proprietors of shares or parts of shares, or otherwise interested therein, for the absolute purchase of their several and respective estates, rights, and interests in and to the same; and also to contract and agree with the over-seers of the poor for the time being of the town of Taunton, and the several parishes of Taunton St. Mary Magdalen and Taunton St. James, for the absolute purchase of the respective estates, rights, and interests of the said town and parishes, under and by virtue of the said therein recited acts:

Held, by BAYLEY and LITTLEDALE, Justices, that the words, "within three calendar months," applied to both branches of the clause, and that the canal company therefore were bound to have contracted within that period with the overseers of the poor of the parishes of Taunton; and not having done so, they could not afterwards compel them to sell their interest. Conservators of the River Tone v. Ash and Others, M. 10 G. 4.

CERTIFICATE.

See Attorney, 1. Special Jury, 1.

CHANGE OF FIRM.
See BILL OF EXCHANGE. 3.

CHARTER.

See Corporation, 4, 5.

CHURCHWARDENS AND OVEL-SEERS.

The statute 59 G. 3, c. 12, s. 17, vests in the churchwardens and overseers of the parish all buildings, lands, and hereditaments belonging to such parish, not merely where the profits thereof are applicable to the relief of the poor, but where they are applicable to those purposes for which clurch-rates are levied; and that although auch buildings, lands, and hereditaments had originally been vested in trustees for the benefit of the parish.

Due on the several demises of William Jackson and Others v. Hiley, E. 10 & 11 G. 4.

COGNOVIT.

See BILL OF EXCHANGE, 9.

COLLECTOR OF TAXES.

See EVIDENCE. 6.

COMMENCEMENT OF ACTION.
See Action on the Case, 2.

COMMISSION.

COMMISSIONERS OF BANKRUPT.

See BANKRUPT. 8.

COMMITMENT.
See TRESPASS. 1.

COMMON.

See Presentment.

COMPUTATION OF TIME.

See Corporation, 4.

CONCEALMENT OF EVIDENCE.

See EVIDENCE, 9.

CONTINGENT REMAINDER.

See Drvise, 2, 3.

CONTRACT WITHIN LIMITED TIME.

See Canal, 2.

COPYHOLDER.

Tenent in fee of copyhold tenements, surrendered to the use of his will, and devised them to A. for life, remainder to B. for life, remainder to his own right heirs. The devisees disclaimed: Held, that on the death of the testator the estate descended to his heir, and that as the devisees would not come in and be admitted, he was entitled to admittance; and that, whether the disclaimer by the devisees was or was not made in furtherance of a scheme to defeat the lord's right to fines, did not affect the question. The King v. Sir T. M. Wilson and Another, M. 10 G. 4.

CORPORATION.

 An information in the nature of quo warranto, against persons for claiming to act as a corporation, must be filed by and in the name of the Attorney-General.

Such an information cannot be filed at the instance of an individual against persons for usurping a franchise of a private nature, not connected with public government.

**The King v. Ogden, M. 10 G. 4. 230

2. By an act for making and keeping the river

By an act for making and keeping the river.

Tone navigable, it was enacted, that the thirty persons therein named and their successors should be conservators of the river, and should have power to cleanse, scour,

open, and keep navigable the said river; and also to cut and make a new channel, if occasion should be, through the ground of other persons, making recompense to the owners

By another clause the conservators were to contract with the owners of land for the loss or damage which any of them should sustain by making the river navigable; and if the owners and the conservators could not agree touching the value thereof, or if the title were in an infant, feme covert, or any other person unable to contract, then the sheriff was to summon a jury to ascertain the value, and the determination of the jury was to bind all parties; and in case the parties interested in the land should not appear, then the jury, in their absence, were to proceed to determine what satisfaction should be made to them respectively, which determination was to be good, valid, and conclusive. and to vest an estate in fee simple in the conservators or their successors, or other right, title, or interest in the lands.

By another clause it was enacted, that there should always be conservators of the said river, and that the thirty persons therein named should continue conservators during their lives, unless any of them should be removed for misbehaviour, which the major part of the conservators were thereby empowered to do, and when the number of the conservators at any time by death or removal should be reduced to twenty, then the survivors were to choose other persons to be joined to themselves to be conservators of the river, so as to make up the number thirty; and the conservators were enabled by the name of the conservators of the river Tone, in the county of Somerset, to take and receive any gift, legacy, or grant of goods, chattels, money, or lands in fee, or for any other estate or term for the uses aforesaid and it was made lawful for any persons & convey any estate to the conservators and their successors without license to alien in mortmain. And the conservators, or the major part of them, or any five of them ap-pointed by the major part of them to be a committee, were authorized in writing under their hands and seals to make any contract. which contract should bind the whole body of the conservators, and the conservators might sue and be sued by the said name of the conservators of the river Tone, in the county of Somerset.

By a subsequent act the conservators were authorized to make orders in writing for the government of the boatmen, bargemen, or others, in navigating boats or barges, or floating timber or the said single.

floating timber on the said river:
Held, that as it manifestly appeared from
the different clauses of these acts of parliament that the conservators should take land
by succession and not by inheritance, although they were not created a corporation
by express words, they were so by implication; and that being so, they were entitled
to sue in their corporate name for an injury
done to their real property. The Conservators of the River Tone v. Ash and Others, M.
10 G. 4. 349

3. By an act of the 44 G. 3, for making the river Tone navigable, conservators were appointed, and all powers given by two former acts of parliament to the Bishop of Bath and Wells and the justices of the peace for the county of Somerset, to examine, state, correct, and allow the accounts of the conservators of the river Tone, were repealed; and instead of such powers, it was enacted, that the accounts of the conservators should be made up to the 24th of June yearly, and that the accounts so made up, and vouchers for the same, should be brought before the Bishop of Bath and Wells, or any five of the said justices without the said bishop, between the ist day of August and the then next general quarter sessions of the peace to be held for the county of Somerset, at a place appointed by the bishop, or any five of the justices without the bishop, then and there to be examined, stated, and corrected, and the accounts, whether or not the same should have been examined and corrected by the said bishop and justices, were to be brought be-fore the bishop and justices, or any five of the justices in the absence of the bishop, at the opening of the court of the next quarter sessions to be held after the 1st day of August yearly; and the bishop and justices at the said sessions, or any five of the justices in the absence of the bishop, were required to examine, state, and allow the said accounts of the conservators, and that allowance was to be final and conclusive: Held, that the bishop and justices were bound to examine, state, and allow the accounts at the first sessions, and had no authority to adjourn the examination to a subsequent sessions.

Semble, That the conservators of the river Tone were a corporation, not merely for the purpose of holding lands, but for the purpose of receiving the toils. The Company of Proprietors of the Bridgwater and Taunton Canal Navigation v. Bluett, M. 10 G. 4. 393 4. By charter the capital burgesses and common council of a borough were authorized every year, on Monday next before Michaelmas, to elect and nominate one of the capital burgesses to be mayor for one whole year thence next ensuing; and he, before he were admitted to execute that office, or in any way to intermeddle in the same office, was, on Friday next after the feast of St. Michael next ensuing such nomination and election, not only to take his corporal oath well and faithfully to execute the office, but also all the oaths appointed by a mayor to be taken; and after such oath so taken, he might execute the office of a mayor of the borough for one whole year then next ensuing. It was then provided, that none who should have once borne the office of mayor should be again elected and preferred to be mayor within the space of three years next ensuing the end and determination of his office of mayoralty: Held, that the words "three years," mentioned in the prohibitory clause, imported years of office, and not calendar years; and, therefore, a person who had once served the office of mayor might be again promoted to the same office as soon as three mayoralties had intervened:

Held, also, that a party became mayor, not when he was elected, but when he was sworn in; and it was sufficient if three mayoralties intervened between the time when he ceased to be mayor, and the time when he was sworn into office a second time. The Ring v. Swyer, H. 10 & 11 G. 4.

5. Where a borough town was incorporated by charter, and certain members of the corporation were made justices (but without

power to try felonies), and the charter contained a general non-intromittant clause, wholly preventing the interference of the county justices within the town: Held, that a rate in the nature of a county rate, might be imposed by the justices of the town, under the authority given by the 55 G. 3, c. 51.

Mercer v. Davis, H. 10 & 11 G. 4.

COSTS.

See Arbitrament, 2. Attorney, 1. Ejectment, 1, 3, 4. Formedon. Pleading, 6. Practice, 3, 4, 13. Special Jury, 1.

COUNTY RATE. See Appeal. Rate, 2.

COURT OF JUSTICE.

The proceeding against a party in a summary manner under the 5 Ann. c. 14, for keeping and using a gun to destroy game is of a judicial nature, at which all persons have a primâ facie right to be present; and, therefore, where a magistrate had, without any specific reason, caused a party who claimed a right to be present to be removed from a justice-room, where such a proceeding was going on, it was held that he was liable to an action of trespass. Daubrey, Gent., One, &c., v. Cooper, M. 10 G. 4.

COURT OF REQUESTS ACT.

A clerk in the excise office, attending the office (in the city of London) from ten till four every day (Sundays and holidays excepted; and having no other means of obtaining his livelihood, but residing with his wife and family out of London, is not a person "seeking a livelihood" within the city of London or its liberties, within the meaning of those words in the London court of requests act 39 & 40 G. 3, c. 104, and, therefore, he is liable to be sued in the superior courts for a debt under 51. Smith v. Hurrell, H. 10 & 11 G. 4.

COVENANT.

- Covenant by the master of a vessel with the several part-owners and their several and respective executors, administrators, and saigns, to pay certain moneys to them, and to their and every of their several and respective executors, administrators, and assigns, at a certain banker's, and in such parts and proportions as were set against their several and respective names: Held, a several covenant, upon which each covenantee must sue severally in respect of his several interest, and that they could not maintain a joint action. Servante and Others v. James, M. 10 G. 4.
- 2. Where the lessee of a public-house covenanted for himself, his executors and assigns, with his lessors (brewers) to take all his beer of them or their successors in their suid trade, and the lessors sold their trade and the public-house, with other premises, to third persons, who removed the plant, &c., to a distance of two miles, and there carried on the business of brewers: Held, that the trade of the lessors was thereby determined, and that their assignce could not take advantage of the covenant, on the assignce of the lessors.

purchasing beer from another brewer. Doe on the several demises of Calvert and Others v. Reid, E. 10 & 11 G. 4. 849

DECLARATION.
See PRACTICE, 9.

DEED.

See Power of Appointment, 1.

DEFEASANCE.

See WARRANT OF ATTORNEY, 1.

DEMISE.

See Annuity. Ecclesiastical Benefice.

DEPOSIT OF TITLE DEEDS.

See TROVER, 3.

DEVISE.

See POWER OF APPOINTMENT.

- 1. Tenant in fee of copyhold tenements, surrendered to the use of his will, and devised them to A. for life, remainder to B. for life, remainder to his own right heirs. The devisees disclaimed: Held, that on the death of the testator the estate descended to his heir, and that as the devisees would not come in and be admitted, he was entitled to admittance; and that, whether the disclaimer by the devisees was or was not made in furtherance of a scheme to defeat the lord's right to fines, did not affect the question. The King v. Sir T. M. Wilson, M. 10 G. 4.
- 2. Testator devised lands to his wife for life; remainder to all the children of his brother that should be living at the time of his wife's decease. His brother left one daughter, who married, and afterwards with her husband, during the life of testator's widow, levied a fine come ceo of the lands, and declared the use to A. B. After the death of the widow, A. B. brought ejectment against the tenant in possession: Held, that it was maintainable; for that although the brother's daughter had only a contingent remainder during the life of the widow, and the fine could only operate by estoppel until the contingency happened, yet afterwards it operated on the estate. Doe dem. Christmas v. Oliver, M. 10 G. 4.
- 181 3. Testator devised to his daughter E. H., the wife of W. H., for life; remainder to John, his daughter's son, and his heirs and assigns for ever; but in case he should die before the testator's daughter E. H., and she should have no other child living at her death, his will was, that his said daughter should give and devise the premises to such person as she should think proper. The testator died in February 1763, and John, the daughter's son, in April following. In January 1766 the daughter had another son. In November 1770 W. H. died, and in 1773 E. H. levied a fine with proclamations: Held, that although at the death of the testator, and until the death of his grandson John, the power given to the daughter to devise to such person as she should think proper, could avail only as an executory devise, yet upon the death of

John the character of the limitation changed, and it became a contingent remainder, and that it was therefore barred by the fine. Doe dem. Harris v. Howell and Others, M. 10 G.

- 4. Testator devised lands to A. B. and his heirs for ever; but if A. B. died without heirs, then to C. D. (who was a stranger in blood to A. B.) and his heirs; or if in case A. B. offered to mortgage or suffer a fine or recovery upon the whole or any part thereof, then to go to C. D.: Held, that A. B. took an estate in fee with an executory devise over, to take effect on conditions which were void in law, and that a purchaser in fee from A. B. would have a good title against all persons claiming under the said will. Warev. Cara, H. 10 & 11 G. 4.
- 5. Testator by will devised certain lands to ha wife for life, and after certain other devises, introduced a residuary clause in favour of his wife, in fee. He afterwards purchased other lands, and then made a codicil; whereby, after reciting that he had made a will, disposing of all he was then possessed of, he ratified and confirmed the will; he then gave his wife a life estate in part of his newly purchased estates, and devised the other part in a manner that could not take effect: Held, that the effect of the codicil was to make the residuary clause in favour of the wife applicable to the after-purchased lands. Waliams v. Goodtille (in Error), E. 11 G. 4.

DILAPIDATIONS.

An incumbent of a living is bound to keep the parsonage-house and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply or maintain anything in the nature of ornament, such as painting (unless that be necessary to preserve exposed timber from decay), and white washing and papering; and in an action for dilapidations against the executors of a deceased rector by the successor, the damages are to be calculated upon this printiple. Wise v. Metcalfe, M. 10 G. 4.

DISCLAIMER.
See Copyholder, 1.

DISCONTINUANCE.

See PLEADING, 6.

DISSENTING MINISTER.
See Landlord and Tenant, 5, 6.

DISTRESS.
See LANDLORD AND TENANT. 4.

DOCK-MASTER.
See Action on the Case. 2.

DOMICILE.
See STATUTE OF LIMITATIONS.

DORMANT PARTNER.
See Vendor and Vender, 3.

ECCLESIASTICA. BENEFICE See Annuity, 1.

EJECTMENT.

See Evidence, 17. PRINCIPAL AND AGENT, 1.

1. Where three ejectments were brought against a landlord and his two tenants, and the landlord obtained a rule for the consolidation of the three actions, and that the ejectment against one of the tenants (who was a pauper) should abide the event of the ejectment against the other, and that action was tried, and the lessor of the plaintiff obtained judgment and took possession of all the tenements, the Court compelled the landlord to pay the coats of that ejectment. Thrustout dem. Jones the Elder and Jones the Younger v. Shenton, M. 10 G. 4. 110

2. Testator devised lands to his wife for life; remainder to all the children of his brother that should be living at the time of his wife's decease. His brother left one daughter, who married, and afterwards with her husband, during the life of testator's widow, levied a fine come ceo of the lands, and declared the use to A. B. After the death of the widow A. B. brought ejectment against the tenant in possession: Held, that it was maintainable; for that although the brother's daughter had only a contingent remainder during the life of the widow, and the fine could only operate by estoppel until the contingency happened, yet afterwards it operated on the estate. Doe dem. Christmas v. Oliver, M. 181

A party in execution for more than twelve months, for the costs of an ejectment exceeding 201., is not a person in execution upon a judgment for a debt or damages not exceeding 201., within the meaning of the 48 G. 3, c. 123; and, therefore, not entitled to be discharged out of custody. Doe v. Reynolds, H. 10 & 11 G. 4.

4. In an ejectment, the Court will compel the real defendant to pay the costs, although he is not a party on the record. Doe dem. Masters v. Gray, H. 10 & 11 G. 4.

ELECTION.
See Corporation, 4.

ELEGIT.

See Power of Appointment, 1.

ENLARGEMENT OF TIME.

See Arbitrament, 1.

ENTRY IN PRIVATE BOOK.

See EVIDENCE, 6.

ERROR.

See PLEADING, 7.

ESCAPE.

See Sheriff, 1.

ESTOPPEL.
See DEVISE, 2.

EVIDENCE.

See BILL OF EXCHANGE, 3.

1. Where, in trespass, the question was, whether certain land was in the parish of A. or parish of B., the land in B. being tithe-free: Held, that ancient leases granted by the ancestor of the lessors, in which the land was described as being in parish B., were admissible as evidence of reputation that the land was in that parish. Old rates, made by the parish officers of B. on the occupiers of the land in question, were also produced, and an account containing an overseer's account, in which against the sum for which the occupier of that land had assessed there were crosses made, were produced: Held, that these were evidence that the sums assessed had been paid by the tenants. Plaxtor v. Dare, M. 10 G. 4.

2. Where it appeared in evidence that the patentee himself invented and brought into use the machine for which the patent was granted; but before that time, several other persons had seen a model and specification of such a machine, which were brought over from America: Held, that the patentee was nevertheless to be considered the inventor, within the meaning of the statute 21 Jac. 1, c. 3, s. 6, no machine having been manufactured and brought into use from the model and specification, and there being no evidence that the patentee had ever seen them. Lewis v. Marling, M. 10 G. 4.

23. In an action on a bill of exchange, purport-

ing to be drawn and accepted by a mining company, wherein the plaintiff, an endorsee for value, sought to charge the defendant as a member of that company, it was proved that the bill had been drawn and accepted by order of the directors of the company. It was proved further, that the company had entered into a contract for the purchase of mines, taken a counting-house in London, engaged clerks, and also an agent to reside in the country, and had worked some of the mines; that the defendant having applied to the secretary of the company for shares, some were appropriated to him; that he paid an instalment of 151, per share; that he attended at the counting-house of the company, and there signed some deed, and afterwards attended a general meeting of the shareholders: Held, that assuming this to be sufficient evidence of the defendant's being a partner in the company, it was in-cumbent on the plaintiff to prove that the directors of that company had authority to bind the other members, by drawing and accepting bills of exchange; and that the plaintiff not having produced the deed of copartnership, nor given any evidence to show that it was necessary, for the purpose of car-rying on the business of that mining company, or usual for other mining companies to draw or accept bills of exchange, there was no evidence to go to the jury of such an authority to draw or accept any bills, and still less to draw or accept bills in this form, which in effect were promissory notes.

Semble, also, that there was not sufficient evidence to show that the defendant had ever become a complete partner in the company, or that he had held himself out to the world as such partner. Dickinson v. Valpy, M. 10 G. 4.

4. Where, in an action by the assignees of B.

a bankrupt, in order to prove the petitioning creditor's debt, they proved that B. was indebted to one R., that a commission afterwards issued against R., and that his assignees were the petitioning creditors against B., and in order to support the commission against R., produced the proceedings under it: Held, that they were not admissible in evidence, and that the plaintiffs were bound to prove by other evidence R.'s trading, act

of bankruptcy, &c.

The plaintiff also produced an order made by the Lord Chancellor under the 6 G. 4, c. 16, s. 18, whereby, after reciting a petition to him by Muskett, he ordered, that if the commissioners should be satisfied that Muskett had proved under the commission against B. a debt sufficient to support the commission, contracted not anterior to the petitioning creditor's debt, the commission should be proceeded in: Held, that this was not a valid order, inasmuch as it did not find. or call upon the commissioners to find, that the original petitioning creditor's debt was insufficient. Muskett and Others, Assignees, v. Drummond, M. 10 G. 4.

5. It is not an answer to an action for oral slander for a defendant to show that he heard it from another, and named the person at the time, without showing that the defendant believed it to be true, and that he spoke the words on a justifiable occasion. M Pherson v. Daniels, M. 10 G. 4. 263

6. An entry made by a deceased collector of taxes in a private book, kept by him for his own convenience, whereby he charged himself with the receipt of sums of money, is evidence against a surety of the fact of the receipt of such money in an action on a bond conditioned for the due payment of the taxes by the collector, although the parties by whom the money had been paid were alive, and might have been called as witnesses; and that upon the general principle that the entry was to the prejudice of the party who made such entry. Middleton and Another v. Melton, M. 10 G. 4.

7. One of the defendants pleaded specially, that the plaintiffs, in Easter term 1827, impleaded him for the same causes of action, and that in Trinity term he pleaded the general issue to that action, and paid 51. 15s. into court; that the plaintiffs costs were taxed at 81.5s.6d., and that they agreed with him to take the sum of 51.15s. out of court; that the defendant paid the costs to the plaintiffs, and that they accepted and re-ceived the 51. 15s., together with those coats, in satisfaction and discharge of the promises mentioned in the declaration. The plaintiffs replied, that they did not agree with the defendant to take and receive the 51. 15s. out of court, and did not accept and receive that sum, together with the said costs, in satisfaction and discharge of the promises mentioned in the declaration. At the trial it appeared that the plaintiffs received their taxed costs, but gave notice to the defendant that they would not take the 51. 15s, out of court, and that they should take out a rule to discontinue the action on payment of costs. These latter costs were taxed and paid: Held, first, that the plaintiffs, in having received the amount of their taxed costs, could ! not be considered as having accepted the 51. 15s., together with those costs, in satisfaction of the promises in the declaration; and that if, in point of law, it could have been so considered, the defendant ought to have pleaded that matter specially; secondly, that the defendant, by receiving his costs, had assented to the discontinuance of the action upon the terms of the rule to discontinue. Power and Another, Assignces of Fulton, v. Butcher and Another, M. 10 G. 4.

Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer; and, therefore, an endorsee may bring evidence to show that the signatures of the supposed drawer to the bill and to the first endorsement, are in the same handwriting. Cooper v. Meyer and Another, H. 10 & 11 G. 4. 468

 A merchant resident at Sydney shipped goods for England on board the ship C., and by another ship that sailed after her, wrote to an agent in England, and desired him, if he received that letter before the C. arrived, to wait for thirty days in order to give every chance for her arrival, and then effect an in-surance on the goods. The letter was received, and the agent having waited more than thirty days, employed a broker to effect an insurance, and handed the letter to him. The broker told the underwriters when the C. sailed, and when the letter ordering the insurance was written, but he did not state when it was received, nor the order to wait thirty days after the receipt of it, before the insurance was effected. The C. never arrived. In an action on the policy, no fraud was imputed to the plaintiff; but several un-derwriters were called for the defendant, who stated that, in their opinion, the matters not communicated were material; and the jury being of opinion that a material part of the letter had been concealed, found a verdict for the defendant: Held, that the evidence of the underwriters' opinion was properly re-ceived, and that, even without it, the jury would have been bound to find that part of the letter not communicated to the underwriters was material, and that, consequently, the policy was void. Rickards v. Murdeck and Another, H. 10 & 11 G. 4.

 In an action by the payee against the maker of a promissory note, the plaintiff proved a joint and several note made by the defendant and another person. The defendant then proved that he was a mere surety, having become a party to the note at the request of the other person, who was indebted to the plaintiff, and that the note not having been paid when it became due, the plaintiff, in Hilary term 1828, brought an action against the principal, which being about to be tried at the Spring assizes 1828, the plaintiff took a cognovit for the debt, payable by three in-stalments, the first on the 28th of April, the others in May and June; but if the defendant failed in payment of any of these instalments, the plaintiff was to be at liberty immediately to enter up judgment, and issue execution for the whole sum. The first instalment was not duly paid: Held, that as the plaintiff, if he had proceeded in the action, could not have obtained judgment and issued execu-tion before the 28th of April, which was the fifth day of Easter term, the plaintiff did not, by taking the cognovit, give any time to the principal debtor.

Quære, Whether evidence was admissible

to show that the defendant was a surety, insmuch as he appeared by the terms of the promissory note to be a principal? *Price* v. *Edmunds*, H. 10 & 11 G. 4. 578

11. A plaintiff in trespass was the occupier of a farm called Tyr Adam, situate within a manor adjoining a mountain, and claimed to be exclusive owner of that part of the mountain next adjoining his farm. The question in the cause being whether he was exclusive owner of the soil, or had a right of common only over that part of the mountain, the defendant, in order to show that the plaintiff had not the right of soil, produced from the rolls of the manor an instrument, purporting to be a presentment in the year 1759, wherein the jurors, after reciting that they were sworn to view such part of the waste land as lieth within the lordship as was claimed by A. B. to belong to his tenement called Tyr Adam, upon their oaths said that they had considered the claim and the evidence, and presented that all the said land within the said boundaries were part and parcel of the common called K., and that neither the said A. B. nor the tenants or occupiers of the tenement called Tyr Adam, had any right to the same, or any further or greater right than such as the other freehold tenants of the lordships had for their commonable cattle:

Held, that this instrument was not admissible in evidence either as a presentment, because the homage had no right to decide the claim made by an individual to the freehold, they being interested, nor as an award, because there was no mutual submission, nor as evidence of reputation, because it was the declaration of the homage post litem motam. Richards v. Bassett, H. 10 & 11 G. 4. 657

12. In action by bill in the King's Bench, the defendant may, under the general issue, give in evidence matter (amounting to accord and satisfaction of debt or damages and costs) which occurred after the issuing of the latitat and before declaration; and such matter is an answer to the action. Worswick, Administrator, v. Beswick and Others, E. 10 & 11 G. 4.

13. Assumpsit by the assignees of a bankrupt against a sheriff, to recover the proceeds of goods seized under a fi. fa. The defendant did not give any notice to dispute. The plaintiffs proved that an act of bankruptcy was committed before the levy: Held, that they were not bound to prove that a petitioning creditor's debt existed at that time, per Lord Tenterden, C. J., and Parke, J. Bayley and Littlepale, Js., dubitantes. Norman and Another, Assignees, v. Booth and Another, E. 10 & 11 G. 4.

14. Where a trader being under apprehension of arrest gave directions to his servant to deny him in case A., a sheriff's officer, called: Held, that the sheriff's officer not having called, this of itself was not any evidence of a beginning to keep house.

Semble, that in order to constitute an act of bankruptcy, by departing from the dwelling-house, the departure must be with an absolute intent to delay creditors. If it be only with intent to delay creditors in case a particular event occurs, and that event does not occur, it is not an act of bankruptcy. Fisher and Another, Assignees, v. Boucher and Another, E. 10 & 11 G. 4. 705 15. Where a promissory note is, on the face of it, made payable on demand, oral evidence

of an agreement entered into, when it was made, that it should not be paid until a given event happened, is inadmissible. Moseley,

Assignee, v. Hanford, E. 10 & 11 G. 4. 16. A parish certificate, dated the 16th of April, 1748, purported in the body of it to have been granted to a pauper and his family by two churchwardens and two overseers. It appeared that on the 27th of May, 1747 five overseers had been appointed, two of whom had signed the above certificate; and an indenture of a parish apprentice of that date recited, that the said five persons were at that time overseers, and that four persons were named churchwardens, two of whom signed the certificate; and that on the 6th of July, 1748, five overseers were again appointed; that four churchwardens had been regularly chosen from 1633 to 1829. By the visitation books for 1746, it appeared that four churchwardens were sworn in. visitation books for 1747 were lost. From those for 1748 it appeared that on the 19th of September, 1748, four churchwardens were sworn in for the year ensuing, but that between the years 1683 and 1829, in twelve instances, less than four churchwardens had been sworn in. At the sessions it was insisted, that in order to give effect to so ancient a document, it ought to be presumed either that a new and valid appointment of overseers had been made between the 24th of October, 1747, and the date of the certificate, 16th of April, 1748, or that at that date there were not four churchwardens sworn in. The court of quarter sessions having refused so to presume, held the certificate to be invalid, and this Court affirmed the decision. E. 10 & 11 G. 4.

17. In ejectment for lands in B., it appeared that in 1788 E. G. purchased the estate in fee, of which he died seised and intestate in 1790, leaving two sons, J. G. and E. G., and in 1812 J. G. died intestate, leaving a son J., the lessor of the plaintiff. In 1788 W. C. was tenant in possession, and so continued until the time of the trial. From the death of E. G. the purchaser, W. C. paid his rent (with the exception hereinafter mentioned) to E. G., the son, until 1817, when he died, leaving two sons, J. G. (who received the rent from 1817 until the time of his death in 1825), and E. G., the defendant. J. G., the eldest son of the purchaser, received in 1804 a half year's rent from W. C., and in 1805 sold and cut down timber on the estate. June 1812 J. G. (the lessor of the plaintiff) employed an agent to demand of W. C. the rent in arrear, when he answered, that his connexion with J. G. as tenant had ceased for several years. In 1820 this action of ejectment was commenced, and the demise was laid on the 1st of May, 1813: Held, first, that there was no adverse possession to bar the recovery of the lessor of the plaintiff in ejectment; and, secondly, that the answer of W. C. in June 1813, was evidence of an antecedent disclaimer, which would suffice to sustain the demise laid on the 1st of May 1813, without proof of any notice to quit. Doe dem. J. Grubb v. E. Grubb, E. 10 & 11 G. 4.

EXECUTION.

See BILL OF EXCHANGE, 9. EJECTMENT, 3.

EXECUTOR.

An incumbent of a living is bound to keep the parsonage-house and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply or maintain anything in the nature of ornament, such as painting (unless that be necessary to preserve exposed timber from decay), and whitewashing and papering; and in an action for dilapidations against the executors of a deceased rector by the successor, the damages are to be calculated upon this principle. Wise v. Metcalfe, M. 10 G. 4. 299

EXECUTORY DEVISE.

See DEVISE, 4.

FINE. See Devise, 1, 2, 3.

FOREIGN BILL.
See BILL OF EXCHANGE. STAMP, 1.

FORMEDON.

Where after demurrer to a replication in formedon, the demandant obtained judgment, and upon the trial of several issues in fact, a verdict being found in favour of the demandant, the latter had judgment that he recover his seisin against the tenant, and upon writ of error brought, the common errors being assigned, the judgment was affirmed: Held, that the demandant was entitled to double costs under the statute 13 C. 2, stat. 2, c. 2, s. 10. Cockerell and Another v. Cholmondeley (in Error), H. 10 & 11 G. 4.

FRAUDS. STATUTE OF.

1. Where A. agreed to supply B. with a quantity of turnip seed, and B. agreed to sow it on his own land, and sell the crop of seed produced therefrom to A. at 12. 1s. the Winchester bushel; and the seed so produced at the price agreed upon exceeded in value the sum of 102.: Held, that this contract was within the seventeenth section of the statute of frauds. and void for want of a memorandum in writing.

Semble, that since the 5 G. 4, c. 74, an agreement to sell by the Winchester bushel, not containing any declaration of the proportion which that measure bears to the imperial bushel, is void. Watts v. Friend, H. 10 & 11 G. 4.

2. A. being indebted to the plaintiff for half a year's rent of a farm, due on the 25th of March, the defendant, an auctioneer, was about to sell the goods of A. on the premises in the month of August. On the day of the sale the plaintiff (the landlord) came there to distrain for his rent. The defendant, in consideration that the plaintiff would not distrain, verbally promised to pay him not only the rent due, but the rent that would become due at the Michaelmas following: Held, that the promise to pay the accruing rent was a promise founded on a new consideration. distinct from the demand which the plaintiff had had against A., and therefore void by the fourth section of the statute of frauds; and

that the promise being entire and in the commencement void in part, were void altogether; and that the plaintiff, therefore, could not recover from the defendant the rent due on the 25th of March. Thomas v. Williams, H. 10 & 11 G. 4.

FRAUDULENT PREFERENCE. See BANKBUFT. 2.

FRIENDLY SOCIETY.

Where a member of a benefit society, complaining of relief having been improperly refused. applies for a summary remedy under the 49 G. 3, c. 125. s. 3, the proceedings must be before two justices resident in the county where the society is held. Sharpv. Aspisall and Parker, M. 10 G. 4.

GAME. See Prisoner, 4.

GENERAL ISSUE.
See EVIDENCE, 12.

GUARANTEE.
See Partnership, 2.

HAWKER AND PEDLAR.

1. By the statute 50 G. 3, c. 41, s. 23, it is enacted, that nothing in that act shall extent to hinder the real worker or maker of any goods, &c., or his, her, or their children, apprentices, or known agents, or servants usually residing with such real worker or maker, from carrying abroad or exposing to sale, and selling by retail, or otherwise, any of the said goods, &c., of his, her, or their own making, in any mart, market, or fair, and in every city, borough, town corporate, and market-town: Held, that this exemption applied to such agents or servants only as resided in the same house with the maker of the goods, as a part of his family. The King v. Mainwaring, M. 10 G. 4.

2. Barm, or yeast. is victuols within the elempting clause of the hawkers' and pediar act 50 G. 3, c. 41, s. 23, and, therefore a person purchasing that article of brewers and carrying the same from town to town and selling the same, is not liable to the penalty imposed by that statute upon hawkers trading without a license. The King v. Hodgkinson, M. 10 G. 4.

3. A servant of a licensed tea dealer was sent

B. A servant of a licensed tea dealer was sent by his master round the neighbourhood to ask for orders for tea, and was subsequently sent by his master to deliver small parcels of tea in pursuance of those orders: Held, that this was not a carrying to sell within the meaning of the hawkers' and pedlars' act, 50 G. 3. c. 51, so as to subject the servant to a penalty for trading without a license. The King v. Ivie M Knight, E. 10 & 11 G. 4.

HIGHWAY.

 An order of justices, for diverting a public highway and substituting a new one for it, containing also an order for stopping up the old highway, is bad, inasmuch as they have no power to stop up the old road until the new one has been made.

An order for diverting an old highway and substituting a new one, must show on the face of it that the justices viewed the line of the proposed new road. The King v. The Justices of Kent. H. 10 & 11 G. 4. 477

A Surveyor of highways cannot maintain an action against the late surveyor for the balance remaining in his hands, until his accounts have been settled and allowed, or disallowed, in the manner pointed out by the 13 G 3, c. 78, s. 48. Heudebourck v. Langton, H. 10 & 11 G. 4.

ILLEGAL CONTRACT.

See Partnership, 2.

IMPERIAL MEASURE. See Frauds, Statute of.

INCLOSURE ACT.

The commissioners under an enclosure act were required to allot the lands directed to be enclosed unto the several proprietors thereof, in such shares, quantities, &c., as they should adjudge to be a just compensa-tion for their several and respective lands, rights of common, &c., therein; and were empowered also to set out, allot, and award any lands, &c., within the parish of A., "in lieu of or in exchange for any other lands, &c., within the said parish; provided that all such exchanges should be ascertained, specified, and declared in and by the award to be made by the consent of the owners of the lands exchanged." The commissioners awarded a certain allotment to A. B. " as a compensation for his open field, lands, and rights of common, and an old enclosure given up by A. B. to be allotted by the commissioners in exchange:" Held, that the commissioners had not pursued the powers vested in them by the act, and that A. B. could not make a good title to the allotment. Wingfield and Others v. Tharp, E. 10 & 11 G. 4. 785 G. 4.

INDENTURE.

See BILL OF EXCHANGE, 11.

INDICTMENT.

Where an indictment alleged that A., B., C., D., &c., on, &c., at, &c., to the number of three and more, together, did by night unlawfully enter divers closes, &c., there situate and being in the occupation of E. F., and were then and there in the said closes, &c., armed with guns. for the purpose of destroying game: Held, that it did not contain a sufficient averment that the defendants were by night in the closes, armed, for the purpose of destroying game; and the judgment given for the crown at the Chester great sessions was reversed. Davies and Others v. The King (in Errer), M. 10 G. 4.

INDORSEE.

See BILL OF EXCHANGE, 8.

INDORSEMENT.
See EVIDENCE, 8.

INFERIOR COURT.
See ATTORNEY, 1. PRACTICE, 5.

INSOLVENT ACT.
See INSOLVENT DEBTOR.

INSOLVENT DEBTOR.

See EJECTMENT. 3.

The assignment of the real and personal estate and effects of an insolvent debtor under the statute 7 G. 4, c. 57. passes to the assignee only what the insolvent was entitled to at law and in equity; and where an insolvent had deposited with a creditor the title-deeds of an estate, as security for a debt: Held, that the assignee of the insolvent debtor could not recover from such creditor the rent of such estate received by the latter, subsequently to the discharge of the insolvent debtor. Garry, Assignee, v. Sharratt, E. 10 & 11 G. 4.

INSURANCE.

1. A., in England, contracted with B. at Petersburgh to send him a cargo of deals, to be paid for by a bill at three months, which he duly accepted. The deals were shipped, and A. effected an insurance. The ship was stranded on the voyage, near Elsinore, and the deals were saved, but so much injured as not to be worth sending for. A., on hearing of the accident, gave the underwriters notice of abandonment the day before the bill became due, which they refused to accept. B.'s agent stopped the goods in transitu at Elsinore. A. having become insolvent: Held, that his assignee, under a commission of bankrupt afterwards issued against him, could not recover on the policy, inasmuch as A., after the stoppage in transitu, had not any insurable interest. Clay, Assignee, v. Harrison, M. 10 G. 4.

2. A merchant resident at Sydney shipped

goods for England on board the ship C., and by another ship that sailed after her, wrote to an agent in England, and desired him, if he received that letter before the C. arrived, to wait for thirty days in order to give every chance for her arrival, and then effect an insurance on the goods. The letter was re-ceived, and the agent having waited more than thirty days, employed a broker to effect an insurance, and handed the letter to him. The broker told the underwriters when the C. sailed, and when the letter ordering the insurance was written, but he did not state when it was received, nor the order to wait thirty days after the receipt of it, before the insurance was effected. The C. never arrived. In an action on the policy, no fraud was imputed to the plaintiff; but several underwriters were called for the defendant, who stated that, in their opinion, the matters not communicated were material; and the jury being of opinion that a material part of the letter had been concealed, found a verdict for the defendant: Held, that the evidence of the underwriters' opinion was properly received, and that, even without it, the jury would have been bound to find that the part of the letter not communicated to the underwriters was material, and that, consequently, the policy was void. Rickards v. Murdock, H. 10 & 11 G. 4.

- 3. By a policy of insurance on a ship for a year, the underwriter stipulated to return a part of the premium, if sold or laid up, for every uncommenced month: Held, that the words laying up meant a laying up for the season, without being employed for the current year; and, therefore, that where a vessel insured for one year had been laid up for several months during the year, but was employed again within the year, that was not such a laying up as to entitle the assured to a return of premium. Hunter v. Wright, E. 10 & 11 G. 4.
- G. 4.

 4. The statute 14 G. 3, c. 48, by section 1 enacts, "that no insurance shall be made on lives, or any other event wherein the person for whose benefit the policy shall be made shall have no interest, and that every such assurance shall be void;" and by section 3, "that in all cases where the insured hath interest in such life or event, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured in such life or other event:" Held, that in order to render a policy valid within the meaning of this set, the party for whose benefit it is effected must have a pecuniary interest in the life or event insured; and, therefore, a policy effected by a father in his own name on the life of his son, he not having any pecuniary interest therein, was void. Halford v. Kymer and Others, E. 10 & 11 G. 4.
- 5. An assured who resided at Plymouth employed an insurance-broker in London to recover a loss from the underwriters; and the latter adjusted the loss by setting off in account against it a debt due to them from the broker for premiums. The name of the underwriter was then struck off the policy. was proved to be the custom at Lloyd's Coffee House in London to consider such set-off as payment between the broker and underwriter. The broker became bankrupt, and never paid the money to the assured: Held, that the set-off in account between the underwriter and the broker was not payment to the assured, inasmuch as the broker had only authority to receive payment for the assured in money; that the custom which pre-vailed at Lloyd's Coffee House was not binding on the assured, who were not shown to be cognisant of it, or to have assented to it; and that the erasure of the name of the underwriter from the policy, that not having been done with the assent of the assured, did not discharge the former. Bartlett and Another v. Pentland, E. 10 & 11 G. 4. 760

6. A broker who has effected a policy, and has a lien on it for his premiums, may be compelled by the assured to produce it on the trial of an action against the underwriters, and he is a competent witness (notwithstanding his lien) to prove all matters connected with the policy.

A policy was effected "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Europe, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, &c., upon goods in certain vessels, beginning the adventure from the loading thereof aboard the said ship as above." The ship took in part of the cargo at Batavia, then went to S., another port in the East Indies (not in the course of a voyage from Ba-

tavia to Europe, and not specified by name in the policy), and took in other goods, then returned to Batavia, whence she afterwards sailed for Europe, and was lost by perils of the sea: Held, that going to S. was not a deviation, and that the goods there taken on board were protected by the policy. Hunter v. Leathley, E. 11 G. 4.

INSURANCE BROKER.
See BANKRUPT, 6.

INTEREST. See BILL OF EXCHANGE, 3.

JOINT ACTION.
See COVENANT, 1.

JOINT STOCK COMPANY.

In an action on a bill of exchange, purporting to be drawn and accepted by a mining company, wherein the plaintiff, endorsee for value, sought to charge the defendant as a member of that company, it was proved that the bill had been drawn and accepted by order of the directors of the company. It was proved further, that the company had entered into a contract for the purchase of mines, taken a counting-house in London. engaged clerks, and also an agent to reside in the country, and had worked some of the mines; that the defendant having applied to the secretary of the company for shares, some were appropriated to him; that he paid an instalment of 151. per share; that he attended at the counting-house of the company, and there signed some deed, and afterpany, and there signed some deed, and atter-wards attended a general meeting of the shareholders: Held, that assuming this to be sufficient evidence of the defendant's being a partner in the company, it was incumbent on the plaintiff to prove that the directors of that company had authority to bind the other members, by drawing and accepting bills of exchange; and that the plaintiff not having produced the deed of copartnership, nor given any evidence to show that it was necessary, for the purpose of carrying on the business of that mining company, or usual for other mining companies to draw or accept bills of exchange, there was no evidence to go to the jury of such an authority to draw or accept any bills, and still less to draw or accept bills in this form, which in effect were promiseory notes.

Semble, also, that there was not sufficient evidence to show that the defendant had ever become a complete partner in the company, or that he had held himself out to the world as such partner. Dickinson v. Valpy, M. 10 G. 4.

JUDGE'S CERTIFICATE.
See ATTORNEY, 1. SPECIAL JURY, 1.

JUDGMENT.

See ABATEMENT OF SUIT. BILL OF EXCHANGE, 9. EJECTMENT, 3.

JUDGMENT CREDITOR.
See Power of Appointment, 1.

JUSTICES.

1. The proceedings against a party in a summary manner under the 5 Ann. c. 14, for keeping and using a gun to destroy game, is of a judicial nature, at which all persons have a primâ facie right to be present; and, therefore, where a magistrate had, without any specific reason, caused a party who claimed a right to be present to be removed from a justice-room, where such a proceeding was going on, it was held that he was liable to an action of trespass. Daubney, Gent., One, de., v. Cooper, M. 10 G. 4.

2. By an act of the 44 G. 3, for making the river Tone navigable, conservators were appointed, and all powers given by two former acts of parliament to the Bishop of Bath and Wells and the justices of the peace for the county of Somerset, to examine, state, correct, and allow the accounts of the conservators of the river Tone, were repealed; and instead of such powers, it was enacted, that the accounts of the conservators should be made up to the 24th of June yearly, and that the accounts so made up, and vouchers for the same, should be brought before the Bishop of Bath and Wells, or any five of the said justices without the said bishop, then and there to be examined, stated, and corrected, and the accounts, whether or not the same should have been examined and corrected by the said bishop and justices, were to be brought before the bishop and justices, or any five of the justices in the absence of the bishop, at the opening of the court of the next quarter sessions to be held after the 1st day of August yearly; and the bishop and justices at the said sessions, or any five of the justices in the absence of the bishop, were required to examine, state, and allow the said accounts of the conservators, and that allowance was to be final and conclusive: Held. that the bishop and justices were bound to examine, state, and allow the accounts at the first sessions, and had no authority to adjourn the examination to a subsequent ses-

sions. Bridgenater and Taunton Canal Company v. Bluett, M. 10 G. 4.

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3. An order of justices, for diverting a public highway and substituting a new one for it, centaining also an order for stopping up the old highway, is bad, inasmuch as they have no power to stop up the old road until the

new one has been made.

An order for diverting an old highway and substituting a new one, must show on the face of it that the justices viewed the line of the proposed new road. The King v. The Justices of Kent, H. 10 & 11 G. 4.

4. Where a borough town was incorporated by charter, and certain members of the corporation were made justices (but without power to try felonies), and the charter contained a general non-intromittant clause, wholly preventing the interference of the county justices within the town: Held, that a rate in the nature of a county rate, might be imposed by the justices of the town, under the authority given by the 55 G. 3, c. 51. Mercer v. Davis, H. 10 & 11 G. 4.

LAND-TAX.

See LANDLORD AND TENANT, 3.

LANDLORD AND TENANT.

Case by the owner of a house against his lessee for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises. Plea, not guilty. The jury found that the lessee did open the door without leave, but that the house was not in any respect weakened or injured by it. The learned Judge thereupon directed a verdict to be entered for the plaintiff with nominal damages, subject to a case: Held, on argument, that the plaintiff was not, at all events, entitled to a verdict; but as the reversionary interest of the plaintiff might be injured, although the house itself was not, and that question had not been submitted to the jury, the Court ordered a new trial. Young v. Spencer and Another, M. 10 G. 4.

Semble, that where a notice to quit is given by an agent of the landlord, the agent ought to have authority to give it at the time when it begins to operate; and that a subsequent recognition of the authority of the agent will

not make the notice good.

Assuming that a subsequent recognition of the authority of an agent can in any case be sufficient, the bringing of an ejectment is not a sufficient recognition of such authority to entitle the lessor of the plaintiff to recover, because the recognition ought at all events to be before the day of the demise laid in the declaration. Doe dem. Mann, Clerk, v. Walters, H. 10 & 11 G. 4.

- 3. Where the owner of a house, in consideration of a premium, demised it at one-third of its annual value, and afterwards redeemed the land-tax: Held, that he was entitled to receive from the tenant an annual payment equal to two-thirds of the land-tax so redeemed. Ward v. Const., H. 10 & 11 G. 4.
- 4. A. being indebted to the plaintiff for half a year's rent of a farm, due on the 25th of March, the defendant, an auctioneer, was about to sell the goods of A. on the premises in the month of August. On the day of the sale the plaintiff (the landlord) came there to distrain for his rent. The defendant, in consideration that the plaintiff would not distrain, verbally promised to pay him not only the rent due, but the rent that would become due at the Michaelmas following: Held, that the promise to pay the accruing rent was a promise founded on a new consideration, distinct from the demand which the plaintiff had had against A., and therefore void by the fourth section of the statute of frauds; and that the promise being entire and in the commencement void in part, was void altogether; and that the plaintiff, therefore, could not recover from the defendant the rent due on the 25th of March. Thomas v. Williams, E. 10 & 11 G. 4.
- 5. A minister of a dissenting congregation, who after his election was placed in possession of a chapel and dwelling-house by certain persons, in whom the legal fee was vested in trust to permit and suffer the chapel to be used for the purpose of religious worship, was a mere tenant at will to those persons, and his interest was determinable by a demand of possession, without any previous notice to quit. Doe dem. Jones v. Jones and Another, E. 10 & 11 G. 4.

6. A minister of a dissenting congregation placed in possession of a chapel and dwelling-house by certain persons, in whom the legal estate is vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those trustees; and his tenancy is determined instanter by a demand of possession. He is not entitled de jure, before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture.

Semble, that he will not be a trespasser, if he enter afterwards to remove his goods, and continue a reasonable time for that purpose. Doe dem. Nicholl and Others v. M'Kaeg, E. 10 & 11 G. 4. 721

LEASE.
See Stamp, 2.

LIBEL.

In an action for a libel, where the language is ambiguous, and it is doubtful whether it imputes any injurious matter to the plaintiff, the proper question for the jury is not whether the intention of the publisher be to injure the plaintiff, but whether the tendency of the matter published be injurious to him. Fisher v. Clement, H. 10 & 11 G. 4.

LICENSE.
See PERAL ACTION, 1

LIEN.

 Where the certificate of a ship's register has been deposited as a security for advances for the use of the ship: Held, that this gives the holder a lien sufficient to defeat an action of trover for the certificate. Bowen v. Fos and Others, M. 10 G. 4.

2. In 1822 an estate was conveyed to such uses as A. B. should by deed, &c., appoint, and in the mean time to the use of himself for life, &c. In 1826 a judgment was obtained against him, and in 1827 he mortgaged this estate, and appointed the use to C. D. for 500 years. After the execution of this deed, the judgment creditor issued an elegit: Held, that his lien upon the land was defeated by the execution of the power. Doe dem. Wigan v. Jones, H. 10 & 11 G. 4.

LIFE INSURANCE.
See Insurance, 4.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

LONDON COURT OF REQUESTS ACT.

See COURT OF REQUESTS ACT.

LORDS' ACT.

By the practice of this Court, the turnkey of a prison is the agent of a debtor confined in execution, for the purpose of receiving the sixpences under the lords' act, and therefore, by the acceptance of spurious coin, binds the debtor. Gainsford v. Marshall, M. 10 G. 4.

MAGISTRATE.
See Trespass. 1.

MANDAMUS.
See NOTARY.

MAYOR.
See Corporation, 4.

MONEY HAD AND RECEIVED.

See Assumpsit. 2.

MONEY PAID.

See Assumpsit, 2.

MORTGAGE.
See Power of Appointment.

NEW TRIAL.

See Action on the Case.

NONSUIT.

See ABATEMENT OF SUIT.

NOTARY.

An act of parliament required, that before a person should be allowed to act as a public notary, he should have been admitted and enrolled in the court wherein notaries had been usually admitted; and that no person should be enrolled as a public notary unless he should have been bound by contract of apprenticeship to serve for seven years to a public notary, and during that term should have continued in such service; and further, that he should, during the whole time and term of service specified in such contract of apprenticeship, or during the space of seven years thereof at least, continue and be acts-ally employed by such public notary in the proper business of a public notary: Held. that a party bound apprentice for the term of seven years, who during the whole of that term acted as a banker's clerk daily till five o'clock in the evening, and after that how went to the notary and presented bills of exchange and prepared protests, was not actually employed by the public notary during the whole period of seven years, within the meaning of the act of parliament, and consequently that he was not entitled to act as a notary; and this Court refused a mandamus to the Scriveners' Company to admit such a party to the freedom of the company, in order that he might be admitted to practise as a notary. The King v. The Scriveners' Coma notary. The King v. ! puny, H. 10 & 11 G. 4.

NOTICE OF APPEAL.

See APPEAL, 1, 2.

NOTICE TO QUIT.

See Landlord and Tenant, 2, 5, 6.

ORDER OF NISI PRIUS.

See Arbitrament, 2.

ORDER OF JUSTICES.

See Justices, 3.

ORDER OF REFERENCE.

See Arbitrament, 2.

PARISH CERTIFICATE.

See EVIDENCE, 16.

PARTNERSHIP.

See BILL OF EXCHANGE, 3.

1. An attorney carried on business under the firm of A. and Son; the son was not in fact a partner, but acted as clerk to his father, and received a salary: Held, that A. might maintain an action in his own name, to recover from a client the amount of a bill for business done. Kell, Gent., One, &c., v. Nainby, M. 10 G. 4.

2. A., B., C., D., and E. carried on trade in partnership, as distillers, and C. alone carried on the business of a retail dealer in spirits, within two miles of the distillery, contrary to the 4 G. 4, c. 94, as. 132, 133, and his name was not inserted as one of the partners in the distillery in the excise-book, or license, as required by the 6 G. 4, c. 81, s. 7: Held, these being mere revenue regulations, the breach of them by one of the partners, with the knowledge of the others, did not render the trade carried on by the five so illegal as to deprive them of the right to recover the price of spirits sold by them, or for breach of a guarantee for the duly accounting of an agent, to whom they had consigned the spirits for sale. Brown and Others v.

Duncan, M. 10 G. 4. 3. In an action on a bill of exchange, purporting to be drawn and accepted by a mining company, wherein the plaintiff, an endorsee for value, sought to charge the defendant as a member of that company, it was proved that the bill had been drawn and accepted by order of the directors of the company. It was proved further, that the company had entered into a contract for the purchase of mines, taken a counting house in London, engaged clerks, and also an agent to reside in the country, and had worked some of the mines; that the defendant having applied to the secretary of the company for shares, some were appropriated to him; that he paid an instalment of 151 per share; that he attended at the counting-house of the company, and there signed some deed, and afterwards attended a general meeting of the shareholders: Held, that assuming this to be sufficient evidence of the defendant's being a partner in the company, it was incumbent on the plaintiff to prove that the directors of that company had authority to bind the other members, by drawing and accepting bills of exchange; and that the plaintiff not having produced the deed of copartnership, nor given any evidence to show that it was necessary, for the purpose of car-rying on the business of that mining com-pany, or usual for other mining companies to draw or accept bills of exchange, there was no evidence to go to the jury of such an authority to draw or accept any bills, and still less to draw or accept bills in this form, which in effect were promissory notes.

Semble, also, that there was not sufficient evidence to show that the defendant had ever become a complete partner in the company, or that he held himself out to the world as such partner. Dickinson v. Valpy, M. 10 G. 4.

128 4. On the 24th of June, 1824, C. agreed to become a partner with A. and B., the business to be carried on in the name of A. and B. for the benefit of A., B., and C.; that the partnership should be considered as com-mencing on the 18th of May preceding. Be-fore the 24th of June A. and B. had opened an account with certain bankers, which was continued in their names till the 22d of September, when the partnership as to B. was dissolved. All the business with the bankers was transacted by B., and the bankers did not know that C. was a partner till the account was closed. B. used the accounts for the purposes of the firm of which C. was a member, as well as for others. On the 21st of May he endorsed a bill of exchange in the partnership names of A. and B. to the bankers, who discounted it, and placed it to the credit of the account. On the 13th of July he endorsed two others in a similar manner: Held, that as the bankers did not know that the money raised by these bills was intended to be applied to other than partnership purposes, C. was liable on the last two bills, but not on the first, he not having been an actual partner at the time when it was discounted. Vere and Others v. Ashby and Others, M. 10 G. 4.

PATENT.

Where a patentee of an improved machine claimed as his invention a part of it which turned out to be useless: Held, that this did not vitiate the patent, the specification not describing it as essential to the machine.

Where it appeared in evidence that the patentee himself invented and brought into use the machine for which the patent was granted; but before that time, several other persons had seen a model and specification of such a machine, which were brought over from America: Held, that the patentee was nevertheless to be considered the inventor, within the meaning of the statute 21 Jac. 1, c. 3, s. 6, no machine having been manufactured and brought into use from the model and specification, and there being no evidence that the patentee had ever seen them. Lewis v. Marling, M. 10 G. 4.

PAYMENT.

A. wishing to obtain credit with his bankers, in 1817 prevailed upon three persons to join him in a promissory note, whereby they jointly and severally promised to pay the bankers or order 300l. The bankers gave A. credit in his pass-book for 300l. on account of the note, and charged him with interest for the same yearly. Upon two of the partners retiring from the banking-house a balance was struck between the old and new firm, and the promissory note was delivered to the new firm, but not endorsed to them. A. at one time had in the hands of his bankers a balance exceeding the amount of the note. He paid interest to the banking-house annually:

Held, that the note being evidently in-

tended to be a continuing security, it was not discharged by reason of A. at one time having in the hands of the bankers a balance exceeding in amount the sum secured by the note. Pease and Others v. Hirst, M. 10 G.

PENAL ACTION.

See PRACTICE, 12.

The master of a ship is not liable to the penalty imposed by the 6 G. 4, c. 125, s. 58, for refusing to employ a pilot, unless the pilot produces his license as required by s. 66, although it is not demanded. Hammond v. Blake, H. 10 G. 4.

PILOT.

See PENAL ACTION.

PLEADING.

1. Where, by a memorandum at the foot of a promissory note, it was made payable at a particular place: Held, that this did not constitute a part of the contract, so as to make it necessary for a party suing on the note to aver and prove a presentment there. Williams v. Waring, M. 10 G. 4.

2. Where an indictment alleged that A. B., &c., C. D., at, &c., to the number of three and more, together, did by night unlawfully enter divers closes, &c., there situate and being in the occupation of E. F., and were then and there in the said closes, &c., armed with guns, for the purpose of destroying game: Held, that it did not contain a sufficient averment that the defendants were by night in the closes, armed, for the purpose of destroying game; and the judgment given for the crown at the Chester great sessions was reversed. Davies and Others v. The King (in Error), M. 10 G. 4.

3. In a declaration against the sheriff for an escape, it is sufficient to allege that the writ directing the arrest was duly endorsed for bail without adding "by virtue of an affidavit made and filed of record." Nightingale vi Wilcoxson and Others (in Error), M. 10 G. 202

4. A variance between the writ and the count (the ac etiam being in case on promises, but the declaration in debt), is a ground for discharging the defendant out of custody on filing common bail, where the sum for which the bail-bond must be taken exceeds 40l. Mayfield v. Davison, M. 10 G. 4.

5. In an action for slander, for words spoken of the plaintiff in his trade, importing a direct assertion made by defendant, that the plaintiff was insolvent, the defendant pleaded, that one T. W. spoke and published the aime words to the defendant, and that the defendant, at the time of speaking and publishing them, declared that he had heard and neen told the same from and by the said T. W.: Held, upon demurrer, that this plea was bad, first, because it did not confess and avoid the charge mentioned in the declaration, the words in the declaration importing an unqualified assertion made by the defendant in the words stated in the declaration, and the words in the plea importing that the defendant mentioned the fact on the authority of T. W.

Secondly, because it did not give the plaintiff any cause of action against T. W., inasmuch as it did not allege that T. W. spoke the words falsely and maliciously.

Thirdly, because it is not an answer to an action for oral slander for a defendant to show that he heard it from another, and named the person at the time, without showing that the defendant believed it to be true, and that he spoke the words on a justifiable occasion.

M' Pherson v. Daniels, M. 10 G. 4.

The declaration stated, that the defendants were indebted to the bankrupt before his bankruptcy for work and labour, as an insurance-broker, and for divers premiums of insurance due and payable from the defendants to the bankrupt, for and in respect of his having underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance for the said defendants, at their request. The plaintiffs, by their particulars of demand, claimed to recover for insurance. The company would have allowed the broker, when he paid the premiums, to deduct 311. Is, as commission: Held, that his assignees were entitled to recover that sum under the words in the declaration, "work and labour" done by the broker, and under the word "insurance," in the particulars of demand:

Held, also, that the assignees were entitled to recover the amount of the premiums which the oankrupt had become liable to pay to the company under that part of the count which charged that the defendants were indebted to the plaintiffs for premiums due to the bankrupt for and in respect of his having caused and procured to be underwritten divers policies: but that the plaintiffs were not entitled to recover such sums under the count for money paid, because the broker had not actually paid the sums, or done anything which was equivalent to payme::

One of the defendants pleaded specially, that the plaintiffs, in Easter term 1827, impleaded him for the same causes of action, and that in Trinity term he pleaded the general issue to that action; that he paid ${\cal A}$ 15s. into court; that the plaintiffs' coats were taxed at 81. 5s. 6d., and that they agreed with him to take the sum of 51. 15s. out of court; that the defendant paid the costs to the plaintiffs, and that they accepted and received the 51. 15s., together with those costs, in satisfaction and discharge of the promises mentioned in the declaration. The plaintiffs replied, that they did not agree with the defendant to take and receive the 51. 15s. out of court, and did not accept and receive that sum, together with the said costs, in satisfaction and discharge of the promises mentioned in the declaration. At the trial it appeared that the plaintiffs received their taxed costs, but gave notice to the defendant that they would not take the 51. 15s. out of court, and that they should take out a rule to discontinue the action on payment of costs. These latter costs were taxed, and the defendants received the difference between those costs and the sum which they had previously paid under the rule to pay money into court: Held, first, that the plaintiffs, in having received the amount of their taxed costs, could not be considered as having accepted the 51. 15s., together with those costs, in satisfaction of the promises in the declaration; and that if, in point of law, it could have been so considered, the defend-

ant ought to have pleaded that matter specially; secondly, that the defendant, by re-ceiving his coats, had assented to the discontinuance of the action upon the terms of the rule to discontinue. Power and Another, Assignees of Fulton, v. Butcher and Capet,

7. In quare impedit by a party claiming to present in the fourth turn in the right of one of four coparceners, it is sufficient to allege in the declaration a presentation by the ances-tor under whom all the coparceners claimed. Declaration alleged that the advowson had descended to the four coparceners, and they not agreeing to present jointly on the first vacancy, the elder sister presented, and afterwards, on two subsequent vacancies, that A. B. and C. D. presented in right of the second and third sisters respectively: Held, that it was to be presumed that those presentations were by right, and not by usur-pation, and therefore did not turn the estate of the consrceners into a mere right; and that quare impedit was maintainable by a grantee of the fourth coparcener:

Held, that it was not necessary for the plaintiff claiming to present in the fourth turn in right of the youngest sister, to show that the presentations in the turns of the other

sisters were made by right.

A conveyance of the interest of the fourth sister, at a time when the church was full of the clerk presented by the eldest, in consideration of 20s., of true and faithful services done, and for good and valuable consideration, is not, on the face of it, fraudulent against a subsequent purchaser, and is not to be so deemed after a verdict found for the plaintiff on an issue joined on a plea alleging such fraud. Gully and Others v. The Bishop of Exeter and Another, H. 10 & 11 G. 4.

> PUACHING. See INDICTMENT.

> > POOR.

See CHURCHWARDENS AND OVERSEERS.

POOR'S RATE. See RATE.

POWER OF APPOINTMENT.

1. In 1822 an estate was conveyed to such uses as A. B. should by deed, &c., appoint, and in the mean time to the use of himself for life, &c. In 1826 a judgment was obtained against him, and in 1827 he mortgaged this estate, and appointed the use to C. D. for 500 years. After the execution of this deed, the judgment creditor issued an elegit: Held, that his lien upon the land was defeated by the execution of the power. Doe dem. Wigan v. Jones, H. 10 & 11 G. 4.

2 An estate, comprising a manor and tenements, with the appurtenances, was devised to trustees to the use of the eldest son of Sir H E for life, without impeachment of waste, with remainders to trustees to preserve contingent remainders, with remainder to the first and other sons of his eldest son in tail male. &c., with a power to the trustees, at the request of the person who for the time being should be in possession of or entitled to the rents and profits of the said manor and tenements, with the appurtenances, by virtue of the limitations therein contained, by any deed or writing, to make sale or dispose of the same, or of any part or parts of the manor and tenements aforesaid, with the appurtenances, to any person, either together or in parcels; and to that end the trustees were also empowered, by any deed or deeds, writing or writings, to revoke, determine, or make void all and every or any of the use and uses, trusts, estates, powers, provisoes, and limitations therein before limited, created, provided, and declared of and concerning the manor and tenements aforesaid; with the appurtenances, sold, to be sold, disposed of, or exchanged; and by the same or any other deed or deeds, writing or writings, to limit and appoint the manor and tenements aforesaid, with the appurtenances, whereof the uses should be so revoked, unto the purchaser.

The trustees sold the estate, exclusive of the timber growing upon it, for 13,400l., and the tenant for life by the same deed sold the timber, wood, and underwood, for 24481.: Held, that the power was not well executed. Cockerell and Another v. Cholmeley (in Error), H. 10 & 11 G. 4.

POWER OF ATTORNEY.

A. being indebted to B., in order to discharge the deht, executed to B. a power of attorney, authorizing him to sell certain lands belonging to him, A.: Held, that this, being an authority coupled with an interest, could not be revoked. Gaussen and Others v. Morton. E. 10 & 11 G. 4.

PRACTICE.

1. Where three ejectments were brought against a landlord and his two tenants, and the landlord obtained a rule for the consolidation of the three actions, and that the ejectment against one of the tenants (who was a pauper) should abide the event of the ejectment against the other, and that action was tried, and the lessor of the plaintiff obtained judgment and took possession of all the tenements, the Court compelled the landlord to pay the costs of that ejectment. Thrustout dem. Jones the Elder and Jones the Younger v. Shenton, M. 10 G. 4. 110
2. A plaintiff in execution upon a judgment

obtained against him for 341., and who had been in prison more than twelve months, held not entitled to be discharged under 48

G. 3, c. 123.

Semble, that that act does not apply to plaintiff in execution upon a judgment. Tinwuth v. Taylor, M. 10 G. 4 114

 In order to entitle a defendant to his costs under the statute 43 G. 3, c. 46, s. 3, on the ground that the plaintiff had arrested him for a larger sun; than he afterwards recovered, it is sufficient to show that the plaintiff had no reasonable or probable cause for procuring the defendant to be arrested for that sum; it is not necessary to show malice. Donlar v. Brett, M. 10 G. 4.

 A plaintiff had sold goods to defendant, to be paid for half in ready money and half by bill at three months. The defendant having refused to pay the half in ready money, the plaintiff arrested him for the full price of the goods: Held, that he had no reasonable or probable cause for doing so, and that defendant was entitled to his costs pursuant to 43 G. 3, c. 46. Day v. Picton, M. 10 G. 4. 120

A variance between the writ and the count (the ac etiam being in case on promises, but the declaration in debt), is a ground for discharging the defendant out of custody on filing common bail, where the sum for which the bail-bond must be taken exceeds 40l. Mayfeld v. Davison, M. 10 G. 4. 223
 By the practice of this Court, the turnkey of

6. By the practice of this Court, the turnkey of a prison is the agent of a debtor confined in execution, for the purpose of receiving the sixpences under the lords' act, and therefore, by the acceptance of spurious coin, binds the debtor. Gainsford v. Marshall, M. 10 G. 4.

7. A person may, under particular circumstances, lay hands on another, in order to serve him with process. Harrison v. Hodgens H. 10 ft 11 Cess.

son. H. 10 & 11 G. 4.

8. Where process was returnable in Easter term, and the plaintiff, in Michaelmas term following, filed common bail for the defendant as of Easter term: Held, that it was too late and irregular. Bugden v. Burr, H. 10 & 11 G. 4.

9. Procedendo awarded where an action of trover had been removed by certiorari from an inferior court, and the return filed, the defendant not having entered into a recognisance to pay debt and costs as required by the statute 7 & 8 G 4, c. 71, s. 6. Furnish v. Swann, H. 10 & 11 G. 4. 458

10. The stat. 17 Car. 2, c. 8. which enacted that

10. The stat. 17 Car. 2, c. 8, which enacted that in certain cases a suit should not be abated by the death of either party, between verdict and judgment, does not apply to cases of nonsuit. Downiggin, Administratrix, v. Harrison, H. 10 & 11 G. 4.

11. A party in execution for more than twelve months, for the costs of an ejectment exceeding 20t., is not a person in execution upon a judgment for a debt or damages not exceeding 20t., within the meaning of the 48 G. 3, c. 123; and, therefore, not entitled to be discharged out of custody. Doe v. Reynolds, H. 10 & 11 G. 4.

12. In a bailable action, the plaintiff may deliver a declaration conditionally, any time before the bail are perfected. Wendover v. Cooper, H. 10 & 11 G. 4. 614

In an ejectment, the Court will compel the real defendant to pay the costs. Doe dem. Masters v. Gray, H. 10 & 11 G. 4. 615
 In actions by bill in the King's Bench, the

14. In actions by bill in the King's Bench, the defendant may, under the general issue, give in evidence matter (amounting to accord and satisfaction of the debt or damages and costs which occurred after the issuing of the latitat and before declaration; and such matter is an answer to the action. Worswick, Administrator, v. Beswick and Others, E. 10 & 11 G. 4.

11 G. 4.

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15. Where a plaintiff, in a qui tam action for usury, sued out his writ in September 1828, and delivered a declaration in Trinity term 1829, and at the summer assizes in that year, the Court refused to allow him to amend the declaration. Wood and Another v. Grimwood, E. 10 & 11 G. 4.

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16. Where a plaintiff issued a joint sci. fa. against A. and B., bail of C. and D., upon which A. only was summoned, B. not being found, and A. entered an appearance for himself enly: Held, that a declaration against

him alone was irregular. Sainsbury v. Pringle, E. 10 & 11 G. 4. 751

17. On an attachment of privilege without an ac eriam clause, the defendant may be compelled to give bail in 40t. Coltins, Gent., One, Gr., v. Wright, E. 10 & 11 G. 4. 814

18. Trespass for assaulting, beating, and turning the plaintiff out of a room, whereby he was prevented from exercising the business of an attorney there. Plea, not guilty; verdict for the plaintiff, damages 1s.: Held, that he was not entitled to more costs than damages. Daubney, Gent., One, &c., v. Cooper sid Others, E. 10 & 11 G. 4.

PRESENTMENT.

A plaintiff in trespass was the occupier of a farm called Tyr Adam, situate within a manor adjoining a mountain, and claimed to be exclusive owner of that part of the mountain next adjoining his farm. The question in the cause being whether he was exclusive owner of the soil, or had a right of common only over that part of the mountain, the defendant, in order to show that the plaintiff had not the right of soil, produced from the rolls of the manor an instrument, purporting to be a presentment in the year 1759, wherein the jurors, after reciting that they were sworn to view such part of the waste land as lieth within the lordship as was claimed by A. B. to belong to his tenement called Tyr Adam, upon their onths said that they had considered the claim and the evidence, and presented that all the said land within the said boundaries were part and parcel of the common called K., and that neither the said A. B. nor the tenants or occupiers of the tenement called Tyr Adam, had any right to the same, or any further or greater right than such as the other freehold tenants of the lordship had for their commonable cattle:

Held, that this instrument was not admissible in evidence either as a presentment, because the homage had no right to decide the claim made by an individual to the freehold, they being interested, nor as an award, because there was no mutual submission, not as evidence of reputation, because it was the declaration of the homage post litem motam. Richards v. Bassett, H. 10 & 11 G. 4. 657

PRINCIPAL AND AGENT.

 Semble, that where a notice to quit is given by an agent of the landlord, the agent ought to have authority to give it at the time when it begins to operate; and that a subsequent recognition of the authority of the agent will not make the notice good.

Assuming that a subsequent recognition of the authority of an agent can in any case be sufficient, the bringing of an ejectment is not sufficient recognition of such authority to entitle the lessor of the plaintiff to recover, because the recognition ought at all events to be before the day of the demise laid in the declaration. Doe on the demise laid in the declaration. The sufficiency of the demise of Mann. Clerk, v. Walters, H. 10 & 11 G. 4. 636

2. A., a merchant at Liverpool, circulated catalogues of certain goods to be sold by aution, subject to the following condition
amongst others:—"Payment to be made on
delivery of bills of parcels, by good bills on
London, to the satisfaction of the sellers, not

exceeding three months' date, to be made equal to cash in four months." B., a broker at Liverpool, sent a catalogue to C., a merchant in London, who in return gave him directions to buy certain lots, which B. bought accordingly. Before the sale began, the auctioneer stated that payment by known buyers was to be on the usual credit, two and two months. B., as a known buyer, received the goods without giving bills, and forwarded them to C. in London, with an invoice stating that payment was to be equal to cash at four months; and a few days af-terwards B. drew on C. for the amount, at four months from the day of the sale, which bill C. accepted and paid at maturity. Withbill C. accepted and paid at maturity. in two months from the sale B. failed, never having given bills to A. for the price of the goods, and A. finding that B. was C.'s principal, sued him for the value : Held, that he could not recover, as C. would naturally be induced by A.'s catalogue to suppose that B. had given bills for the goods at the time of delivery, and therefore accepted B.'s draft under a mistake occasioned by A.; and per PARKE, J., The broker, B., had not any authority from C. to make a contract for goods to be paid for at two and two months, and consequently C. was not bound by it. Horsfall and Another v. Fauntleroy and Another, E. 10 & 11 G. 4. 755

PRINCIPAL AND SURETY. See BILL OF EXCHANGE, 3, 9.

PRISONER. See LORDS' ACT. 1.

1. Quere, Whether a person tried for felony, and acquitted, has a right to have a copy of the record of his acquittal? Browne v. Cumming and Others, M. 10 G. 4.

 A plaintiff in execution upon a judgment obtained against him for 34l., and who had been in prison more than twelve months, held not entitled to be discharged under 48 G. 3, c. 123.

Semble, that that act does not apply to plaintiffs in execution upon a judgment.

Tismouth v. Taylor, M. 10 G. 4. 114
3. By the practice of this Court, the turnkey of

- a prison is the agent of a debtor confined in execution, for the purpose of receiving the sixpences under the lords' act, and therefore, by the acceptance of spurious coin, binds the debtor. Gainsford v. Marshall, M. 10 G. 4.
- 4. The proceeding against a party in a summary manner under the 5 Ann. c. 14, for keeping and using a gun to destroy game, is of a judicial nature, at which all persons have a prima facie right to be present; and, there-fore, where a magistrate had, without any specific reason, caused a party who claimed a right to be present to be removed from a justice-room, where such a proceeding was going on, it was held that he was liable to an action of trespass. Daubney, Gent., One, de., v. Cooper, M. 10 G. 4. 237

PROCESS, SERVICE OF. See ASSAULT.

PROMISE. See STATUTE OF FRAUDS, 2. PROMISSORY NOTE.

See BILL OF EXCHANGE, 1, 3, 8, 9, 10. PLEADING. 1.

PROMOTIONS, p. 1.

PURCHASER IN FEE. See DEVISE, 4.

QUARE IMPEDIT.

In quare impedit by a party claiming to present in the fourth turn in the right of one of four coparceners, it is sufficient to allege in the declaration a presentation by the ancestor under whom all the coparceners claimed. Declaration alleged that the advowson had descended to the four coparceners, and they not agreeing to present jointly on the first vacancy, the elder sister presented, and afterwards, on two subsequent vacancies, that A. B. and C. D. presented in right of the second and third sisters respectively: Held, that it was to be presumed that those presentations were by right, and not by usurpation, and therefore did not turn the estate of the coparceners into a mere right; and that quare impedit was maintainable by a grantee of the fourth coparcener:

Held, that it was not necessary for ne plaintiff claiming to present in the fourth turn in right of the youngest sister, to show that the presentations in the turns of the other

sisters were made by right.

A conveyance of the interest of the fourtn sister, at a time when the church was full of the clerk presented by the eldest, in consideration of 20s., of true and faithful services done, and for good and valuable considera-tion, is not, on the face of it, fraudulent against a subsequent purchaser, and is not to be so deemed after a verdict found for the plaintiff on an issue joined on a plea alleging such fraud.

A court of error will not inquire into the propriety of the rules made by the court below for amending the declaration, striking out pleas, or a new trial. Gully and Others v. The Bishop of Exeter, H. 10 & 11 G. 4.

> QUO WARRANTO. See CORPORATION. 1.

RATE.

See APPEAL, 2.

1. By a canal act, the proprietors of the Oxford Canal were empowered to take a mileage tonnage for coals and other merchandises, excepting that they were not to take a ton-nage upon coals for a distance of two miles measured from L. to B. As to those two miles, it was enacted that the proprietors of the Coventry Canal should take all the rates and duties payable by virtue of that act for all coals carried from any part of the Oxford Canal within those two miles; and the proprietors of the Oxford Canal were to take all the rates, payable by an act for making the Coventry Canal, for all goods, except coals, conveyed upon any part of the Oxford Canal. and afterwards upon the Coventry Canal, within three miles and a half of the junction of the two canals. The point of junction of the Oxford and Coventry Canals was in the

parish of F. That parish contains one mile and nine hundred and sixty-three yards of the Oxforc Canal, being part of the two miles above mentioned, and also two miles and a quarter of the Coventry Canal, being part of the three miles and a half above men-

By an act, 33 G. 3, c. 80, for making the Grand Junction Canal, reciting that it was apprehended the intended canal would be injurious to the company of proprietors of the Oxford Canal, it was agreed that the compensation thereinafter mentioned should be made to them as an indemnification against such injury. It then authorized the propri-etors of the Oxford Canal to take, for all coals that should pass from the Oxford Canal into and upon the Grand Junction Canal. the sum of 2s. 9d. per ton, without regard to the distance the same should pass on the Oxford Canal; and for all other goods which should pass from any navigable canal into or upon the Oxford Canal, and from thence into or upon the Grand Junction Canal, or from the Grand Junction Canal into or upon the Oxford Canal, and from thence into or upon any other canal, the sum of 4s. 4d. per ton, without any regard to the distance the same should pass on the Oxford Canal.

Held, first, that the proprietors of the Oxford Canal were rateable to the poor in the parish of F. for the mile tonnage for merchandise, not being coals, passing along the Oxford Canal in that parish.

Secondly, that they were rateable in that parish for the mile tonnage payable to them in respect of tolls collected on the Coventry Canal, in the proportion which one mile nine hundred and sixty-three yards bears to two

miles

Thirdly, that they were rateable in that parish for such a proportion of the compensation tonnage payable to the Oxford Canal Company under the Grand Junction Canal act for merchandise, not being coals, passing from the Coventry Canal along the Oxford Canal to the Grand Junction Canal, and vice versa, and consequently through the parish of F., as one mile nine hundred and sixtythree yards bears to thirty-four miles and seven eighths, the distance between the points at which the Oxford Canal joins the Coventry and Grand Junction Canals.

Fourthly, that they were rateable in that parish for the same proportion of the com-pensation tonnage for coals passing along the same portion of the Oxford Canal from the Coventry Canal into the Grand Junction

Canal.

Held, further, that in fixing the amount of the rate, the sum paid by the proprietors for the poor-rate, the expense of collecting the tolls, of repairing the banks of the canal, and of supplying it with water, ought to be deducted from the gross profits. The King v.

The Oxford Canal Company, M. 10 G. 4. 2. Where a borough town was incorporated by charter, and certain members of the corporation were made justices (but without power to try felonies), and the charter contained a general non-intromittant clause, wholly preventing the interference of the county justices within the town : Held, that a rate in the nature of a county rate, might be imposed by the justices of the town, under the authority given by the 55 G. 3, c. 5; Mercer v. Davis, H. 10 & 11 G. 4. 617

RECOGNISANCE.

See TROVER. 2.

RECORD OF ACQUITTAL.

Queere, Whether a person tried for felony and acquitted, has a right to have a copy of the record of acquittal? Brown v. Cumming and Others, M. 10 G. 4.

> RECOVERY. See DEVISE, 4.

RECTOR.

An incumbent of a living is bound to keep the parsonage-house and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the origical form, without addition or modern improve-ment; but he is not bound to supply or maintain anything in the nature of ornament, such as painting (unless that be necessary to preserve exposed timber from decay), and whitewashing and papering; and in an action for dilapidations against the executors of a deceased rector by the successor, the damages are to be calculated upon this princi-Wise v. Metcalfe, M. 10 G. 4.

REGISTER ACT. See SHIP.

REPEAL OF ACT OF PARLIAMENT See CANAL ACT. 2.

> REVERSIONARY INTEREST. See Action on the Case, 1.

> > REVOCATION.

See Arbitrament, 2. Power of Attores, 1

ROAD.

See HIGHWAY, 1.

SCIRE FACIAS.

See PRACTICE, 13.

SCRIVENERS' COMPANY. See MANDAMUS, 1.

> SECRET PARTNER. See Partnership, 4.

SETTLEMENT—by Apprenticulia.

- 1. The allowance of an indenture of apprenticeship, to which the parish officers are so tual parties, is required by the 56 G. 3. c. 139, s. 1, to be signed by two justices, but need not be under seal; but the allowance of an indenture to which the parish officers are not parties, but in respect whereof some expense has been incurred by the public Pa rochial funds, is required by the eleventh section of that statute to be scaled as well as signed by two justices. The King v. The Inhabitants of St. Paul, Exeter, M. 10 G. 4.
- 2. Where a pauper applied to a master to take him as an apprentice, and the master said he

would not take him as an apprentice, because if he did he should offend the farmers, and a week afterwards it was agreed between the master and the father-in-law of the pauper, that the pauper should serve the master four years to learn his trade, to have meat drink, washing, and lodging the whole time: Held, that the principal object of the parties being that the pauper should learn the trade of the master, it was to be deemed a contract of apprenticeship, and not one of hiring and service. The King v. The Inhabitants of Edingale, E. 10 & 11 G. 4. 739

SETTLEMENT-by Birth.

An unmarried woman settled in the parish of M., was removed from the parish of P. to the parish of S. S. appealed, and the sessions quashed the order of removal, but before the appeal was heard the woman was delivered of a bastard child in S.: Held, that the bastard was not settled in the parish of M. The King v. The Inhabitants of Martlesham, in the County of Suffolk, M. 10 G.

SETTLEMENT-by Estate.

1 The burgesses of the borough of B. were entitled to receive such share of the rent of certain estates as the corporation at large should allow to them. The estates were vested in the corporation at large, and demised by lease, whereby the rents were reserved to the corporation: Held, that a freeman of B., who resided in the borough, and was in the receipt of a portion of the rents, which had been assigned to him by the corporation, did not thereby gain a settlement by estate. The King v. The Inhabitants of Belford, M. 10 G. 4.

An estate in remainder will not confer a settlement. It must be vested in possession. The King v. The Ishabitants of Willoughbywith Sloothby, M. 10 G. 4.

3. A. being seised in fee of a close of land, gave a small piece by parol to B., who built a cottage on it, and resided in it fifteen years, when A. told him he had sold the land to C., and asked B. to give him possession and to sell him his right; A. agreed to give B. 3l. for giving possession, and that B. should take the materials; B. pulled down the cottage and carried away the materials, and delivered possession to C.: Held, that B. did not gain any settlement by residing in the house. The King v. The Inhabitants of Chew Magna, E. 10 & 11 G. 4.

4. A papper was hired as shepherd by the tenantry farmers of a manor, for a year, to keep the tenantry flock; he was to receive 14s. per week, and to have a piece of land called The Shepherd's Croft, which was to make up money as good as 16s. per week, and he served a year under this hiring. The tenantry farmers were leaseholders and copyholders of the manor. By agreement made in 1799, between the then lord of the manor and his lessee of the manor, and the leaseholders and copyholders of that manor, arbitrators were appointed for dividing and alloting the open fields within the manor amongst the lessees for life of the manor, and the several leaseholders and copyholders in respect of the land which they had in the manor; and the allottees were to be possessed of the lands allotted to them, for the same

estate and interest in the lands in lieu whereof the allotments were made. The arbitrators, by their award, allotted to W. B., the
lord and farmer of the manor, in trust for the
shepherd or keeper of the flock, in lieu of
lands in the common field, held by custom
by the shepherd, the land which the pauper
took when he was hired as shepherd, and he
let part of this land to a tenant: Held, that
the pauper took the land in his character of
servant, in lieu of wages, and not under the
award, and, consequently, that he gained no
settlement by estate. The King v. The Inkabitants of South Newton, Wilts, E. 10 &
11 G. 4. 838

5. The husband of a pauper being settled in parish A., in 1800, enclosed a small piece of waste land in parish B. from a common, and held and cultivated it until Christmas 1827. when he sold it and conveyed it to a purchaser. From the year 1800 to 1825 he resided out of parish B.; but in the year 1825 he removed to that parish, and in 1826 built a hut on the land and lived in it a year and a half. In the years 1806, 1811, and 1817, the parish officers and freeholders perambulated the parish, for the purpose of marking their boundaries and asserting their rights of common. On those occasions they pulled up a portion of the fence to the land so en-closed, and dug up part of the hank, and rode through the enclosure. In 1820 or 1822 a like perambulation was made by the direction of the lord of the manor, when similar acts were done. No acknowledgment was paid to the lord of the manor for the land : Held, that there was an adverse possession, and that the husband of the pauper gained a settlement by estate in B. The King v. The Inhabitants of Woodurn, E. 10 & 11 G. 4. 846

SETTLEMENT—by Hiring and Service.

1. A hiring from the 13th of May 1819 to the 13th of May 1820 (that being leap year), and a service under it till the 12th of May 1820, viz. 365 days: Held, not sufficient to give a settlement. The service must be for a whole year, although it happen to consist of 366 days. The King v. The Inhabitants of Roxby, M. 10 G. 4.

2. A pauper hired himself for a year, at 51. wages, to his aunt, who occupied six acres of land; when she had no work for him he was to work for anybody for his own benefit: Held, that this was an exceptive hiring, and that service under it did not confer a settlement. The King v. The Inhabitants of South Killingholme, E. 10 & 11 G. 4.

SETTLEMENT—by Renting a Tenement.

1. By the 6 G. 4, c. 57, which repealed the 59 G. 3, c. 50, it is enacted, that no person shall acquire a settlement by reason of settling upon any tenement, unless it shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bonâ fide rented by such person at the sum of 10% a year at the least, for the term of one whole year; nor unless such house or building, or land, shall be occupied under such yearly hiring: Held, per totam curiam, that under that statute a pauper who rented a dwellinghouse and land at a rent exceeding 10% per annum, but who underlet the land, gained a

settlement. The King v. The Inhabitants of Greut Bentley, H. 10 & 11 G. 4. 520 2. Where the lessee of tolls and a toll-house of

2. Where the lessee of tolls and a toll-house of a navigation underlet the same for the remainder of a term of three years, at the annual rent of 42L, and the under lessee occupied them for upwards of a year, and paid a year's rent, and it was found as a fact that the toll-house had always been used as a public-house as well as for the collection of tolls, and was worth 25L a year if let as a public-house without the tolls, and 4L a year if not so let; it was held, that the under lessee did not gain any settlement by the renting of a tenement, inasmuch as he was a person renting the tolls, and residing in a toll-house of a navigation, within the 54 G. 3, c. 170, a. 5. The King v. St. Andrew the Less. Combridge. E. 10 & 11 G. 4. 742
3. A pauper in 1800 was hired, as a confined

labourer, at thirty guiness a year. He was to have a house, two gardens, and a rood of potatoes. After the bargain was made, his master said he might have the milk of a cow; and shortly after going into the service, he had the milk of a cow, which was fed on his master's close during that part of the year when cattle are pasture-fed. The value of the house, gardens, and the rood of potators, was less than 10l. a year, but, with the keep of the cow upon the land, amounted to more than that sum: Held, that the pauper did not gain a settlement by the occupation of a tenement of the yearly value of 10l.; first, because it was no part of the contract that the pauper should have the milk of a cow; and, secondly, assuming that it was so, it was not part of the contract that the cow should be pasture-fed. The King v. The Inhabitants of Langriville, E. 11 G. 4.

SETTLEMENT—by serving an Office.

The office of town crier and bellman is a public annual office within the 3 W. & M. c. 11, s. 6, by the execution of which a settlement may be gained; and if the town comprises several parishes, the settlement will be gained in that parish in which such officer has last resided for forty days. The King v. The Inhabitants of St. Nicholas, Hereford, E. 10 & 11 G. 4.

SHERIFF.

See BANKRUPT, 11.

In an action against the sheriff for an escape, it is sufficient to allege that the writ directing the arrest was duly endorsed for bail, without adding "by virtue of an affidavit made and filed of record." Nightingale v. Wilcoxson and Others (in Error), M. 10 G. 4.

SHIP BROKER.

See Assumpsit, 3. Custom. 1.

SHIP MASTER.

See PENAL ACTION, 1.

SHIP.

Where the certificate of a ship's register has been deposited as a security for advances for the use of the ship: Held, that this gives the holder a lien sufficient to defeat an action of to ver for the certificate. Query, Whether a person holding the certificate under such circumstances, and refusing 10 give it up when demanded, is guilty of a willul detention within the meaning of the register act 4 G. 4, c. 41. Bowen v. Fas and Others, M. 10 G. 4.

SLANDER.

In an action for slander, for words spoken of the plaintiff in his trade, importing a direct assertion made by the defendant, that the plaintiff was insolvent, the defendant pleaded, that one T. W. spoke and published to the defendant the same words, and that the defendant, at the time of speaking and publishing them, declared that he had heard and been told the same from and by the said T. W.: Held, upon demurrer, that this plea was bad, first, because it did not contess and avoid the charge mentioned in the declaration, the words in the declaration importing an unqualified assertion made by the defendant in the words stated in the declaration, and the words used in the plea importing that the defendant mentioned the fact on the asthority of T. W.

Secondly, because it did not give the plaintiff any cause of action against T. W., masmuch as it did not allege that T. W. spoke the words faisely and maliciously.

Thirdly, because it is not an answer to an action for oral slander for a defendant to show that he heard it from another, and named the person at the time, without showing that the defendant believed it to he true, and that he spoke the words on a justifiable occasion.

M'Pherson v. Daniels, M. 10 G. 4. 253

SPECIAL JURY.

The statute 6 G. 4, c. 50, enacts, that the party who shall apply for a special jury shall pay the costs occasioned thereby, unless the Judge before whom the cause is tried shall, immediately after the verdict, certify: Held. that a defendant, who had applied for a special jury, was not entitled to the costs of the jury, where the Judge who tried the cause nonsuited the plaintiff on his opening. If and Another v. Grimwood, E. 10 & 11 G. 4.

SPECIAL FORM OF ACCEPTANCE

See BILL OF EXCHANGE, 2.

SPURIOUS COIN. See Lords' Act.

STAMP.

See BILL OF EXCHANGE, 11.

1. The drawee (who was also payee) of a foreign bill of exchange drawn in three parts, accepted and endorsed one part to a credior, to remain in his hands until some other security was given for it; and afterwards accepted and endorsed another part for value to a third person. The acceptor substituted another security for the part first accepted, where upon it was given up to him: Held, that under these circumstances the holder of the part secondly accepted was entitled to recover on the bill against the acceptor, and that the bill being foreign did not require a stamp; Held, also, by Lord Tenterden, C. J., and

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Parke, J., that the acceptor would have been liable on the part secondly accepted, even if the first part had been endorsed and circulated unconditionally. Holdsworth v. Hunter, H. 10 & 11 G. 4.

2. The stamp required by the 55 G. 3, c. 184, for a lease, is regulated by the consideration (whether fine or rent) expressed to be paid, and not that which is actually paid. Doe dem. Kettle and Others v. Lewis, E. 10 & 11 G. 4.

STATUTE—effect of Repeal. See BANKRUPT, 1.

STATUTE OF LIMITATIONS.

See BILL OF EXCHANGE, 3.

In an action of debt it was averred, that before the making of the instrument and obligation thereinafter mentioned, the plaintiffs carried on business in Scotland, and that one A. B. and the defendant were resident and domiciled therein; and that by a certain instrument and obligation in writing (which was set out, the said A. B. and the defendant became bound, and obliged themselves conjointly and severally to pay to the plain-tiffs the sum of 400l. sterling. It was then averred, that by the law of Scotland at the time of making such instrument and thence hitherto in force, the time for bringing any suit or instituting any legal proceeding by the plaintiffs against the defendant upon the instrument, and the cause and right of action accruing thereon, had not yet elapsed, that is to say, by virtue of the said law, the plain-tiffs had the right and privilege of suing and bringing any action thereon, at any time within forty years from the time of making and signing the bond. Plea, that the cause of action did not accrue within six years: Held, upon demurrer, that the plea was an answer to the action. The British Lines. enswer to the action. The British Linen Company v. George Harley Drummond, Esquire, E. 11 G. 4.

STOPPAGE IN TRANSITU.

A., in England, contracted with B. at Petersburgh to send him a cargo of deals, to be paid for by a bill at three months, which he duly accepted. The deals were shipped, and A. effected an insurance. The ship was stranded on the voyage, near Elsinore, and the deals were saved, but so much injured as not to be worth sending for. A., on hearing of the accident, gave the underwriters notice of abandonment the day before the bill became due, which they refused to accept. B 's agent stopped the goods in transitu at Elsinore. A. having become insolvent: Held, that his assignee, under a commission of bankrupt afterwards issued against him. could not recover on the policy, inasmuch as A., after the stoppage in transitu, had only an insurable interest. Clay, Assignee, v. Harrison, M. 10 G. 4.

SURETY.

See BILL OF EXCHANGE, 3, 9. BOND, 1.

SURVEYOR.

A surveyor of highways cannot maintain an action against the late surveyor for the ba-

lance remaining in his hands, until his accounts have been settled and allowed, or disallowed, in the manner pointed out by the 13 G 3. Heudebourck v. Langton, H. 10 & 11 G. 4.

TITLE.

See VENDOR AND VENDEE, 1.

TOLL-HOUSE.

See SETTLEMENT BY RENTING A TENEMENT, 2.

TOLL-THOROUGH.

The repair of some streets in a town, is not a sufficient consideration to support a claim of toll-thorough in all parts of the town. Brett v. Beales, H. 10 & 11 G. 4.

TREASURER.

See Action on the Case, 2.

TRESPASS.

See PRESENTMENT, 1.

 Trespass will lie against a magistrate for committing a party charged with felony for re-examination for an unreasonable time, but without any improper motive.
 Semble, That a warrant of commitmen

Semble, That a warrant of commitmen for an unreasonable time is wholly void.

Davis v. Capper, M. 10 G. 4.

2. The proceeding against a party in a summary manner under the 5 Ann. c. 14, for keeping and using a gun to destroy game, is of a judicial nature, at which all persons have a primâ facie right to be present; and, therefore, where a magistrate had, without any specific reason, caused a party who claimed a right to be present to be removed from a justice-room, where such a proceeding was going on, it was held that he was liable to an action of trespass. Daubney, Gent., One, &c., v. Cooper, M. 10 G. 4.

TROVER.

 Where the certificate of a ship's register has been deposited as a security for the use of the ship: Held, that this gives the holder a lien sufficient to defeat an action of trover for the certificate. Bowen v. Fox and Others, M. 10 G. 4.

Procedendo awarded where an action of trover had been removed by certiorari from an inferior court, and the return filed, the defendant not having entered into a recognisance to pay debt and costs as required by the statute 7 & 8 G 4, c. 71, a. 6. Furnish v. Swans, H. 10 & 11 G 4.
 In April 1826, A. having contracted to pur-

d. In April 1826, A. having contracted to purchase an estate from B., and having had the title-deeds delivered to him, agreed to deposit the same with C., as a security for the loan of 5000l., and to give him the mortgage as soon as the legal estate was conveyed to him. B. afterwards conveyed the estate to A.; but before such conveyance was made, and after the title-deeds had been deposited with C., the latter refused to complete the mortgage unless A. would agree to pay usurious interest upon the sum of 5000l. A. having so agreed, delivered to C. the deed of conveyance of the estate from B. to A. A. afterwards became bankrupt; and in an action of trover brought to recover the deeds,

it was held, that the original possession of the title-deeds being perfectly good, gave C. a right to the estate whenever B. should have conveyed that estate to A.; and that he, and not A.'s assignees, had a right, therefore, to the deed of conveyance from B. to A. Wood and Another, Assignees, v. Grimwood, E. 10 & 11 G. 4.

TURNKEY.

See Lords' Act.

UNDERWRITER.
See Insurance. 5.

UNDERTENANT.

See SETTLEMENT BY RENTING A TENEMENT, 1.

USURY.

See TROVER, 3, 5.

In January 1827 A. paid C. a premium, in consideration of his having agreed to continue to A. a loan on a sum of 5000l., at 5 per cent. interest, payable half yearly, on the 8th of March and the 8th of September. The half year's interest at the rate of 5 per cent., on the 8th of March was paid to C.: Held, that C. having then taken, accepted, and received more than 5 per cent. for the forbearance of 5000l. for half a year, the offence of usury was then complete, and that C. did not commit a second offence by reason of his having received on the 8th of September another half year's interest at the rate of 5 per cent.

Where a plaintiff, in a qui tam action for usury, sued out his writ in September 1828, and delivered a declaration in Trinity term 1829, and at the summer assizes in that year withdrew the record, the Court refused to allow him to smend the declaration. Wood and Another v. Grimwood, E. 10 & 11 G. 4.

VARIANCE.
See Pleading, 4.

VENDOR AND VENDER.

1. By contract A. agreed to sell to B. the two leases and good will in trade of a publichouse, and shop adjoining, for the sum of 4250l., "as he holds the same," for terms of twenty-eight years from Midsummer next ensuing, at the annual rent therein mentioned, and B. agreed to accept a proper assignment of the said leases and premises as above described, without requiring the leasor's title; and upon payment of the said sum of 4250l., A. agreed to execute an effectual assignment of the said leases, and deliver up possession of all the said premises. Held, that the true meaning of this agreement was, that the vendee was to purchase the two leases without inquiring into the title of the leasor, and could not refuse to complete his purchase on account of an objection to that title. Spratt v. Jeffery, M. 10 G. 4. 249

A. having contracted with B. for the purchase of a real estate, the vendor acting bona fide, delivered an abstract, showing a good title; and A., before he examined it with the original deeds, contracted to resell several portions of the property at a consi-

derable profit. Upon a subsequent examination of the abstract with the deeds A. discovered that the title was defective, and thereupon the sub-purchasers refused to complete their purchases and he refused to complete his purchase from B., and brought as action, wherein he claimed as damages the expense which he had incurred in the investigation of the title; the profit that would have accrued from the resale of the property; the expense attending the resale; and the sums which he was liable to pay to the sub-contractors for the expenses incurred by them in examining the title: Held, that he was entitled to recover only the expenses that he had incurred in the investigation of the title, and nominal damages for the breach of contract, as no fraud could be imputed to the vendor. Walker v. Moore and Another, M. 10 G. 4.

3. Where three parties agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and he made a contract for the purchase accordingly: Held, that all might join in suing the vendor for a breach of that contract. Cothay and Others v. Fennell and Others, E. 10 & 11 G. 4.

Others, E. 10 of 11 C. 4.

In April 1826, A. having contracted to purchase an estate from B., and having had the title-deeds delivered to him, agreed to deposit the same with C., as a security for the loan of 5000L, and to give him the mortgage as soon as the legal ostate was conveyed to him. B. afterwards conveyed the estate to A.; but before such conveyance was made, and after the title-deeds had been deposited with C., the latter refused to complete the mortgage unless A. would agree to pay usurious interest upon the sum of 5000L. A. having so agreed, delivered to C. the deed of conveyance of the estate from B. to A. A. afterwards became bankrupt; and in an action of trover brought to recover the deeds, it was held, that the original possession of the title-deeds being perfectly good, gave C. a right to the estate whenever B. should have conveyed that estate to A., and that he and not A.'s assignees had a right, therefore, to the deed of conveyance from B. to A. Wood and Another v. Grimwood, E. 10 & 11 G. 4.

5. A., a merchant at Liverpool, circulated caulogues of certain goods to be sold by auction, subject to the following condition amongst others:—"Payment to be made on delivery of bills of parcels, by good bills on London, to the satisfaction of the sellers, sot exceeding three months' date, to be made equal to cash in four months." B., a broker at Liverpool, sent a catalogue to C., a merchant in London, who in return gave him directions to buy certain lots, which B. bought accordingly. Before the sale began, the auctioneer stated that payment by known buyers was to be on the usual credit, two and two months. B., as a known buyer, received the goods without giving bills, and for warded them to C. in Lendon, with an invoice stating that payment was to be equal to cash at four months; and a few days afterwards B. drew on C. for the amount, at four months from the day of the sale, which bill C. accepted and paid at maturity. Within two months from the sale B. failed, never 'having given bills to A. for the price of the goods, and A. finding that C. was B.'s prin-

cipal, sued him for the value: Held, that he could not recover, as C. would naturally be induced by A.'s catalogue to suppose that B. had given bills for the goods at the time of delivery, and therefore accepted B.'s draft under a mistake occasioned by A.; and per PARKE, J., The broker, B., had not any authority from C. to make a contract for goods to be paid for at two and two months, and consequently C. was not bound by it. Horsfall and Another v. Fauntleroy and Another, E. 10 & 11 G. 4.

VERDICT.
See Special Juny.

VICTUALS.

See Hawker and Pedlar, 2.

WARRANT OF ATTORNEY.

The fourth section of the statute 3 G. 4, c. 39, which requires the defeasance to a warrant of attorney to be written on the paper or parchment on which the instrument itself is written, applies only to such warrants of attorney as fall within the former sections of the act, viz. warrants of attorney, which in

the event of not being filed within twentyone days after execution, are void against the
assignees of a bankrupt, and consequently a
warrant of attorney subject to a defeasance,
not written on the same paper or parchment,
is not void between the parties, but only
against the assignees of a bankrupt: Held,
by Lord Tentenden, C. J., Bayley, and
LITTLEDALE, Js. (PARKE, J., dissentiente).
Bennett v. Daniel, H. 10 & 11 G. 4. 500

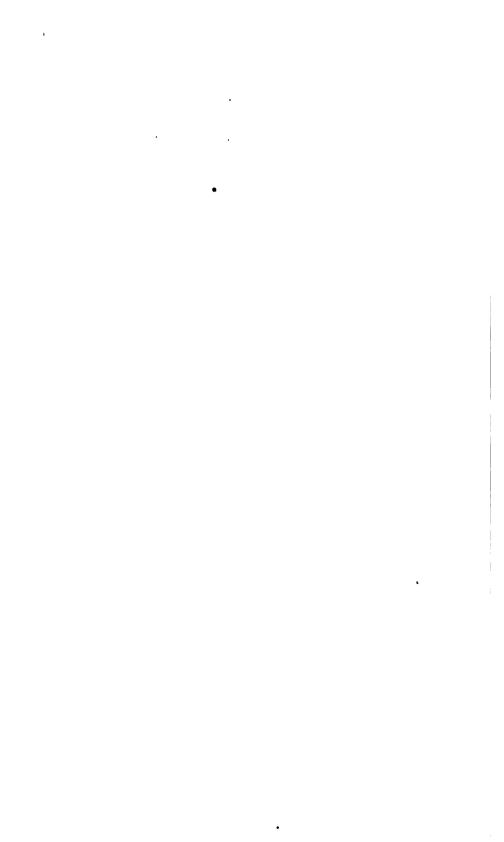
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See HAWKER AND PEDLAR, S.



REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas,

AND

OTHER COURTS.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

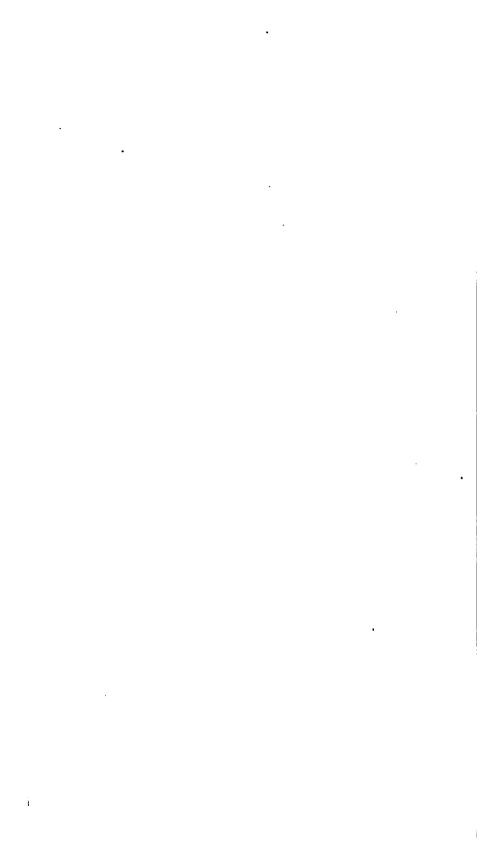
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JUDGES

OF THE

COURT OF COMMON PLEAS,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL, Knt. Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir STEPHEN GASELEE, Knt

Hon. Sir JOHN BERNARD BOSANQUET, Knt.

Hon. Sir EDWARD HALL ALDERSON, Knt.



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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS.

IN

Michaelmas Cerm,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV. 1881.

DEVENOGE v. BOUVERIE. Nov. 2.

An annuity deed, of which there was no counterpart, was placed in the hands of R., as agent for granter and grantee. R. received the annuity for grantee. The granter redeemed the annuity by paying the amount of the purchase-money to R., who, without express authority from the grantee, delivered the deed to granter to be cancelled. R. having absconded without paying the grantee, and the grantee having sued granter for arrears, Held, that he was entitled to call for an inspection of the deed.

THE plaintiff had obtained a rule nini for the defendant to produce, and for the plaintiff to inspect and take a copy of, an indenture between the plaintiff and defendant, bearing date October 11th, 1814.

By this deed the defendant, in consideration of 650l., had granted an annuity to the plaintiff of 100l. a year; and there being no counterpart, the deed was, as the plaintiff deposed, placed in the hands of one Riley, the solicitor concerned for the defendant and on behalf of *all parties, on an understanding that he should receive the appuits on the part of the plaintiff

In 1816 the defendant redeemed the annuity, by paying the amount of the purchase-money into the hands of Riley, when Riley delivered up the deed to him to be cancelled without any express authority from the plaintiff.

Riley never disclosed this to the plaintiff, but continued to pay the annuity till 1830, when he absconded; and the annuity being no longer paid, the plaintiff commenced this action on the deed.

On the part of the defendant it was sworn that the deed was prepared by Riley, and placed in his hands as agent of the plaintiff, and not as solicitor of the defendant.

Merewether, Serjt., who showed cause, contended that this was not a case in which the Court would summarily assist the plaintiff. The deed was lawfully in possession of the defendant, upon payment of the purchase-money to the plaintiff's agent, who had authority to receive it, as might be inferred from the fact or his holding the deed, and receiving the annuity for the plaintiff. The parties being both innocent, potior est conditio possidentis; and the rather, as

(419)

there had been laches on the part of the plaintiff, in not watching more closely

the conduct of his agent.

Wilde, Serjt. The laches is on the part of the defendant, in redeeming the annuity without communication with the principal, or requiring his written discharge. Riley held the deed as trustee for both parties. In his hands the plaintiff would have been entitled to an inspection; and the defendant having obtained the deed without authority, cannot now deprive the plaintiff of his right.

*TINDAL, C. J. It would be of no advantage to the defendant if the Court were to discharge this rule: a little evidence would be sufficient to launch the plaintiff's case; and if he fell into a variance, it would probably be of such a nature as a Judge might at once correct under the provisions of the

late act

The case, however, falls within the ordinary rule, which entitles a party to the inspection of a deed placed in the hands of one as trustee for several. Although the defendant denies that Riley was an agent for him alone, it is not denied that he was agent for both parties, and that agrees with the probabilities of the case; for there was but one part of the deed, and it was probable that it should be held for the use of both. But take it that Riley was agent for the plaintiff alone: it is not shown that he had authority to receive the redemption money, or to surrender the deed; the defendant, therefore, cannot withhold a deed which he has obtained without authority. The want of caution is rather on the side of the defendant, in paying without any regular discharge from the plaintiff, than on the part of plaintiff, who had no reason for inquiry as long as he received his annuity regularly.

Gaselee, J. I think the rule ought to be made absolute. It is clear that Riley was the agent of the defendant; for the deed was prepared on his part by

Riley, and it never came to the hands of the plaintiff.

Bosanquet, J. According to the well established practice, the plaintiff is entitled to the inspection of this deed. Both parties were interested in the deed, of which only one part was executed, and that part was placed in the hands of a third person, as agent for both. It has now come to the hands of the defendant, as it is suggested, by his redeeming the annuity; but whether *he obtained it with or without the authority of the plaintiff, is the question to be tried by a jury.

ALDERSON, J., concurring, the rule was made

Absolute.

KING, Demandant; GIBSON, Deforciant. Nov. 3.

A fine on paper from Jamaica, where no parchment could be procured, allowed to pass, being copied on parchment and attached thereto.

This was a fine from Jamaica on paper, and on the margin of the acknow-

ledgment it was signified that no parchment could be procured.

Wilde, Serjt., moved that the fine might pass, although the practice of the Court required that it should be engrossed on parchment. In many cases the Court had departed from its strict rules where circumstances rendered the observance of them impracticable; as in Seton v. Sinclair, 2 W. Blacks. 880, where the affidavit of due acknowledgment was not made by an attorney, there being no attorney for the party to resort to; and in Price, demandant, Williams, tenant, 4 Taunt. 573, where there was no notarial seal.

Per Curiam. Let the fine be copied on parchment, and the paper being

attached, it may pass.

*57

*WILLATTS v. JAMES KENNEDY. Nov. 3.

Declaration, that C. K. was indebted to the firm of B. and S.; that plaintiff had been appointed by the Court of Chancery receiver of the debts of the firm, whereby C. K. became liable to pay plaintiff when requested; that in consideration of the premises, and that the plaintiff as such receiver would give C. K. two months' time to pay, defendant promised to pay in case C. K. omitted to do so within that time. Breach, that C. K. omitted, and that defendant never paid: Held, on arrest of judgment, that sufficient authority appeared for the plaintiff to contract and sue, and sufficient consideration for the defendant's promise.

THE plaintiff had obtained a verdict on the second count of his declaration, which stated that Charles Kennedy, before and at the time of the making of the promise and undertaking of the defendant thereinafter next mentioned, was indebted to certain persons, commonly called and known by the style and firm of Boeme and Smout, in a certain sum of money, to wit, 25l. 2s., to wit, at, &c.; that the plaintiff, before and at the time of the making of the said promise and undertaking, and while the said C. Kennedy was so indebted as aforesaid, had been appointed by the High Court of Chancery receiver of the debts and moneys then due and owing to the said firm, to wit, at, &c., by means whereof the said C. Kennedy then and there became liable to pay to him, the plaintiff, as such receiver, the said sum of money so by him the said C. Kennedy due to the said firm as aforesaid, when he, C. Kennedy, should be thereunto requested, to wit, at, &c.; and thereupon, and whilst the plaintiff was such receiver as aforesaid, and the said C. Kennedy was so liable as aforesaid, to wit, on, &c., at, &c., in consideration of the last-mentioned premises, and that the plaintiff, as such receiver as aforesaid, at the special instance and request of the defendant, would not adopt any legal proceedings against the said C. Kennedy for the recovery of the said sum in which the said C. Kennedy was so indebted to the said firm as aforesaid, for a period of two months thence next following, to wit, until the *6] 25th day of January, which should be in the *year 1830, the defendant undertook, and then and there faithfully promised the plaintiff, as such receiver as aforesaid, to pay him the said last mentioned sum of 25l. 2s. at the expiration of the said last-mentioned period, to wit, on, &c., at, &c., should the said debt so due from C. Kennedy to the said firm as aforesaid be then unpaid. And the plaintiff averred that he, confiding in the said promise and undertaking of the defendant, did not adopt any legal proceedings against the said C. Kennedy for the recovery of the said sum in which the said C. Kennedy was so indebted to the said firm as aforesaid for the said period of two months, to wit, until, &c., at, &c.; but that the said C. Kennedy, although he was afterwards, to wit, on, &c., at, &c., requested so to do, did not, nor would pay the said sum of money, or any part thereof, to the plaintiff as such receiver, or to the said firm, or to any other person on their behalf, but altogether refused and neglected so to do, to wit, at, &c. And the same debt so due from the said C. Kennedy to the said firm was at the expiration of the said last-mentioned period, to wit, on, &c., wholly unpaid, to wit, at, &c., whereof the defendant afterwards, to wit, on, &c., there had notice; and thereby, and according to the tenor and effect of his said promise and undertaking, he the defendant then and there became liable to pay to the plaintiff as such receiver, the said sum of 25l. 2s., on the same day and year aforesaid, to wit, at, &c.

Cross, Serjt., obtained a rule nisi to arrest the judgment, on the ground that there was no consideration for the defendant's promise, and that the plaintiff had no authority to enter into or sue on such a contract as that on which he

had declared.

*7] *Wilde, Serjt., showed cause. The plaintiff, as receiver appointed by the Court of Chancery, had authority to collect and sue for the debts of the firm (Wynne v. Lord Newborough, 1 Ves. jun. 164), and, as incidental to that authority, to press or suspend payment according to a reasonable discretion; for by a judicious forbearance he might collect more than by immediate urgency. After verdict it must be assumed that his authority was duly proved at the trial.

If he had authority to suspend as well as to enforce payment, he had authority to enter into a contract such as the present, by which the suspension is accorded on terms favourable to the principal creditors, namely, the advantage of security for the debt. Then, the plaintiff having authority to make the contract, is the only person who can sue on it. He is not agent of the creditors, but rather appointed to control them, and is clothed with an independent right. No other could sue; and payment, even to the creditors, would have been no discharge. Forbearance is a good consideration; for the plaintiff was responsible for the result, and that responsibility might turn out to his detriment. If, however, his responsibility were a matter of doubt, and an advantage were gained by a concession as to the disputable point, that is a sufficient consideration. Longridge v. Dorville, 5 B. & A. 117, Stracy v. Bank of England, 6 Bingh. 754.

Cross. The plaintiff merely styles himself receiver appointed by the Court of Chancery; an office of which a court of law can take no notice. If, however, the office be recognised, the plaintiff's duty was simply to collect debts, not to enter into contracts for the forbearance of them, or to engage in suits to enforce *such contracts. And there is no consideration for the defendants' promise; since the verdict in this action would be no answer to an action in

the name of the original creditor against C. Kennedy.

TINDAL, C. J. I think there is no ground for arresting the judgment on the second count in this declaration. The count states that one Charles Kennedy was indebted to the firm of Boeme and Smout in the sum of 251. 2s.; that the plaintiff was appointed by the High Court of Chancery receiver of the debts due to the firm; whereby Charles Kennedy became liable to pay the plaintiff, as such receiver, the said sum of money, when he should be thereunto requested: there is, therefore, a distinct allegation of C. Kennedy's liability to pay the plaintiff when requested. It is objected, however, that this Court cannot take judicial notice of the office of receiver; but after verdict we may assume that it was proved the plaintiff had a right to enforce payment to himself in the capacity of receiver. And, as to the objection that there is no consideration for the defendant's promise, it is sufficient to observe that the plaintiff did not interfere as a stranger in the concerns of the firm for which he was appointed receiver: it was his duty to require the debtor to pay, and the duty of the debtor to pay The contract, therefore, to forbear to proceed against the debtor was a contract from which the plaintiff might incur a detriment; and it is a sufficient consideration for a contract if one party receives a benefit or the other is exposed to a detriment from it. We must assume it to have appeared that a receiver is liable to answer to the Court of Chancery, and that therefore it might be a detriment to him to give time, where his duty in the first instance was to require payment. Boeme and Co. could not *have put this matter in suit against the defendant; and it would be too much to say that he should be answerable neither to the receiver nor to the creditor. After verdict the plaintiff is sufficiently connected with the cause of action; there is no ground for considering him a stranger; and the rule therefore must be discharged.

Gaselee, J. I am of the same opinion. A receiver must have a reasonable discretion; and if he exercises it as in the present instance, it is not for this Court to say he has done wrong. He is responsible to the court by which he was appointed. By giving time he has incurred a responsibility, which is a suffi-

cient detriment to form the consideration for the defendant's promise.

Bosanquet, J. There is no ground for arresting the judgment in this case. It has been objected that the plaintiff has no authority to sue: but the contract in question was made by him in his character of receiver, and not as agent of the creditors, and in his character of receiver he is entitled to sue. As to the objection that a receiver has no authority to exercise forbearance towards a debtor, he must exercise a reasonable discretion, and such forbearance is not of itself incompatible with his duty as receiver. Here he agrees to forbear if a third person will give security, which is an advantage to the creditors, and a reasonable exer-

cise of discretion. That forbearance too was an advantage to the debtor, and was a sufficient consideration for the defendant's promise.

ALDERSON, J. I am of the same opinion. James Kennedy obtains time for Charles Kennedy, on an undertaking to pay in case Charles should omit to do so.

*10] That is a sufficient consideration for James Kennedy's *promise; and the jury might reasonably presume that the plaintiff had authority to do that which the defendant requested him to do.

Rule discharged.

HAMILTON, Demandant; FARRER, Tenant; WILSON, Vouchee. Nov. 4

Recovery amended by transposing the names of demandant and tenant.

Russell, Serjt., moved to amend this recovery, suffered at bar in Michaelmas term 1782, by reversing the names of demandant and tenant, pursuant to the deed to make the tenant to the *præcipe*, which bore date November 27, 1782, and the deed to lead the uses, which bore date January 3, 1782, and according to which Farrer was to be demandant and Hamilton tenant. Possession had gone according to the deed ever since.

Russell relied on Lord, demandant, Biscoe, tenant, Barnes, 24, Roberts, demandant, Robinson, tenant, 2 Taunt. 222, in which the same amendment had been made; and Loggin, demandant, Rawlins, tenant, Barnes, 21, where the principle on which such amendments are allowed is stated to be the statute of 8 Hen. 6, to amend the misprision of the clerk. Upon that principle the amendment of inserting "all tithes" was allowed in Dowse, demandant, Lloyd, tenant, 2 B. & P. 578, and Milbank v. Jolliffe, there cited.

In Michaelmas term 1830 the Court allowed the amendment now required, in a recovery in which Rose was demandant, Frowd tenant.

* Wilde, Serjt., opposed the application, on the ground that this recovery was suffered at bar; and the deed to create a tenant to the præcipe bearing a date subsequent to the first day of the term in which the recovery was suffered, to which day the judgment had relation, it could not operate in support of the recovery. The rule, therefore, as to collecting the intention of the parties from the deed, did not apply. The recovery at bar was accomplished according to the intention of the parties; and the mistake was not there, but in the deed. If so, the recovery wholly failed; for the tenant had no estate in him at the time of the recovery; and the statute 14 G. 2, c. 20, s. 6, which enacts that a recovery shall be good though the deed be executed after judgment, provided it be executed within the same term, applies only to cases where the person joining in the recovery has a sufficient estate in him to suffer the same. To put the demandant in his place, without any writing to warrant such a proceeding, would be, not to amend, but to substitute a new recovery, and to falsify the records of the court; it would, in effect, alter the warrant of attorney, which the court has always refused to do. The cases referred to in support of the application passed without opposition, and perhaps without discussion; but in Allen, demandant, Hexley, tenant, 6 B. M. 46, the Court refused to make the amendment now required.

Russell. In that case certain documents were called for by the Court; and, as they were not produced, there might have been reason for suspecting fraud.

TINDAL, C. J. I think that this amendment ought to be allowed, and that in allowing it we violate no general rule of law, while we carry into effect the obvi12 ous intention of the parties. That a recovery was intended *to be suffered, and the dramatis personæ assigned, is admitted; and the only question is, whether the formal parts of the proceeding are sufficient after fifty years' possession in conformity with the intention of the parties. In support of that intention so evinced, can we allow the names of the demandant and tenant

to be transposed? Lord, demandant, Biscoe, tenant, is an authority in point, and a decision where the application was opposed. But it is said, that in that case the deed to make the tenant to the præcipe was anterior to the recovery, so that there was something to amend by. It is true that here the deed bears date the 27th of November: it may, however, have been executed at any time before: but if it were executed on the day it bears date, not more than three weeks could have elapsed from the time of the recovery; and by the statute 14 G. 2, c. 20, s. 6, a deed executed subsequently to the recovery in the same term, is put on the same footing as a deed executed before. So that this case falls within the principle of the case in Barnes; and we are glad that any ground can be found to support a possession of fifty years, and the manifest dictates of justice.

GASELEE, J. Consistently with the facts alleged, the deed may have been executed by the tenant in tail before the day of its date; so that there may be no

necessity for recurring to the statute of 14 G. 2.

Bosanquet, J., concurred in the propriety of the amendment.

ALDERSON, J. We should be very anxious to grant this amendment where the parties clearly intended to effect a valid recovery; and the only error is of the same nature as putting John Doe by mistake for Richard Roe.

*THORNTON v. HORNBY. Nov. 4.

[*13

Upon reference to a surveyor of a cause and all matters in difference, an award that defendant had overpaid plaintiff 34l., Held, not sufficient to entitle the plaintiff to enforce the award by attachment.

This cause, and all matters in difference between the parties, had been referred to the arbitration of a surveyor. Costs to abide the event. The defendant had paid 600% into court.

The arbitrator awarded that the defendant had overpaid the plaintiff 34l.

Jones, Scrjt., in showing cause against a rule for an attachment, objected that this award was not final, and was void for uncertainty. The arbitrator should have disposed of the cause and of the matters in difference separately. The 341 might have been overpaid upon a general balance of other matters in difference, and the plaintiff might have been unpaid as to the matter contested in this action, and entitled to the verdict and costs, which he might levy separately: Highgate Archway Company v. Nash, 2 B. & A. 537. If the 341 was to be taken as overpaid in the action, then there was no adjudication upon the other matters in difference. In Randall v. Randall, 7 East, 81, where various matters were referred to an arbitrator, it was held he must adjudicate upon all.

Andrews, Serjt., for the plaintiff, contended that the award was sufficient, it not appearing that any matters save those in the cause had come before the arbitrator. The award amounted in effect to a finding that the plaintiff had no

cause of action.

*The Court took time to consider, and now thought there was sufficient doubt on the face of the award to justify the refusal of an attachment, and to leave the plaintiff to his remedy by action.

Rule discharged.

PLANCHE v. COLBURN and Another. Nov. 5.

Defendants engaged plaintiff to write a treatise for a periodical publication. Plaintiff commenced the treatise, but before he had completed it, the defendants abandoned the periodical publication: Held, that plaintiff might sue for compensation, without tendering or delivering the treatise.

THE defendants had commenced a periodical publication, under the name of "The Juvenile Library," and had engaged the plaintiff to write for it a volume upon Costume and Ancient Armour. The declaration stated, that the defendant had engaged the plaintiff for 100*l*., to write this work for publication in "The Juvenile Library;" and alleged for breach, that though the author wrote a part, and was ready and willing to complete and deliver the whole for insertion in that publication, yet that the defendants would not publish it there, and refused to pay the plaintiff the sum of 100*l*., which they had previously agreed he should receive. There were then the common counts for work and labour.

At the trial before Tindal, C. J., Middlesex sittings after last term, it appeared that the plaintiff, after entering into the engagement stated in the declaration, commenced and completed a considerable portion of the work; performed a journey to inspect a collection of ancient armour, and made drawings therefrom; but never tendered or delivered his performance to the defendants, they having finally abandoned the publication of "The Juvenile Library," upon the *15] ill success of the early numbers of the work. An attempt was made *to

show that the plaintiff had entered into a new contract.

The Chief Justice left it to the jury to say, whether the work had been abandoned by the defendants, and whether the plaintiff had entered into any new

contract; and a verdict having been found for him with 50% damages,

Spankie, Serjt., moved to set it aside, on the ground that the plaintiff could not recover on the special contract, for want of having tendered or delivered the work pursuant to the contract; and he could not resort to the common counts for work and labour, when he was bound by the special contract to deliver the work. If the plaintiff had delivered the work, or so much of it as he had completed at the time "The Juvenile Library" was abandoned, the defendants might

have turned it to account in some other way.

TINDAL, C. J. In this case a contract had been entered into for the publication of a work on Costume and Ancient Armour in "The Juvenile Library." The considerations by which an author is generally actuated in undertaking to write a work are pecuniary profit and literary reputation. Now, it is clear that the latter may be sacrificed, if an author, who has engaged to write a volume of a popular nature, to be published in a work intended for a juvenile class of readers, should be subject to have his writings published as a separate and distinct work, and therefore liable to be judged of by more severe rules than would be applied to a familiar work intended merely for children. The fact was, that the defendants not only suspended, but actually put an end to, "The Juvenile Library;" they had broken their contract with the plaintiff; and an attempt was *16] made, but quite unsuccessfully, to show that the plaintiff *had afterwards entered into a new contract to allow them to publish his book as a separate work.

I agree that, when a special contract is in existence and open, the plaintiff cannot sue on a quantum meruit: part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances the plaintiff ought not to lose the fruit of his labour; and there is no ground for the application which has been made.

GASELEE, J., concurred.

Bosanquer, J. The plaintiff is entitled to retain his verdict. The jury have found that the contract was abandoned; but it is said that the plaintiff ought to have tendered or delivered the work. It was part of the contract, however, that the work should be published in a particular shape; and if it had been delivered after the abandonment of the original design, it might have been published in a way not consistent with the plaintiff's reputation, or not at all.

ALDERSON, J., concurred, and the learned Serjeant Vol. XXI.—54 2 N 2

*COBBETT and Others, Assignees of BAKER, a Bankrupt, v. COCH-RANE. Nov. 10.

Plaintiffs declared as assignees, but assigned a breach in non-payment to them, assignees as aforesaid, instead of us assignees as aforesaid: Held, sufficient on special demurrer.

THE plaintiffs declared, as assignees of the bankrupt Baker, for the amount of goods sold by him to defendant; and alleged as a breach, that the defendant had not paid Baker or the plaintiffs, "assignees as aforesaid."

Demurrer, that the damage was not alleged to have accrued to the plaintiffs, as assignees as aforesaid, and that the plaintiffs had shown no cause of action

in any other character.

Merewether, Serjt., in support of the demurrer, referred to Bridgen v. Parkes,

2 B. & P. 424, and Henshall v. Roberts, 5 East, R. 150. But

The Court thought there was nothing in the objection, for the words "assignees as aforesaid," might be rejected as surplusage.

Judgment for plaintiffs.

*BOOTY, Demandant; CAMERON, Tenant; NORTH, and Three Others, Vouchees. Nov. 11.

In this recovery there were four vouchees, three of whom appeared in court; the fourth, who resided in Jamaica, had executed a warrant, in which he was the only vouchee named.

The officer of the Court, thinking that all four ought to have been named in

that warrant, otherwise it did not appear to be the same recovery,

Taddy, Serjt., moved that the recovery might pass, contending that the warrant was sufficient, as not being incompatible with a recovery in which four were vouched, and referred to Simmons and three others, vouchees, 11 B. Moore, 485, as an authority in point.

The Court thought the warrant was not in the regular form, but on the autho-Fiat.

rity of the case referred to, acceded to the application.

MARKHAM, Plaintiff; BAYLEY, Deforciant.

This fine was taken in the West Indies, by commissioners under a dedimus potestatem duly acknowledged: the præcipe and concord were signed by the *commissioners, and the usual affidavit made by one of them; but one of [*19 the commissioners omitted to endorse his name on the dedianas.

Scriven, Serjt., moved that the fine might pass notwithstanding. Fiat.

HEPWORTH v. SANDERSON. Nov. 12.

Plaintiff issued a mandate to the officer of a liberty, to arrest the defendant on a cs. ss. Defendant was assured discharged, under the insolvent debtors' act, from the custody of the sheriff of the county. The plaintiff having become the assignee under the discharge, Held, that he was estopped to rule the officer of the liberty to return the mandate for the capture of the defendance. of the defendant.

THE plaintiff in this cause having obtained a rule calling on the bailiff of the

liberty of Langborough (Yorkshire) to make a return to the sheriff's mandate for the capture of the defendant under a ca. so.;

Wilde, Serjt., moved to discharge this rule, on an affidavit, which stated that, upon the commissioner of the insolvent debtors' court making his last visit to York, the constable of York Castle had certified that the defendant was in his custody at the suit of the plaintiff; that the defendant had been duly discharged under the insolvent debtors' act, and that the plaintiff, the sole creditor, had

afterwards been appointed assignee of his estate and effects.

Jones, Serjt., on the part of the plaintiff, contended that this was no answer to the rule for the officer of the liberty to return the mandate. The officer of the liberty was guilty of a violation of his duty in transferring the defendant to the custody of the sheriff. In Boothman v. Earl of Surry, 2 T. R. 5, it was held, that the bailiff of a liberty, who had the return and execution of writs, was *201 in execution to the county gaol, situate out of the liberty, and there delivered him into the custody of the sheriff; and the plaintiff's acceptance of the office of assignee, which is a trust for the benefit of a general body of creditors, was no waiver of any claim he might have, as an individual, against the officer

of the liberty for misconduct anterior to the date of the assignment.

TINDAL, C. J. The plaintiff in this action has obtained the ordinary rule, calling on the officer of a liberty to return the mandate of the sheriff for taking the defendant into custody upon a capias ad satisfaciendum. A rule has since been obtained to discharge the rule for compelling a return to the mandate; and we think this latter rule should be made absolute. There are many cases in which a plaintiff is not entitled to call for the return of a writ; as where he has taken an assignment of the bail-bond, or has otherwise so conducted himself as to show that he is contented. Thus, when, he has acted as his own builiff, or when, after an arrest, he has met the defendant and accepted a sum in discharge of all claims, can he call for a return of the writ? Put the case of the bankruptcy of the defendant, and the plaintiff becoming his assignee, could he sue the sheriff and obtain a separate compensation? The merits are the same here; for after the arrest, the plaintiff consents to become assignee under the insolvent debtors' act, and has all the defendant's property; he is estopped, therefore, to go into the question of escape, which, at all events, is an escape in law only, and After becoming a party to the deed of assignment, which would not not in fact. have been made, unless the defendant had been in custody and discharged, the plaintiff has admitted that the custody was an existing legal custody; *he ought not, therefore, still remaining assignee, to call for this return in the face of his own admission.

GASELEE, J. The assignment to the plaintiff is subsequent to the discharge of the defendant, and that is decisive. The defendant's petition shows where he is in custody, and his schedule, for what debts. The plaintiff, therefore, must have been aware of all the circumstances when he consented to become assignee.

Bosanquer and Alderson, Js., concurring, the rule for discharging the rule for a return was made

Absolute.

SHERLOCK v. BARNED. Nov. 12.

When the costs of the former trial are to abide the event of a new trial, if the same party succeeds on the new trial, he has the costs of both trials; if a different party, he has only the costs of the new trial.

Upon the first trial of this cause the plaintiff obtained a verdict, which the defendant moved to set aside, on the ground of an alleged misdirection of the Judge. The Court directed a new trial, and by the terms of the rule the costs of the former trial were to abide the event.

The defendant having obtained a verdict on the new trial, the prothonotary allowed him the costs of that trial only; whereupon

Wilde, Serjt., obtained a rule for the prothonotary to review his taxation, and

allow the costs of the former trial also.

Jones, Serjt., who showed cause, contended, that by the practice of both Courts, when the costs of the *former trial were to abide the event, if the same party succeeded on both trials he had the costs of both; if a different party, he had only the costs of the last trial. Chapman v. Partridge, 2 N. R. 382.

Wilde. In Chapman v. Partridge the Court said, that the words of the rule onght to be construed with reference to the question which must have been depending, namely, whether the new trial should be granted upon payment of the costs of the first by the defendant; and upon that principle proceeded the decision in Brown v. Boyn, 5 B. M. 309. Here, the plaintiff, having obtained the first verdict through the misdirection of the Judge, was not entitled to exact the costs of the first trial as the condition of allowing the defendant to go down again; and the defendant having now established that the plaintiff never had any cause of action, ought, in justice, to be indemnified for all the expense he has incurred. With reference to the question here, the rule, that the costs of the former trial shall abide the event, must be construed as a sort of bargain made with the defendant to insure him ultimately against the vexation of an unfounded suit.

TINDAL, C. J. We ought to adhere to the rule generally received in this Court, and universally in the Court of King's Bench, that a party who succeeds on a second trial, not having succeeded on the first, is entitled to the costs of the second trial only. There has been no bargain here to take the case out of the ordinary rule. A misdirection was alleged, and the Court feeling a doubt, sent the case down for a second inquiry. The defendant was put under these terms to insure to the plaintiff the costs of both trials, in case the verdict should be the *same way a second time; for a party does not pay the costs of a trial [*23] on which he succeeds.

GASELEE, J. There never has been any variance between the practice of the two courts on a rule worded like this; and if there were any bargain between these parties to a different effect, it ought to have been clearly expressed.

BOSANQUET, J., concurred.

ALDERSON, J. The condition that the costs of the former trial shall abide the event, is a condition in favour of the party against whom the rule for a new trial is granted. The party applying for a new trial must take it on any terms which the Court may think fit to impose. The party against whom the application is made is already in a favourable position, and can scarcely be called on to pay costs for his success.

Rule discharged.

POWELL v. EASON. Nov. 14.

A discharged insolvent is not exonerated from the claim of a surety, who pays, subsequently to the discharge, a debt due before.

THE defendant had been discharged under the insolvent debtors' act in February 1830.

The plaintiff, as a surety, had joined the defendant in a promissory note to one Bell, which became due before the defendant had filed his schedule in order

to his discharge. The schedule specified the debt to Bell.

This note, the plaintiff, after the defendant's discharge, was called on to pay, and having paid it in *December, 1830, sought by this action to recover the amount from the defendant. The defendant had inserted the plaintiff's name and the amount of the promissory note in his schedule.

A verdict having been obtained for the plaintiff,

Adams, Serjt., obtained a rule nisi to set it aside, on the ground that the lefendant, by his discharge under the insolvent debtors' act, was exonerated from any such demand.

Wilde, Serjt., was to have shown cause, but the Court called on

Adams to support his rule. He contended that the general object of the insolvent debtors' act, 7 G. 4, c. 57, was to give the debtor a complete discharge from all his embarrassments, which object would be defeated if, notwithstanding a discharge from the claim of a principal creditor, he should afterwards be liable at the suit of a surety to such creditor. The insolvent is not to take the benefit of the act a second time within five years, except in certain cases, of which a suit at the instance of a surety is not one; if, therefore, this action lies, the defendant may, for five years, be deprived of the benefit of the act. By section 60 he is to be released from arrrest for any debt or sum or sums of money due before his discharge; and the words sum or sums of money seem to have been intended to apply to such a demand as the present. So by s. 51 he is to include in his schedule sums payable by way of annuity or otherwise. In Wilmer v. White, 6 Bingh. 291, the Court did not decide this question, but merely refused to interfere summarily on motion.

*Heath, Serjt., was on the same side.

TINDAL, C. J. I think the verdict for the plaintiff ought to stand. The question arises on the construction of the insolvent debtors' act, and we are to take the description of the debts from which the insolvent is to be discharged from the tenth and forty-sixth sections of the act. The tenth, which authorizes the insolvent's petition, describes them as "the demands of all persons who shall claim to be creditors of such prisoner at the time of presenting such petition."

And s. 46 authorizes his discharge from custody "as to the several debts and sums of money due or claimed to be due at the time of filing such prisoner's petition."

Then, was the plaintiff a creditor of the defendant at the time of presenting his petition? There was no debt as between him and the defendant; the debt was due from the defendant to Bell, the plaintiff was no more than a surety, and consequently no creditor at the time of the discharge. As a confirmation of this view of the subject, we find that in an act passed the year before, the bankrupt act 6 G. 4, c. 16, a machinery is employed to relieve the bankrupt from the claim of a surety, for he may pay the debt and stand in the place of the original creditor. There is no such clause in the present act, from which we may infer that the legislature intended to discharge a bankrupt from such claims, but not an insolvent.

GASELEE, J. I am of the same opinion. There is no possibility for a surety to claim under the insolvent debtors' act, except by paying the debt before the insolvent's discharge.

Bosanquet, J. The plaintiff is entitled to retain his verdict: the debt for *26] which he sues became due *subsequently to the discharge of the insolvent, and there are no words in the act which relieve the insolvent from such a claim. The relief is confined to debts due at the time of the discharge. As to debts to become due by bond, annuity, or otherwise, the fifty-first section, which applies to them, cannot include a debt like this, for it says the Court shall ascertain their value, "regard being had to the original price given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of filing such prisoner's petition."

ALDERSON, J. The fifty-first section was meant to benefit annuity creditors, by enabling them to claim for the whole amount, instead of the mere arrears due at the time of the discharge.

Rule discharged.

THORNE v. Marquis of LONDONDERRY. Nov. 12.

Defendant, upon certain terms favourable to plaintiff, was allowed to have a special jury after the cause had stood for trial by a common jury during a whole sittings, and had been twice postponed at the instance of the defendant.

This cause, an action for an assault on a female servant, was entered for trial by a common jury at the sittings after last Trinity term; it was twice called on late in the day, and as often postponed on the representation of the defendant's counsel, that it would occupy a long time. The cause having been made a remanet to this term, the defendant now obtained a rule for a special jury; which rule

Wilde, Serjt., moved to discharge, on the authority of the rule of Court, which requires that the rule for a *special jury be served two days before the adjournment day after each term (R. T. 52 G. 3. 4 Taunt. 600). The application should have been made before the adjournment day of the last sittings.

Jones, Serjt., on the part of the defendant, offered judgment of the term, the production of certain witnesses, and other facilities to the plaintiff, as the condi-

tion of retaining the special jury.

These terms were not acceded to; but

The Court allowed the defendant to retain his special jury upon condition of his fixing the cause for trial on a certain day, giving judgment of the term, and bringing up certain witnesses required by the plaintiff.

Rule to set aside the rule for a special jury discharged.

Mayor and Corporation of NORWICH v. GILL. Nov. 16.

Practice. Elisors.

THE sheriffs and coroners of Norwich being members of the corporation, Taddy, Serjt., moved that the Court would enjoin the prothonotary to approve or appoint elisors to whom process should be directed; the prothonotary thinking he could not do so without an order from the Court.

The Court acceded to the application, and made the rule absolute in the first instance.

Rule absolute.

*SCRUTON v. DAWSON. Nov. 16.

F*28

Practice. Venue.

JONES, Serjt., upon the usual affidavit, moved to change the venue from London to the city of Norwich, unless the plaintiff would consent to try in the county of Norfolk; but

The Court refused to accede to the application, except on an affidavit disclosing special grounds for it, and Jones Took nothing (a)

(a) See Walton v. Hutton, 1 Chitty's Rep. 14, and 1 Tidd's Pr. 655 (8th ed.), in note. Also 15 Petersdorff's Ab. tit. Venue, in note.

WILLIAMS v. LEWSEY. Nov. 16.

As against an execution creditor, a landlord is entitled to a full year's rent, although he has been used to remit some portion of it to his tenant.

EXECUTION being issued in this cause against the defendant's goods, the sheriff, before the goods were sold, received notice from the defendant's landlord to retain 450l. for a year's rent.

The sheriff, under an indemnity, refused to retain more than 360l., on the

ground that the landlord had abated his rent to that amount.

On a motion calling on the sheriff to pay over the 450*l*. to the defendant's landlord out of the proceeds of the defendant's goods, the landlord deposed, that though on account of hard times he had made a voluntary reduction in the defendant's rent, yet he always considered himself entitled to demand the full amount, *and gave his half-year's receipt for "180*l*. in satisfaction of 225*l*.," whereupon,

TINDAL, C. J., said it was a very clear case. The landlord was not bound to make an abatement to the tenant's creditors, because he had chosen to make an abatement to the tenant.

Rule absolute.

Wilde, Serjt., for the landlord; Andrews, Serjt., for the sheriff.

BRIDGES, Widow, v. SMYTH, Spinster. Nov. 16.

Same v. Same.

Held, that a judgment for plaintiff in this Court might be set off against a judgment for defendant in K. B., although plaintiff was dead, and the judgment was assets in the hands of her administrator:

Held, that the judgment in K. B. for defendant was valid, although not entered up within two terms after death of defendant, verdict having been given during her life, and the delay occasioned by a motion touching an award.

Mrs. Bridges had judgment in this Court in the above two actions to the amount of 816l. 15s., and she dying after the judgments were entered up, Frowd, her attorney, who claimed to be a judgment-creditor, had taken out letters of administration.

Miss Smyth had a judgment in the Court of King's Bench to the amount of 30521. against Mrs. Bridges, and Frowd was requested to set off the 8161. 15s.

against the 30521. This he refused to do: whereupon,

Wilde, Serjt., obtained a rule nisi for Miss Smyth to enter satisfaction on the judgment rolls in this Court, upon acknowledging satisfaction for 816l. 15s. on the judgment for 3052l. in the Court of King's Bench, and for Frowd to pay the costs of the application.

*30] *Storks and Russell, Serjts., showed cause, and objected, first, that the judgment in the Court of King's Bench was invalid; Mrs. Bridges having died after verdict, and judgment not having been signed within two terms after her death, as it ought to have been pursuant to 17 Car. 2, c. 8.

Secondly, That execution had been executed by Mrs. Bridges, she having issued a writ of elegit, and having commenced actions of ejectment to enforce it.

Thirdly, That Mrs. Bridges being dead, and Frowd being her administrator, the judgments in this Court were in a different right, and could not be set off without compromising the interests of creditors; and

That Frowd had a lien for his costs upon the judgments in this Court.

Wilde, in answer to the first objection, stated, that the verdict in the King's Bench had been obtained before the death of Mrs. Bridges, and was taken subject to the award of an arbitrator as to the amount, which award was also made

before the death of Mrs. Bridges; but that she obtained a rule nisi to set aside the award, against which rule, owing to the pressure of business in the Court, cause could not be shown within two terms after the death of Mrs. Bridges.

In answer to the second, he stated that the actions of ejectment had not been proceeded with, and cited Simpson v. Hanley, 1 M. & S. 696, where the defendant was allowed to enter satisfaction on the roll upon a judgment obtained against him, on his acknowledging satisfaction for the amount upon a judgment obtained by him in C. P. against the plaintiff for a larger amount, although he had the plaintiff in custody in execution of that judgment; and Lomas v. Mellor, 5 B. M. 95, to the same effect.

*In answer to the third objection, he cited Barker, Administratrix, v. Braham, 3 Wils. 396, where a judgment in B. R. was ordered to be set off against a judgment in C. B., and the balance due to the plaintiff to be paid by the defendant in C. B.; the balance being all that the creditors could claim.

As to the attorney's lien, in this Court it did not interfere with a set-off of

judgments.

TINDAL, C. J. We think this rule ought to be made absolute. Mrs. Bridges obtained judgment against Miss Smyth in two actions in this Court, amounting together to 8161. 15s., and died after the judgments had been entered up in this Court, but two terms before judgment had been entered up against her by Miss Smyth in the Court of King's Bench. Frowd, her attorney, took out administration to the effects of Mrs. Bridges, claiming to be a judgment creditor; and the question is, Whether the judgments entered up in this Court for Mrs. Bridges are properly the subject of set-off against the judgment obtained by Miss Smyth in the Court of King's Bench? Three objections have been made to the set-off. It has not been urged that the judgments of one Court cannot be set off against the judgments of another; but it is said that the judgment in the Court of King's Bench, if not void, is at least irregular, because it was not signed within two terms after the death of Mrs. Bridges. The rule, however, established by the statute 17 Car. 2, does not apply to such a case as this. The verdict was obtained in the lifetime of Mrs. Bridges: the amount of damages was referred to an arbitrator, who also made his award in her lifetime; but an application was made on her part to reduce the amount of damages, and the rule was pending during the time *necessary for deciding other causes which had priority. Pending the rule Mrs. Bridges died. The case, therefore, does not depend on the statute of Car. 2, but on the rule of common law, that where parties are hung up by act of law neither of them loses his right, but eventually judgment is entered nunc pro tunc, as if the party were still alive. And while the judgment is suffered to exist on the rolls of the Court without any steps to set it aside, we can only treat it as a valid judgment.

The second objection is, that Mrs. Bridges, one of the parties, has prosecuted her judgment to execution; that she has advanced a step further than the other, and ought not now to be stopped. In reality she has obtained no advantage, because nothing has been done on the ejectments; and endeavouring to obtain satisfaction is no answer to an application like this unless complete satisfaction be obtained. That appears from Simpson v. Handley, where the defendant was allowed to set off a judgment against a judgment of the plaintiff's, although he

had the plaintiff in execution.

The third objection is, that this is not a case between two parties, each in his own right; not a case of simple plaintiff and defendant; but the plaintiff in one suit being dead, the rights of others, that is, the rights of creditors to assets, intervene. The objection turns on a fallacy. For what are the assets? Suppose a simple contract debt of 50% on one side, and of 40% on the other, the assets would be 10%. The circumstance that the debts are judgment debts makes no difference: the actual balance forms the assets. In Barker, Administratrix, v. Braham, a judgment in B. R. was ordered to be set off against a judgment in C. B., and the balance due to the plaintiff to be paid by the defendant in C. B. As to the attorney's lien, it is well known that in this Court we do not regard

it when we look at the rights *of the parties. An officer of the Court was bound to know the rule in that respect, and therefore Mrs. Bridges's attorney having refused to allow the set-off, must pay the costs of this

application.

GASELEE, J. The only difficulty I felt was as to the attorney's being administrator. That doubt is removed by Barker v. Braham; and we cannot upon affidavit inquire into alleged defects in a judgment of the Court of King's Bench. I have some doubt about the costs, but not enough to induce me to differ from the rest of the Court.

BOSANQUET, J. I concur as to the set-off; and as to the costs, I think they ought to be paid by the attorney, because, being an officer of the Court, he was bound to know the rule, and not to drive the other party to make this application. ALDERSON, J., concurred. Rule absolute.

CORBETT and Another v. BROWN. Nov. 15.

Plaintiffs being about to furnish defendant's son with goods on credit, inquired of the defendant. by letter, whether his son had, as he asserted, 3001. of his own property: defendant answered that he had; the fact being that defendant had lent his son 3001. on his promissory note, payable with interest on demand, and had received interest on the note.

The son having afterwards become insolvent, Held, that this was a misrepresentation for which the defendant was liable in damages to the plaintiffs, and a jury having found for

defendant, the Court granted a new trial.

THE declaration stated, that the plaintiffs, before and at the times of the committing the grievances by the defendant as thereinafter mentioned, had been, *31] and still were, warehousemen, and the trade and *business of warehousemen for and during all that time had used, exercised, and carried on, and still did use, exercise, and carry on, at, &c.; that the plaintiffs, so being warehousemen, and so using, exercising, and carrying on the said trade and business, one Henry Brown, before the committing of the grievance by the defendant thereinafter next mentioned, on the 15th of April, 1830, at, &c., applied to the plaintiffs, and then and there stated, that he was about to commence business at Norwich, and that he had 300l. capital, his own property, to commence business with, at, &c., and then and there requested the plaintiffs to sell goods to him Henry Brown in the way of the plaintiffs' trade and business of warehousemen, and then and there referred the plaintiffs to the defendant to corroborate the statement of him, Henry Brown, that he had capital 300l. of his own property, to commence business with, at, &c., whereof the defendant afterwards, and before the sale of the goods by the plaintiffs to the said Henry Brown thereinafter next mentioned, on, &c., at, &c., had notice, and was then and there requested by the plaintiffs to inform them if the said Henry Brown had 300l. capital, his own property, to commence business with, at, &c.; nevertheless the defendant, well knowing the premises, and that Henry Brown had not 3001. capital, his own property, to commence business with, at, &c., but fraudulently intending craftily and subtilly to deceive and injure the plaintiffs in that behalf, to wit, on, &c., at, &c., falsely, fraudulently, and deceitfully informed the plaintiffs, in answer to their inquiry, that the statement so made to them by Henry Brown as to the 300% was perfectly correct, as the defendant had advanced him, Henry Brown, the money; by means and in consequence of which information so given by the defendant to the plaintiffs as aforesaid, they, not knowing to the contrary, but believing therefrom that Henry *Brown had 3001. capital, his own property, to commence business with, at, &c., afterwards, to wit, on, &c., and on divers other days and times to wit, at, &c., were induced to give credit to Henry Brown, and did then and there sell and deliver to him divers goods on

credit, at or for divers prices, in the whole amounting to a certain large sum of

money, to wit, the sum of 700*l*.; whereas in truth and in fact the said Henry Brown, at the time of the defendant so giving the information to the plaintiffs as aforesaid, had not 300*l*. capital, his own property, to commence business with, at, &c., and the defendant, at the time of his so giving the information to the plaintiffs, well knew the same; and whereas in truth and in fact the defendant, at the time of his so giving the information to the plaintiffs, had not advanced the said sum of 300*l*., or any sum whatever, to Henry Brown. Averment, that Henry Brown now is in bad and insolvent circumstances, and that the sum of 700*l* is wholly due and unpaid to the plaintiffs, and that they are likely to lose the same.

Plea, not guilty, and issue thereon.

At the trial before Tindal, C. J., London sittings after last term, it appeared that H. Brown, being about to open a shop at Norwich, applied to the plaintiffs for a supply of goods upon credit; and upon inquiry as to his circumstances, he stated he had a capital of 300l. to begin with. The plaintiffs were particular in their inquiries, and H. Brown referred to his father (the defendant) to corroborate the truth of his statement; whereupon the following correspondence took place between the plaintiffs and the defendant:—

"Your son, Mr. Henry Brown, has purchased goods of us, and referred us to you in order to corroborate his statement of having 300l. capital, his own property, to commence business with at Norwich. We require to *know if such be the case. Any further information you may please to give will oblige us, and which we shall be happy to apply in promoting your son's object, provided we can consistently do so. We shall be glad of an answer by return of post; and are, &c.

CORBETT, SIMES, and Co."

"In reply to your letter of yesterday, I beg to acquaint you that the statement made to you by my son Henry as to the 300% is perfectly correct, as I advanced him the money, being the utmost I could spare at the present time, in

consequence of having a numerous family.

"I hope my son's dealings with you will be at all times as correct as the present statement; and am, &c.

JAMES BROWN."

In consequence of the defendant's letter, the plaintiffs trusted H. Brown from time to time to a large amount, and he soon became bankrupt in their debt, paid a dividend of 8s. 6d. in the pound, and left the plaintiffs losers of the sum of 389l. 10s. 7d. The 300l. defendant had lent to H. Brown about three weeks before his letter to the plaintiffs, the defendant taking, at the time of the loan, H. Brown's promissory note for the amount, payable on demand, with interest at 5 per cent., which interest was paid up to the time of H. Brown's bankruptoy; but the defendant declined to prove the 300l. as a debt under his son's commission. The jury found for the defendant; whereupon,

Wilde, Serjt., obtained a rule nisi to set aside this verdict as contrary to the evidence, the plaintiffs having requested to know whether the defendant's son had 300l. capital, of his own property, and the defendant having stated such to

be the fact, when he knew his son had none but borrowed capital.

*Jones, Serjt., who showed cause, contended that the defendant was warranted in the answer he had given, money lent by a parent being commonly intended as a gift; as it turned out in this case, the father having forborne to prove for his debt under the son's bankruptcy. Besides which, money borrowed, when once in the son's disposition, was as much his own property, and as applicable to mercantile purposes, as money realized by himself.

TINDAL, C. J. We think there ought to be a new trial in this case on payment of costs; the jury having drawn a conclusion from the defendant's letter,

which, it seems to the Court, its contents do not warrant.

GASELEE, J., concurred.

BOSANQUET, J. A party who sets up in business on borrowed capital is in very different position in point of credit from a party who sets up unembarrassed with debt.

ALDERSON, J. The question is, whether, from the statement's being false within the defendant's knowledge, the Court must not infer fraud.

. Rule absolute.

*387

*KENNETT v. MILBANK. Nov. 17.

Defendant, by a deed reciting that he was indebted to plaintiff and others, assigned his property to plaintiff, in trust to pay all such creditors as should sign the schedule of debts annexed provided that if all did not sign, the deed should be void. Plaintiff never signed, nor was the amount of his debt stated:

Held, not a sufficient acknowledgment to take plaintiff's debt out of the statute of limitations,

although it was admitted orally that he had but one debt.

This was an action on a promissory note, to which the defendant pleaded the statute of limitations.

To take the case out of the statute, the plaintiff put in a deed of 13th of March, 1829, between the defendant of the one part, and the plaintiff and one Cooper of the other; by which, after reciting that the defendant was indebted to the plaintiff and others, the defendant assigned a freehold estate and all his property to the plaintiff and Cooper, in trust to sell the same, and pay such creditors as should sign their names to the schedule of debts annexed, if the defendant should have omitted to pay 6s. 8d. in the pound by the 20th of December then next; with a proviso that if all the creditors, whose debts amounted to 10l., did not sign by the 13th of August then next, the deed and all the covenants should be void.

The plaintiff never executed the deed, and the amount of his debt was no where stated; but it was admitted by counsel at the trial, that the promissory

note sued on was the only debt due.

It was objected, that the recital in the deed was not a sufficient acknowledgment of the specific debt to take it out of the statute of limitations; and the verdict was taken for the plaintiff, with leave for the defendant to move to set it aside, and enter a nonsuit instead.

Andrews, Serjt., having obtained a rule nisi accordingly,

Wilde, Serjt., showed cause. The recital in the deed is a sufficient acknow-*39] ledgment in writing to satisfy the *statute 9 G. 4, c. 14. It is stated in the deed, without qualification, that the defendant was indebted to the plaintiff; and it was admitted at the trial, that there was no other debt besides the promissory note. Before the statute 9 G. 4, a promise to pay was implied from an unqualified admission of debt. Tanner v. Smart, 6 B. & C. 603, Haydon v. Williams, 7 Bingh. 163, Gibbons v. M'Casland, 1 B. & A. 690, Mountstephen v. Brook, 3 B. & A. 141. The statute has merely required that the acknowledgment shall be in writing; for if it did not give the same effect to the acknowledgment when once established by writing, as was given before to a parol acknowledgment, it would be worse than nugatory. It may be collected, however, from the language of the statute itself, that an unqualified acknowledgment in writing was to have the same effect as before; for, after reciting that questions had existed as to the effect of acknowledgments and promises, it enacts, "that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment, or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby."

TINDAL, C. J. The rule for entering a nonsuit in this case ought to be made absolute. The question is, whether the debt which the plaintiff seeks to recover has been taken out of the operation of the statute of limitations by any evidence adduced at the trial. Independently of the statute 9 G. 4, c. 14, I should have

But by that statute it is enacted, "that in actions of debt, had *no doubt. or upon the case grounded upon any simple contract, no acknowledgment, or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." The question, therefore, is, whether we have any evidence in writing of an acknowledgment or promise with respect to this debt. Evidence of promise there is none. A deed was put in, by which the defendant, after reciting that he was indebted to the plaintiff and others, assigned his property to the plaintiff and Cooper in trust to sell the same and pay the creditors who should sign their name to the schedule of debts annexed, in case the defendant should have omitted to pay 6s. 8d. in the pound by a given day; with a proviso that the deed and all the covenants in it should be void, unless all the creditors whose debts amounted to 10% signed within a certain time. The deed was never executed by the plaintiff, nor does it even specify the amount of his debt. It cannot, therefore, be considered evidence of a promise; and the less so, as it became void for want of execution by the creditors within the stipulated time. Is it, then, evidence of an acknowledgment? By the 9 G. 4, which was passed to put an end to doubts which had arisen on the statute 21 Jac. 1, it is required that the whole of the acknowledgment shall be in writing. The deed in question is made in trust for those creditors who shall come in and sign the schedule; but the plaintiff's name is not there; and the acknowledgment ought to go to amount as well as to credit, otherwise the plaintiff might claim one thousand pounds as easily as one. It has been contended, indeed, *that this part of the acknowledgment has been supplied by the admission of counsel in Court; but that is not sufficient where the statute requires the acknowledgment to be in writing, and the only object of the admission is to save the time of the Court. Suppose, before the statute of 9 G. 4, the statute of limitations had been pleaded, and the counsel for the defendant had admitted his handwriting, would that alone have taken the case out of the statute? If not at a time when the whole of the admission might be by parol, why should it have that effect when the whole of the acknowledgment is required to be in writing? The recent statute was intended to protect parties against demands made after an unreasonable time, and no injustice is done in giving it full effect.

GASELEE, J. I am of the same opinion. The deed recites that the defendant was indebted to the parties in the sums set opposite to their names; but no sum is mentioned as the plaintiff's debt, and, therefore, there is no evidence of any acknowledgment in writing. There is also another point in this case on which a difficulty arises: an acknowledgment before the time limited by statute has elapsed, has been held evidence from which a promise to pay may be inferred; but it is not clear that such an inference would be drawn where the acknowledgment is after the six years; and if there be any promise in this case, it is qualified with the condition that it should be void unless all the creditors whose debts amounted to 10% should sign the deed within a given time. The admission by counsel was made without prejudice, and cannot be taken into

account.

Bosanquet, J. The late statute requires that the whole of the acknowledgment shall be in writing. The *acknowledgment here is only in general terms, that the defendant is indebted in the sums set opposite to the names of the parties, but no sum is specified as the amount of the plaintiff's claim; therefore, without the additional evidence in writing of that sum, there is no such acknowledgment as the statute requires.

An acknowledgment, however, can only operate as evidence of a promise; and if it be accompanied with qualifications which show it was not meant to operate as a promise, it will not be sufficient to take a debt out of the operation of the statute of limitations. The evidence here is a deed, which concludes with a reviso that unless all the creditors of a certain class come in and sign within

a given time, the deed and the covenants contained in it shall be void. The acknowledgment was part of the deed, and has become void for want of the

condition required to give it validity.

ALDERSON, J. The enactment which requires the acknowledgment of a debt to be in writing, must apply to the debt for which the plaintiff is suing. The acknowledgment here is only of some debt; but of what, remains to be made out by parol evidence. To admit such evidence under these circumstances, would defeat the whole object of the recent statute. It might lead to conflicting testimony, and produce all the inconvenience which that statute was designed to obviate.

Rule absolute.

*43] *YOUNG, Assignee of YOUNG, a Bankrupt, v. MARSHALL and POLAND, Sheriff of Middlesex. Nov. 19.

The sheriff sold goods under a f. fa., without notice of a previous act of bankruptcy by the defendant, and paid over the proceeds of the sale to the plaintiff upon an indemnity: Held, that the defendant's assignee might properly sue the sheriff in an action for money had and received.

This was an action for money had and received, brought by the plaintiff, as assignee of Young, a bankrupt, to recover the proceeds of certain goods of the bankrupt sold by the defendants as sheriff of Middlesex, under a writ of fieri facias; the commission of bankrupt having been issued against Young on an act of bankruptoy anterior to the writ of fi. fa.

The defendants had no notice of the bankruptcy until after the levy, when

they paid the proceeds over to the execution creditor under an indemnity.

A verdict having been found for the plaintiff,

Taddy, Serjt., obtained a rule nisi to set it aside, on the ground that the action was misconceived, and ought to have been trover; contending that the action for money had and received did not lie, at least against a public officer, where the money had been paid over and the property changed.

Wilde, Serjt., who showed cause, was proceeding to urge, that the sheriff, having paid over under an indemnity, stood in the same situation as the party

indemnifying, when the Court called on

Taddy to support his rule. By the sale under the execution, the property in the goods was changed, and ceased to be the property of the bankrupt or his Perkinson v. Gilford, Cro. Car. 539, Clerk v. Withers, Ld. *assignee. Raymd. 1073, per Gould, J., Moreland v. Pellatt, per Bayley, J., 8 B. & C. 723. Although, therefore, the assignee might sue the sheriff in trover for improperly detaining goods to which the assignee was entitled, Price v. Helyar, 4 Bingh. 597, he could not sue him in assumpsit for proceeds arising from the goods after the property in them had been changed by a venditioni exponas under the fi. fa. Besides, by suing in form ex contractu, he treats the sheriff as his agent, and affirms all his previous acts. After affirming the sale, therefore, the plaintiff cannot claim the proceeds on the ground that the sale was not warranted. At all events, the action is too late after the sheriff has paid the mouey over in obedience to a writ. Thurston v. Mills, 16 East, 267. sheriff, as a public officer, ought to be protected where he acts without notice.

TINDAL, C. J. The verdict for the plaintiff in this case may be supported on a principle generally known and acknowledged in Westminster Hall. This is an action by the assignee of a bankrupt against the sheriff of Middlesex, on the ground that he has sold, under a fi. fa., goods belonging to the plaintiff, and which he ought not to have taken. But no party is bound to sue in tort, where, by converting the action into an action of contract, he does not prejudice the defendant; and, generally speaking, it is more favourable to the defendant that he should be sued in contract, because that form of action lets in a set-off, and enables him to pay money into Court. It has been contended, however,

that the action does not lie here, because the defendant has paid the money over to a judgment creditor without *notice of the act of bankruptcy. If that were so, I should agree that the money was no longer in the defendant's hands to the use of the plaintiff: but money paid over on an indemnity, may be said not to have been paid over at all: the defendant, however, paid after notice, for he paid upon an indemnity, and that could only have been exacted on knowledge of the facts. The case, therefore, falls within the general rule, that a party is not bound to sue in tort, where, by suing in contract, he produces no injury to the defendant.

PARKE, J. The indemnity is of itself strong evidence of notice before the

payment.

BOSANQUET, J. By relation to the act of bankruptcy, the property was in the plaintiff at the time of sale. The plaintiff who sues in an action for money had and received, does not thereby affirm the acts of the sheriff, he merely waives his claim to damages for a wrong, and seeks to recover only the proceeds of the sale. It is true the sheriff is a public officer, but if he pays over upon an indemnity, he pays with notice, and the plaintiff, who is entitled, must recover.

ALDERSON, J. If ever the question should arise, whether the sheriff is liable when he has sold and paid over without notice of the act of bankruptcy, the Court will determine it; but no such question arises here, because the indemnity is virtually notice. It has been urged, that the property is changed by sale; and so it is as between a purchaser and the party against whom execution has issued, but not as against a party whose goods have been wrongfully taken. By proceeding by the action for money had and received, the party merely waives his claim to damages for the seizure and detention of the goods, and is content to sue for the proceeds.

Rule discharged.

*DOE v. WHITCOMB. Nov. 19.

Γ*46

The judgment in the preceding ejectment is evidence in an action for mesne profits against a defendant who came into possession under the defendant in the ejectment.

TRESPASS for mesne profits. At the trial before Alderson, J., last Somerset assizes, the evidence was,

Judgment in ejectment against Simon Payne in Hilary term 1823, upon a

demise for twenty-one years, commencing in 1822;

A scire fucias upon this judgment in Trinity 1830, and notice thereof to the defendant and others;

Execution, by habere facias possessionem.

It was then proved that the defendant had occupied the premises for a year ending November 1830; that he had been let into possession under an agreement made by the son of Simon Payne on behalf of his father, and had paid rent to the son.

It was objected, that this evidence did not connect the defendant with Simon Payne sufficiently to render him liable to this action for mesne profits, and the verdict was taken for the plaintiff, with leave for the defendant to move the Court on the point: accordingly,

Stephen, Serjt, having obtained a rule nisi to set aside the verdict,

Wilde, Serjt., showed cause, and contended, that the defendant, having come in under S. Payne, held the premises under the same liabilities. If the law were otherwise, the defendant in ejectment might always deprive his landlord of the mesne profits, by delivering up possession to a stranger.

Stephen. The judgment in ejectment was no evidence against the defendent Whitcomb. A judgment is *evidence only against parties and privies; Outram v. Morewood, 3 East, 345. Whitcomb is not a party. And privies are only of two kinds; privies in estate, and privies by act of law in the

post: Co. Lit. 352 a. He was not a privy by act of law, and he could not be privy in estate; for Simon Payne was a trespasser, and had no estate. Whitcomb, therefore, though liable to be put out of possession, is not, by this evidence, so connected with S. Payne as to be liable for the mesne profits. In Denn v White, 7 T. R. 112, it was held, that a recovery in ejectment against the wife could not be given in evidence in an action against the husband and wife for mesne profits.

TINDAL, C. J. We entertain no doubt on the case. The evidence was, a judgment in ejectment against Simon Payne; the execution of a writ of possession thereon; that the defendant came in under Simon Payne; had possession for a certain time, and paid rent to a certain amount. The only objection to the verdict is, that the defendant is a stranger to the record in ejectment against Payne. The answer is, that the defendant came in under Payne while the judgment in ejectment was pending, and that he cannot hold by a better title than Payne. As he came in under Payne, the judgment is evidence against him.

Rule discharged

*48] *BUDD v. FAIRMANER. Nov. 14.

"Received of B. 101. for a gray four year old cold, warranted sound:"
Held, that the warranty was confined to soundness, and that, without proving fraud, it was no ground of action that the colt was only three years old.

THE plaintiff sued on an alleged breach of warranty in the sale of a horse.

The proof of the warranty consisted of the following receipt, which was drawn up by the plaintiff's servant, and signed by the defendant.

"Received of Mr. Budd 101. for a gray four year old colt, warranted sound in

every respect."

The complaint was, that the colt, which the plaintiff had purchased to match another in his possession, was only three years old; as to which, the evidence seemed somewhat conflicting; but the Chief Justice, before whom the cause was fried, thinking the warranty applied to soundness only, and that the age was a

mere matter of description, the plaintiff was nonsuited.

Wilde, Serjt., moved to set aside the nonsuit, on the ground that the defendant's warranty included the age as well as the soundness of the animal. By the very act of sale, the vendor warrants that the article is such as he professes to sell, and the purchaser proposes to buy. Thus, in Gardiner v. Gray, 4 Campb. 144, where the defendant undertook to sell the plaintiff waste silk, and sent an article not saleable under that denomination, Lord Ellenborough said, "The intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them: the purchaser cannot be supposed to buy goods to lay them on a dunghill." In Bridge v. Wain, 1 Stark. 504, it was held, that where goods sold were *described in the invoice as scarlet cuttings, a warranty was to be inferred that the goods answered the known mercantile description of scarlet cut-So in Yates v. Pym, 6 Taunt. 446, where the defendant sold what he described as prime singed bacon, he was not allowed to show a custom in the trade to receive bacon to a certain degree tainted, as prime singed bacon; and the bacon in question being tainted, the plaintiff retained his verdict. Here, the purchaser proposed to buy a four year old horse for the purpose of matching another: a three year old colt was unfit for such a purpose, or even for general employment. The seller professed to sell a four year old; and having altogether failed, he is liable in damages for his breach of contract: for the particular warranty as to soundness does not supersede the general warranty that the thing sold is what the vendor professes to sell. Lord Coke says, "If a man make a feoffment by dedi, and in the deed doth warrant the land against J S and his

heirs, yet dedi is a general warranty during the life of the feoffor."(a) And in policies of insurance, a particular warranty does not narrow any general or implied warranty; as that the ship is seaworthy, or the like. If the defendant had sold a gelding or a stallion warranted sound, would it have been a performance of his contract to have delivered a mare?

The Court granted a rule nisi, against which Andrews and Russell, Serits., showed cause.

The instrument produced is a mere receipt, and must be construed according to the intention which appears on the face of it. From the position of the word warranted, it is plain that soundness was all that *the defendant proposed to warrant, and that age was mere matter of description; if it had been [*50] proposed to warrant age as well as soundness, the instrument should have run "warranted four years old, and sound." The cases relied on are not cases of warranty, but of general contract; and doubtless a vendor must deliver an article, answering, in all material points, the description of the article he professes to sell. But a horse, unexceptionable in other respects, does not materially vary from the description given of him if he turn out to be three years old instead of four, more especially as the difference between the two ages is perceptible by inspection of the mouth, which excludes the probability of any intentional misrepresentation. In Dunlop v. Waugh, Peake N. P. C. 167, it was held that what the vendor says about the age of an animal, is not a warranty of the age, for it may be a mere statement of his belief. In Richardson v. Brown, 1 Bingh. 344, the defendant's advertisement was, "To be sold, a black gelding five years old; has been constantly driven in the plough; warranted;" and it was holden that the warranty applied to soundness only. So, in Dickenson v. Gapp (tried before Dallas, C. J., Middlesex sittings 1821), the plaintiff sued for a breach of warranty, in proof of which he adduced the following receipt :-- "Received of Mr. Dickenson 1001. for a bay gelding, got by Cheshire Cheese; warranted sound;" and then showed that the horse was not got by Cheshire Cheese. Dallas, C. J., held, that the warranty was confined to soundness, and nonsuited the plaintiff, who never moved to set aside that decision. So in Jeudwine v. Slade, 2 Esp. 572, it was held, that putting down the name of an artist in a catalogue as the painter of a picture, is not such a warranty as will subject the party selling to *an action, if it turn out that he might be mistaken, and it was not the work of the artist to whom it was attributed. Upon a mistaken representation a party is not liable, unless he be guilty of fraud, but upon a warranty he is liable at all events. Williamson v. Allison, 6 East, 446. If the defendant be held to have warranted the age, he may, with as much justice, be contended to have warranted the colour of the horse, or any other quality equally obvious to the sense.

Wilde and Spankie, Serjts. Richardson v. Brown was not an action on a warranty, but for the price of a horse which the defendant had kept and used; and the alleged warranty being apparently resorted to by an afterthought for the purpose of eluding payment, was not entitled to much favour. There is no printed report of Dickenson v. Gapp; and as to the age of the horse being apparent upon inspection, it does not appear but that the plaintiff purchased without inspection on the recommendation of the defendant. The principle which applies to such transactions is clearly laid down in Shepherd v. Kain, 5 B. & A. 240, where the defendant sold what he described to be "a copper-fastened vessel; to be taken with all faults" The Court held, "with all faults must mean, all faults which it may have consistently with its being the thing described;" and that as the ship was not copper fastened, the plaintiff was entitled to recover for a breach of warranty.

TINDAL, C. J. In this case a written instrument was produced by the plaintiff to show the nature of the contract between him and the defendant, and we are to interpret that instrument like all others, according to the intention of the

The instrument appears *to be a receipt for 101. "for a gray parties. four year old colt. warranted sound." I should say that, upon the face of this instrument, the intention of the parties was to confine the warranty to soundness, and that the preceding statement was matter of description only. And the difference is most essential. Whatever a party warrants, he is bound to make good to the letter of the warranty, whether the quality warranted be material or not: it is only necessary for the buyer to show that the article is not according to the warranty: whereas, if an article be sold by description merely, and the buyer afterwards discovers a latent defect, he must go further, allege the scienter, and show that the description was false within the knowledge of the seller. And where there is an express warranty as to any single point, the law does not beyond that raise an implied warranty that the commodity sold shall be also merchantable. Therefore, in Parkinson v. Lee, 2 East, 313, upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, although a fair merchantable price was given, it was held that the seller was not responsible for a latent defect, unknown to him, but arising from the fraud of the grower from whom he purchased. A party who makes a simple represention stands, therefore, in a very different situation from a party who gives a warranty. And if so, how can I say that this distinction was not present to the mind of the defendant in this case? When he sells a gray four year old colt, warranted sound, he means to say that he will be responsible for the soundness, but that the rest is only matter of representation, for which he will not be answerable, unless it be shown to be false within his knowledge. Many cases have been referred to, and some stress has been laid on the effect of the word dedi when contained in a grant; *but, according to Lord Eldon, in Browning v. Wright, 2 B. & P. 21, words of that nature "import a contract in law, the effect and meaning of which would be affected by the subsequent words of the indenture;" and in the cases relied on for the plaintiff, the sellers had delivered commodities essentially different from those which they had professed to sell. Richardson v. Brown, and Dickenson v. Gapp are authorities in point for the defendant.

GASELEE, J., concurred.

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Bosanquer, J. In every case where the contract appears on a written instrument, the instrument must be construed according to the intent of the parties. As, where the dealing is by a contract note, the article delivered must agree with the terms of the note; or, where a ship is insured, it must correspond with the warranties contained in the policy. What is the instrument here? Not a contract of sale, but a mere receipt, describing an antecedent contract. Are we to infer from the terms used, that the party had expressly contracted the animal should be four years old? The collocation of the word warranted shows that such was not the intention of the parties. Richardson v. Brown proceeded on this principle, and Dickinson v. Gapp is almost the same case as the present. Interpreting this instrument, therefore, according to the intention of the parties, I think it clear that the warranty was confined to soundness.

ALDERSON, J. It is not necessary to refer to Richardson v. Brown, because we can see here, from the collocation of the word warranted, that it is confined to the quality of soundness.

Rule discharged.

*WILSON v. HAMER. Nov. 22.

A party discharged from arrest on giving security, cannot be arrested again if the security turn out to be worthless, unless he has been guilty of fraud.

THE defendant had been discharged from an arrest, upon giving the plaintiff securities, which, as the plaintiff alleged, turned out to be of no value. The Vol. XXI.—56

prothonotary, upon an investigation of the circumstances, found that there was no fraud; but the plaintiff, when the nature of the securities was manifest, without restoring them, had arrested the defendant a second time for the same cause.

Wilde, Serjt., obtained a rule nisi for setting aside the process on the defend-

ant's filing common bail; when

Spankie, Serjt., in support of the second arrest, relied on Puckford v. Maxwell, 6 T. R. 52, where the defendant having been arrested at the suit of the plaintiff, obtained his discharge by giving a draft for a part of the demand,

which draft being dishonoured, a second arrest was held regular.

TINDAL, C. J. The rule must be made absolute. The defendant was discharged from the first arrest upon an arrangement that securities should be given. Whether they were adequate or not, at all events the plaintiff took them, and now, without restoring them, arrests the defendant a second time. The principle of the case referred to is, that when a party gets rid of an arrest by subterfuge or fraud, as by giving a check on a person with whom he has no connexion, the plaintiff may arrest him again. That is not the case here, and, therefore, the rule must be made

Absolute.

*DIGBY v. Lord STIRLING. Nov. 22.

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Defendant having voted at the election of Scotch peers, Held, as a Scotch peer, entitled to be discharged from arrest, although his vote had been protested against, his claim to the title disputed, and never recognised by the House of Lords or at Court.

SPANKIE, Serjt., had obtained a rule nisi to set aside the capias ad respondendum and bail-bond in this case, upon an affidavit that the defendant was a Scotch peer; had voted at elections for Scotch peers in the years 1825, 1830, 1831, when his vote was duly received by the clerk of session; and that an application similar to the present had been made to Lord Tenterden with success.

Wilde, Serjt., showed cause on affidavits, which denied that the defendant had any rightful claim to the title, or that the patent on which he relied, existed. It was also to be collected from the defendant's own affidavit, that at the last election the Duke of Buccleugh and Lord Lauderdale had protested against the defendant's voting; that his right had not been recognised by the House of Lords previous to voting, as required by order of that house; that the Lord Chancellor had refused to acknowledge him, and the King to receive him at court. The defendant, therefore, it was contended, was not even a peer de facto; for the clerk of session had exercised no judgment on the claim, his office being

merely ministerial.

TINDAL, C. J. The course which the Court will pursue is that to which the defendant is entitled at their hands. Without our coming to any decision on the particulars of the defendant's claim, he is entitled to be discharged on common bail if he acts as a peer of Scotland. By the twenty-second article of the act of union (5 Ann. c. 8), sixteen peers of Scotland are to sit and *vote in the twenty-third article, all peers of Scotland are to enjoy all privileges of peers as fully as peers of England, except the right and privilege of sitting in the House of Lords. By an act of the next year, 6 Ann. c. 23, the mode of electing the sixteen peers is regulated. Proclamation is to be issued commanding all the peers of Scotland to assemble and meet at Edinburgh to elect, by open election, the sixteen peers; and we have only to see whether the defendant did, in obedience to any such proclamation, meet at Edinburgh for the purpose of such election. It is not denied that he did so in 1825, 1830, and 1831. No objection was made till the last time, and he then voted in defiance of the protest of two of the peers; the protest, therefore, serves rather to

strengthen than to impair his claim. However, on the validity of his title we give no opinion; but as he performed acts which Scotch peers are called on to perform, and which, since the Union, were the only acts which he could perform in the character of peer, he is entitled to the protection of these statutes. We cannot presume that any one would be allowed to vote who is not de facto a peer. This Court cannot judicially notice the order of the House of Lords that no one shall vote till his title has been recognised by that House. We think, therefore, that this rule must be made absolute; but as it has been obtained under circumstances of doubt, without costs.

Rule absolute accordingly.

*57] *BRADLEY v. RICARDO. Nov. 23.

Where a party being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not, therefore, to be repudiated by the Judge.

This was an action against the sheriff of Gloucestershire for a false return of sulla bona to a writ of fi. fa.

At the trial the plaintiff called the sheriff's officer to prove the receipt of the warrant to levy.

Upon cross-examination, the witness affirmed that no goods could be found

belonging to the party against whom the levy was directed.

The plaintiff's counsel was then proceeding to prove his case by other witnesses, and to contradict the sheriff's officer as to his statement that no goods could be found, when the learned Judge who presided thought that, if the plaintiff were permitted to contradict a witness placed in the box by himself, as to a particular fact, the whole evidence of the witness must be struck out; upon which the plaintiff was nonsuited.

Wilde, Serjt., obtained a rule nisi to set aside the nonsuit, contending that though a party is not allowed to throw general discredit on the character of a witness called by himself, he may set him right as to any particular fact which

he may have stated incorrectly, and the rest of his evidence may stand.

Ludlow, Serjt., showed cause, and relied upon Alexander v. Gibson, 2 Campb. 556, where it was held that if a witness unexpectedly gave evidence against the party calling him, although his evidence could not be in part relied upon, and the rest of it disproved, it might be entirely repudiated, and witnesses might be called on the same side to contradict him. And Lord Ellenborough said, "The *party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated." The witness was not a witness of necessity, for the fact of the receipt of the warrant might have been proved by another.

TINDAL, C. J. This rule must be made absolute. The object of all the laws of evidence is to bring the whole truth of a case before a jury; but if this rule were to be discharged, that would no longer be the just ground on which the principles of evidence would proceed, but we should compel the plaintiff to take singly all the chances of the tables, and to be bound by the statements of a witness whom he might call without knowing he was adverse, who might labour under a defect of memory, or be otherwise unable to make a statement on which complete reliance could be placed. Suppose a case in which, for some formal proof, the plaintiff is obliged to make a witness of the defendant's attorney, who on cross-examination makes a statement adverse to the plaintiff; is the plaintiff to be precluded from calling the witnesses whom he had prepared before to show the real state of the case? It has been urged as an objection, that this

would be giving credit to the witness on one point after he has been discredited on another; but difficulties of the same kind occur in every cause where a jury has to decide on conflicting testimony. The general rule is, that a party shall not be permitted to blast the character of a witness called in support of his case by adducing general evidence to his discredit; but I have never heard it said that when surprised by a statement contrary to fact, he may not call *another witness to show how the fact really is. It is a common occurrence that persons called on to give their testimony decline to make any statement before they appear in Court. It would be a great hardship if the party compelled to call such persons should be bound by everything they may choose to say. The alteration in the general rule which the defendant in this case seeks to establish, would lead to great inconvenience and injustice. The rule, therefore, which has been obtained for setting aside the nonsuit must be made absolute.

GASELEE, J. In Alexander v. Gibson, Lord Ellenborough says, "The party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated." With deference to Lord Ellenborough, it seems to me that it is for the jury to say whether his evidence is to be entirely repudiated or not. It is going too far to determine that the party shall suffer because a witness is not consistent in his testimony. Ewer v. Ambrose, 3 B. & C. 749, is in

point.

BOSANQUET, J. I think that this nonsuit ought to be set aside. The general rule is, that a party who calls a witness into the box is not permitted to prove generally that he is unworthy of credit, but may contradict him as to particular facts. It has been objected, however, that you cannot contradict him as to a particular fact without repudiating his evidence altogether. But the practice has always been the other way, and if there be anything in Alexander v. Gibson in support of the *argument urged on the part of the defendant, I cannot agree in that view of the subject: it is inconsistent with both principle and practice. A party is often compelled to call an adverse witness; and if he, on cross-examination or otherwise, makes statements inconsistent with fact, another witness may be allowed to contradict him: and there is no instance of a judge having been called upon in such a case to strike out the rest of his evi-The discrepancy may afford a fair topic for counsel as to the degree of credit to which the witness is entitled, but the whole statement must go to the jury, who, in forming their judgment, are often guided by the manner and feelings of the witness. If he states some facts which are adverse to the bias under which he speaks, and some which coincide with it, the jury may, without inconsistency, believe the one statement and reject the other.

ALDERSON, J. I am of the same opinion, and adhere to the rule as laid down in Buller's Nisi Prius. A party will not be permitted to produce general evidence to discredit his own witness. That is the true rule, and I cannot but dissent from the restriction of it which has been ascribed to Lord Ellenborough. The case cited by him, Lowe v. Jolliffe, establishes the contrary of the proposition for which it was cited. There all the attesting witnesses swore to the insanity of the testator when the will was executed, but they were contradicted by

other evidence, and the will was established.

Now, in order to prove a will by an insane person, it must be proved, not only that the testator was insane but that the will was executed; and in that case, although the testimony was rejected as to the sanity, it was received as to the execution: that agrees with good sense and the general practice.

A party calls many witnesses; one of them states a fact adverse to his claim, another explains the *statement: was it ever heard of that on such an occasion the whole testimony of the former witness should be struck out?

A witness is called to prove a notice to produce a written instrument: upon cross-

examination he makes some incorrect statement: is the party who calls him and who controverts this statement to be precluded from giving a copy of the written instrument in evidence, because, as it has been argued, the testimony of the witness as to the notice is to be struck out? Such a rule would lead to the greatest inconvenience.

The rule as laid down by Mr. Justice Buller is intelligible and clear, namely, that a party shall not be permitted to throw general discredit on a witness whom he has put into the box; but it would be monstrous if the whole of his testimony were to be struck out because a subsequent witness sets him right as to a single Rule absolute.

fact which he may have stated incorrectly.

HEWITT v. PIGOTT, Sheriff of SOMERSET. Nov. 23.

HEWITT v. Lord EGMONT.

Plaintiff had judgment against E. for 24971., and issued a writ of f. fa., to which the sheriff returned nulla bona, being indemnified by E.'s attorney, to whom, with other trustees, E.'s property had been conveyed in trust, to pay creditors. A verdict having been given for the sheriff, in an action against him by plaintiff for a false return, plaintiff was not allowed to set off the costs in that action against the debt due on the judgment for 24971.

THE plaintiff had a judgment for 2497l. 8s. 8d. in the above cause against Lord Egmont, whose property, by a deed of November 1824, had been conveyed to C. F. Adey and others in trust to sell and pay creditors.

The plaintiff issued a fi. fa. on this judgment, to which Pigott, the sheriff of Somersetshire, indemnified *by Adey on the part of Lord' Egmont's trus-

*62] tees, returned nulla bona. The plaintiff, thereupon, sued Pigott the sheriff for a false return. Adey appeared as attorney for Pigott, in whose favour the verdict was ultimately found.

Cross, Scrit., upon an affidavit of the foregoing facts, and that Adey had offered the plaintiff 7001, and a debenture for 10001, in discharge of his claim on Lord Egmont, obtained a rule nist to set off the costs payable by the plaintiff in the action with Pigott, against the judgment in the action with Lord Egmont.

Wilde and Jones, Serjts., showed cause, upon an affidavit which stated that after the offer made by Adey to the plaintiff, discoveries had been made by which the Court of Chancery had been induced to stay the proceedings on the judgment against Lord Egmont, and to direct a Master to investigate the plaintiff's accounts: an investigation which was still pending. But they relied on the objection, that the two actions were not between the same parties; for, admitting that Adey had acted for Lord Egmont in some particulars, the indemnity given by him in the action against the sheriff, was not given on behalf of Lord Egmont, but of the trustees under the deed of 1824, and the general body of creditors.

Cross, Serjt., contended, that as the trustees represented Lord Egmont he must be considered the real defendant in the action against the sheriff.

TINDAL, C. J. The question upon the rule is, are the costs payable by the plaintiff in his action against the sheriff, to be written off against the debt due to him on his judgment against Lord Egmont? Are the funds to be resorted *63] to in the two actions substantially the *same? Even supposing the trustees to be substantially the defendants in the action against the sheriff, the action is hostile to them, and to the parties whom they represent; the plaintiff, in suing the sheriff, seeks to obtain a priority over the other creditors of Lord Egmont. To yield to this application, would be to give him the priority to the attent of the costs in that action, and enable him to fight the question at the expense of the creditors at large. It is clear, therefore, that the two suits are not substantially between the same parties, and the rule must be discharged.

GASELEE, J. I am of the same opinion; we could not, in any view of the case, set off one demand against the other without going into the plaintiff's account, and that account is now before the Court of Chancery.

Bosanquet, J. The ground for this application, namely, that the parties are substantially the same, entirely fails. One action is against the sheriff; the other against the Earl of Egmont. The sheriff is indemnified by trustees for creditors, among whom the plaintiff is one, and the Earl of Egmont is only so far interested as respects the surplus, if any, after the discharge of the trust. The trust-deed is the deed of the creditors, and the suit against the sheriff is substantially a suit against them.

ALDERSON, J. I am of the same opinion. In applications, like this, to the equitable jurisdiction of the Court, we must see our way clearly before we interpose. In the present case, we might do gross injustice by acceding to the plaintiff's demand. If the estate of Lord Egmont be insolvent, we should injure the other creditors. If it be solvent, the plaintiff in the long run will be indemnified for his loss.

Rule discharged.

*ANDREWS v. THORNTON. Nov. 24.

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The Court refused to discharge the rule for a special jury, on the ground that the defendant had obtained it in January 1831, and up to the Michaelmas term following had omitted a strike the jury, although the cause stood for trial in July.

THE defendant, after notice of trial, served a rule for a special jury on the 31st of January last. The cause, which was an action for slander, stood for trial on the 8th of July, but did not come on. The defendant having up to the present time omitted to strike his special jury,

Wilde, Serjt., obtained a rule nisi to discharge the rule of the 31st of Jun-

ary.

Spankie, Serjt., who showed cause, referred to Bloxam v. Brown, 4 Taunt 470, Tripp v. Patmore, 4 B. M. 470, and Thorne v. Marquess of Londonderry, ante, 26, contending that the Court would not discharge the rule for a special jury unless it were distinctly sworn that the cause was not proper to be tried by a special jury, and that delay alone was the object which the party had in view.

Wilde. The present case is distinguishable from those which have been cited; for the defendant here, by omitting to strike his special jury for such a length of time after notice to try by a common jury, has in effect abandoned his rule. By striking the special jury now, he will be enabled to postpone the trial till after Hilary term.

TINDAL, C. J. A rule must be made in future to obviate this inconvenience. But I cannot say the defendant here has so far erred as to exclude himself from the right to a special jury; at the same time, as there *has been cause for complaint, the rule must be discharged without costs.

Rule discharged accordingly.

BOWER v. JONES. Nov. 24.

By agreement, T., an agent, was to have a commission on all sales effected, or orders executed by him; the principal to be responsible for bad debts, and the agent to draw his commission monthly. By the custom of the trade, commission was not allowed on sales which produced bad debts: Held, notwithstanding, that under the terms of this agreement T. was entitled to commission on bad debts.

In an action against the defendant as guarantee of Benjamin Tupling, an arbitrator found specially, that on the 2d of January, 1826, it was agreed between the plaintiff and B. Tupling, that the said B. Tupling should become the agent for the sale of the plaintiff's manufactured stock of goods in London and its vicinity, for which the plaintiff was to pay him a commission of 5l. per cent. on all goods sold or orders executed through the London markets, the plaintiff to be responsible for all bad debts contracted in his name for the purpose of carrying on his business, and to allow the said B. Tupling to draw his commission monthly, he, B. Tupling, at the same time undertaking to make due remittances from time to time of moneys received on account of the plaintiff, and to make up all the accounts monthly; also to give security that the amount of stock and book debts should be appropriated solely for the use of the plaintiff: That on the 9th of January, 1826, the defendant duly executed a guarantee in writing to the plaintiff, in the words and figures following; -- "In consequence of an agreement entered into the 2d of January, 1826, by Joseph Bower to supply Benjamin. Tupling with stock of plated goods to sell for him on commission, I hereby agree as surety to guaranty Mr. Bower to the amount of 2001. for a due return of the stock in hand, and payment of the moneys received on account of the said Joseph Bower, agreeably to the engagement subsisting between them. Samuel Jones:" Upon the faith of *which guarantee the plaintiff employed the said Benjamin Tupling to sell goods for him on commission, according to the terms of the aforesaid agreement. That it was not the custom of the trade to which the plaintiff belonged to allow a commission to agents upon bad debts, but that B. Tupling did from time to time credit himself in his account with the plaintiff with certain sums for commission on certain sales effected by the said B. Tupling on behalf of the plaintiff, which afterwards turned out to be unproductive through the insolvency of the purchasers, and which commission on such bad debts amounted to 141. 8s. That if Tupling had no claim to place this 14l. 8s. to the credit side of his account with the plaintiff, there was a balance due to the plaintiff of 8l. 11s. 3d. exclusive of the sum of 27l. 4s. 10d. paid into Court by the defendant on account of the action; and exclusive also of the further sums thereinafter mentioned. That B. Tupling transmitted from time to time, at intervals of about three months, returns of the amount of sales made and cash received by him on account of the plaintiff. That in the return sheet dated the 30th of June, 1828, there was an entry amongst others of certain goods there specified, amounting to 16l. 2s. 3d. as having been sold by B. Tupling to himself on the 17th of May, 1828, which goods were subsequently paid for by B. Tupling in due course. That in the return sheet dated the 29th of September, 1828, there was a similar entry of goods amounting to 38l. 6s. 3d. as having been in like manner sold by the said B. Tupling to himself, on the 28th of August, 1828, for which he accepted a bill drawn by the plaintiff on the 9th of October, 1828, which bill was twice renewed, the last time on 24th of March, 1829; but neither the original nor either of the renewed bills was ever paid. the return sheet dated the 10th of December, 1828, there was a similar entry of *a sale of goods by the said B. Tupling to himself, on the 21st of November, 1828, amounting to 13l. 2s. 6d., for which no payment was ever made. That at the close of the year 1828 the plaintiff came to town, and personally investigated the said B. Tupling's accounts, but could not agree with him in balancing them. That the said B. Tupling in his return sheet, dated the 29th of December, 1828, debited himself in the sum of 68l. 14s. 6d. for goods sold

by him, B. Tupling, to himself, which he entered in one gross sum under the designation of "sundries," and without any particular date or dates, there having been before no entry of sales made by him without specifying the details of the articles alleged to have been sold. That in the last return sheet furnished by the said B. Tupling on the 30th of March, 1829, there was an entry of goods, the particulars of which were specified as having been sold by B. Tupling to himself on the 31st of January, 1829, amounting to 191. 14s.; and another entry of a similar alleged sale to himself on the 20th of February, 1829, amounting to 231. 16s., the particulars of which were not specified. That for some time previously to the date of the last-mentioned return, the said B. Tupling was in embarrassed circumstances, and shortly afterwards took the benefit of the insolvent act, having previously, however, in pursuance of the plaintiff's directions, returned to him the remainder of the goods then in his possession unsold, amounting in value to upwards of 600l. That no part of the amount of the said several alleged sales from the said B. Tupling to himself was ever paid or settled for, either in cash or by securities, except the two first as before mentioned. That the plaintiff never remonstrated with the said B. Tupling upon his debiting himself with the said alleged sales or any of them, nor ever expressed any objection thereto. That considering the state of the said B. Tupling's circumstances at that *period, and the form in which the entry of the 29th of December, 1828, was made, the arbitrator was of opinion that that entry or alleged sale, and those of the 31st of January, 1829, and 20th of February, 1829, were expedients to which the said B. Tupling, deeming the former alleged sales to himself to have been sanctioned by the plaintiff, had recourse, in order to enable him to meet deficiencies in his accounts with the plaintiff, and not for the purpose of re-selling the goods to customers of his own for a profit in the regular way of his trade. That the plaintiff, in a letter addressed to B. Tupling on the 19th of February, 1829, when referring to the general state of the accounts between them, included the amount of the alleged sales to Tupling under the head of "accounts owing." That in another letter addressed to B. Tupling on the 31st of March, 1829, the plaintiff used the words "You can surely send me 201. on your own account." And a subsequent letter dated the 7th of April, 1829, and addressed to B. Tupling by the plaintiff, contained the following passage:-"I am sorry to hear that your health will not permit you to follow your business: although we have been hitherto unfortunate in our business, I should have felt much pleasure in keeping up a correspondence and doing a little business with you. As for the agency business it does not answer; that I need not tell you; therefore the sooner it is given up the better."

The arbitrator then awarded and adjudged that the plaintiff was entitled to recover of and from the defendant under and by virtue of the said guarantee, exclusive of the said sum of 271. 4s. 10d. paid into Court as aforesaid, the said sum of 8l. 11s. 3d., if the Court should be of opinion that the plaintiff was by law entitled to disallow as between him and the defendant all those sums for which credit was taken by Tupling as commission on sales which subsequently turned out to be unproductive, owing to *the insolvency of the purchasers: and further awarded and adjudged that the plaintiff was entitled to recover of and from the defendant, under and by virtue of the said guarantee, the said several sums of 13l. 2s. 6d., 68l. 14s. 6d., 19l. 4s., and 23l. 16s., in addition to the said sum of 8l. 11s. 3d., if the Court should be of opinion that the conduct observed by the plaintiff in reference to the said alleged sales by B. Tupling to himself, did not amount in point of law to a sanction of the said transactions, so as to discharge the defendant's liability in respect of the amount thereof,—which said several sums amounted altogether to 1331. 8s. 6d.,—and then directed that a verdict should be entered for the plaintiff for the said sum of 1331. 8s. 6d., subject to the opinion of the Court; but if the Court should be of opinion that the plaintiff could not, in point of law, disallow the said credits for commission on the bad debts as aforesaid, and by his conduct had discharged the defendant from all

liability in respect of the amount of the said alleged sales to B. Tupling, in that case he directed that a verdict should be entered for the defendant.

Wilde, Serjt., having obtained a rule nisi to enter up a verdict for the plain-

tiff pursuant to the award,

Jones, Serjt., showed cause. The defendant is entitled to the verdict. First, by the express terms of the agreement Tupling is entitled to commission on bad debts; for he is to have the commission on all goods sold; the plaintiff is to be responsible for bad debts; and Tupling is to draw his commission monthly.

The custom of the trade cannot prevail against an express agreement.

Secondly, the loss upon the sales made by Tupling to himself is not within the scope of the defendant's guarantee. Tupling has transmitted all the money he *received, and has returned all the stock on hand; and the defendant's guarantee extends to no other matters. The course of dealing between the parties, and the plaintiff's letters, show that the plaintiff never objected to the sales made by Tupling to himself; and as he permitted those sales to go on after Tupling had been under the necessity of renewing his bill for payment, the plaintiff must take the consequence of his own remissness, and not cast it on the defendant. In Bartlett v. Pentland, 10 B. & C. 770, Lord Tenterden says, "If the plaintiffs had by their neglect, even though that neglect had been induced by the misrepresentation of their agent, placed the defendant in a situation different from that which he might have been in if no such neglect had taken place, there might be ground for contending that, in point of justice, they, and not the defendant, ought to be losers."

The parties must be presumed to have been dealing according to the custom of the trade, which would exclude the 141. 8s. claimed for commission on bad debts. It could never be the intention of the parties that the plaintiff should lose his goods and pay commission for the loss. Then, with respect to the sales alleged to have been made by Tupling to himself, the plaintiff may be admitted to have recognised the three first, having received payment on one, having consented to renew a bill on the other, and the third standing unimpeached on the award; but the three subsequent sales, styled in the award expedients, are in effect admissions that the amount of them, 68l. 14s. 6d., 19l. 14s., and 23l. 16s., was so much money had and received by Tupling to the plaintiff's use, under sales made to others, and falsely ascribed to himself; money *which *71] he has omitted to pay over, and for which the defendant is therefore

responsible under the terms of his guarantee.

The Court thought that by the express terms of the agreement between the plaintiff and Tupling, Tupling was entitled to the commission on the bad debts, but that the defendant was liable, under the terms of his guarantee, to make good the three sums which Tupling had, as an expedient, entered as sales to himself, the entry by way of expedient implying that the money had been received to the plaintiff's use upon sales to other persons, and falsely entered as sales to Tupling; whereupon the judgment was ordered to be entered up for the amount of those three sums, and the balance of 8l. 11s. 3d. found by the arbitrator, minus 14l. 8s. commission on the bad debts.

Judgment for plaintiff accordingly.

TALBOT v. BINNS and Another. Nov. 25.

The cause assigned at the end of a writ of pone is more form, and cannot be traversed by the

A WRIT of pone had been issued in this case as follows:---"William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith. To the sheriff of Yorkshire, Vol. XXI.—57 2 P 2

greeting. Lay before our justices at Westminster, on the 31st day of October, the plaint which is in your county by our writ, between Joseph Talbot and Joseph Binns and Anthony Hornby, of a plea of trespass upon the case; and give notice to the said Talbot that he be there ready to prosecute his plaint thereupon against *the said Joseph Binns and Anthony, if he be willing, and have there this writ and the other writ. Witness, ourself, at Westminster, the 21st day of June, in the first year of our reign.

"Because the said Joseph Binns and Anthony, for the favour which the said Joseph Talbot hath in the said county, cannot obtain justice, as it is said, let this writ be executed, if the cause be true, and the said Joseph Binns and

Anthony desire it, and not otherwise."

To which the sheriff made the following return:-

"My answer to this writ appears in a certain schedule hereunto annexed.

"HARRY JAMES GOODRICKE, sheriff.

"I, Sir Harry James Goodricke, Bart., sheriff of the county of York, do hereby humbly certify and return to our lord the king, that the writ hereunto annexed, and to me directed, was delivered to me on the 28th day of June last past, being the day before my county court held at the castle of York in and for the same county, on Wednesday, the 29th day of the same June, on which day the issue joined between the said parties named in the said writ was appointed for trial, and I did thereupon in my said county court cause the said writ to be openly read: whereupon and before the allowance of the said writ before the suitors of the same court, then and there came the plaintiff named in the said writ, to wit, Joseph Talbot, and then and there alleged that the defendants named in the said writ, to wit, Joseph Binns and Anthony Hornby had sued out and procured the said writ for the purpose of harassing him the said plaintiff by unjust and unnecessary delays, and thereby preventing the recovery of the money and damages sought to be recovered of them the said defendants by the said plaintiff in and by the said plaint: and the said Joseph Talbot further then and there alleged, *that the cause set forth at the foot of the said writ, was falsely and untruly so set forth by or at the suggestion of [*7] the said Joseph Binns and Anthony Hornby; and thereupon the said Joseph Talbot then and there traversed and denied the truth of the cause so set forths: the foot of the said writ for the execution thereof, and offered then and there w prove that such cause so stated was untrue, and thereof put himself upon the country; and the said Joseph Binns and Anthony Hornby being solemnly called to answer the said allegations so alleged and made by him the said Joseph Talbot, and to prove the truth of the cause so set forth by them for the execution of the said writ, then and there neglected to make any answer or to join issue upon the traverse so made by him the said Joseph Talbot as aforesaid, where upon it was adjudged by the suitors of the said court that the cause assigned for execution of the said writ at the foot thereof was untrue, and, therefore, that I ought not to put the plaint in the said writ mentioned before his said majesty s within I am commanded, wherefore I could not execute the said writ, the cause therein alleged for the execution thereof not being true.

"The answer of Sir Harry James Goodricke, sheriff."

Jones, Serjt., on the part of the defendants, obtained a rule nisi to set aside this return on an affidavit that interlocutory judgment was signed in the county court before the defendants had pleaded; that no issue was ever joined; and that a writ of inquiry was executed the day after the writ of pone was lodged with the clerk of the county court. He contended that it was imperative on the sheriff to return the plaint, and that he could not traverse the formal cause alleged for issuing the pone.

Cross, Serjt., showed cause on an affidavit, which stated, that the action was brought to recover 6l. 12s. 8d., *the balance of a blacksmith's bill; that the defendants had, on the 19th of February, been duly served with a writ of justicies, and on the 6th of April with particulars of demand; had imparled; had repeatedly asked for time, and had been advised by their attorneys to settle,

the plaintiff having agreed to make a small abatement; that judgment was suffered by default, and notice of inquiry given on the 14th of June; and that the defendants were three times called on in the county court to substantiate the truth of the allegation in their writ of pone, but that neither they nor their

agent appeared.

Cross admitted that it might be imperative on the sheriff to return the plaint when the pone is issued by the plaintiff, because in his case the writ contains no allegation of the cause for issuing the pone, nor an injunction to the sheriff to act only if that allegation be true. But a defendant cannot sue out a pone without alleging a cause. Fitz. N. B. 119; and to prevent vexation and delay upon so small a demand, the Court would hold him to the letter of his writ. The whole proceeding was disgraceful to the administration of justice.

Sed per Curiam. That is an observation for the legislature. We cannot alter the practice of centuries. The allegation of cause for a writ of pone is a mere matter of form; as much so as the allegation of latitancy upon mesne process, or the affection of John Doe for the tenant in possession. In all the books

there is not a single instance of such a return as the present.

Rule absolute.

See F. N. B. 70.

*75] *WALFORD v. ANTHONY, HAYCOCK, and COOKE. Nov. 25.

The declaration stated that defendants A., H., and C. broke a close of the plaintiff abutting on a close of the said defendant. The plaintiff's close abutted on a close of the defendant A.: Held, an ambiguity, and not a variance.

The declaration stated, that Anthony, Haycock, and Cooke, the defendants in this suit, were attached to answer Walford, the plaintiff, for that the defendants had broken and entered a close of the plaintiff in the parish of Boreham, abutting towards the north on a close of the said defendant, and towards the south on Blind Lane. There was a second count for cutting down trees, and a third for carrying them away.

The defendants pleaded, first, not guilty; and then four pleas, alleging a right

of way in various forms.

The plaintiff joined issue on the first plea; traversed the right of way in the

four others, and newly assigned excess in the assertion of the right.

The defendants joined issue on the traverse as to the right of way, and pleaded to the new assignment, first, not guilty, and then four special pleas to so much of the new assignment as related to the trespasses whereof the plaintiff had complained in his second and third counts, and which were not justified in the defendants' second, third, fourth, and fifth pleas.

The plaintiff joined issue on the first plea to the new assignment, and traversed the matter alleged in the four others, upon which traverses issue was joined.

The pleadings were of great length.

At the trial before Gaselee, J., it appeared that the close in Boreham in which the alleged trespasses had been committed, was bounded on the south, indeed, by Blind Lane, but on the north by a close of the defendant Anthony; whereas the allegation in the declaration that it abutted on the north on a close of the said *defendant, could only apply, as it was contended on the part of the defendants, to a close of the defendant Cooke, he being the last named defendant, and therefore the only one to whom the participle said could refer.

The learned Judge was of this opinion; but offered to go on with the trial if the plaintiff would apply himself to the merits of the disputed right of way, instead of taking a nominal verdict for the mere excess in the assertion of it. These terms were declined, and the plaintiff's counsel elected to be nonsuited

for the alleged variance.

Stephen, Serjt., obtained a rule nisi to set aside the nonsuit, contending that the word said did not necessarily refer to the last named defendant, and that it might be applied to such one of the three as the case required; and he urged that the expression said defendant was an ambiguity on the face of the declaration, of which no advantage could be taken except by way of special demurrer.

Jones and Merewether, Serits., showed cause. In cases like the present the word said has always been held to refer to the last antecedent, in order to avoid the inextricable ambiguity which would otherwise present itself. Thus in Morgan's case, Cro. Eliz. 101, the indictment which was in Somerset, stated that Thomas Morgan nuper de D. in com. Dorset. gen. apud W. in comitat. prædict. did strike and kill Turberville; and the indictment was held void because prodict. must be intended in Com. Dorset, which was last mentioned. In Pollard v. Lock, Cro. Eliz. 267, in an information against Lock, two Locks being named, the prædict. was held to refer to the *latter. Rex v. Griepe, Ld. Raym. 261, was ruled on the same principle, and in Childe v. Towers, Cro. Eliz. 11, where the venue was laid in Warwickshire, and the plaintiff declared that the defendant being possessed at Norton, in the county of Northampton, assumed apud Stonely in com. prædict., and the venire facias was awarded de Stonely in com. War.; it was held a mis-trial, for apud Stonely in com. prædict. shall be intended in Com. North., which is last named. [ALDERSON, J. In R. v. Moor Critchill, 2 East, 66, where two counties were named in an order of removal, it was held, that the word said did not refer to the last.] That case was decided on the ground that the jurisdiction of magistrates ought to appear without ambiguity.

Stephen. Morgan's Case was overruled by Sherley v. Sackville, Cro. Eliz. 465. And Pollard v. Lock, R. v. Griepe, and Childe v. Towers were ruled on the ground of ambiguity, not of variance. It is clear that prædictus does not necessarily refer to the last antecedent, though it is otherwise as to the word idea.

Co. Litt. 20 b.

TINDAL, C. J. The question is, whether there has been a variance in this case. or a defective and ambiguous description; and I think the objection on the record is of the latter, and not of the former class. The defendants, three in number, are put together under one appellation by the term defendants. That is a modern practice; for the old course was to name each individual, and if that course had been pursued, the present difficulty would probably never have occurred. The declaration then states, that a trespass was committed in a close abutting on a certain close of the said defendant. *That would have raised a doubt in the mind of any one perusing the record, and I should have said immediately "which defendant?" But it also would have given a very inconvenient latitude to the party proceeding to trial; for he might have selected the close of one or the other of them, as should appear best to suit his purpose. If all the three defendants had been named through the record, the doubt would only have been more prominent. If we could read it "the close of the said defendant," it would be an undisputed variance; but, as it stands, it is rather an ambiguit, and a nonsuit on the ground of variance cannot be supported. As there was however, on the part of the plaintiff's counsel, something like a desire to be nonsuited, we think the costs of the nonsuit should abide the event of the new trial, the defendants being permitted to suffer judgment by default on the new assignment.

GASELEE and BOSANQUET, Js., concurred.

ALDERSON, J. A variance can only be where there is a clear discrepancy between averment and proof. If there is an ambiguity in averment, the difference cannot be clear, because the proof may be true in one sense. In the authorities cited from Cro. Eliz., the difficulty was occasioned by the mention of one county in the margin, and a different county in the body of the record, and it was held, in conformity with all the decisions, that the county in the body of the record is that to which the proceedings properly have relation. But in Bishop v. Grant, Cro. Eliz. 324, where, in error, upon an assize of rent-seek, the plain-

tiff made title to rent granted, to be paid yearly at the four feasts, Christmas, Annunciation, St. John the Baptist and Michaelmas, and showed *rent arrear for four years at the Annunciation last past, which plaintiff demanded in crastino prædict. festi Purificationis, the error assigned was, that no feast of the Purification is mentioned before, so that it appeareth not that the demand was after the rent was due; Foster moved that the word "Purification" shall be void and surplusage; but Gawdy said, "although the word 'Purification' be void, yet prædict. festum cannot refer to the last feast, for there are divers feasts mentioned, so it cannot be referred to any one certain. Rule absolute.

PALMER v. MARSHALL. Nov. 25.

A policy on ship at and from Bristol to London, attaches during the vessel's stay at Bristol; therefore, where the assured did not sail till three months after the execution of the policy, Held, that the delay was a material variation of the risk.

This was an action on a policy of assurance for 1500l. on the yacht Ruby, at and from Bristol to London. The policy bore date the 28th of January, 1831. The declaration stated, that the plaintiff had effected it by M'Ghie and Page, his agents in that behalf, and averred a loss by being run down by another vessel through the violence of winds and waves.

At the trial before Taunton, J., last Dorcester assizes, it appeared that the Ruby, a yacht of thirty-seven tons, not coppered, at the date of the policy was lying in the float at Bristol, where she continued till the 17th of May, when she commenced her voyage round the Land's End, and was run down off the Start

on the 21st of May.

The defendant's subscription to the policy was admitted, and it was shown that the plaintiff was the only person interested in the vessel: but there was no express proof that M'Ghie and Page were the plaintiff's agents.

*The omission of this proof was objected to on the part of the defendant, as a fatal defect in the plaintiff's case, but the objection was overruled.

It was also objected, that the voyage having been deferred for so long a time after the date of the policy, the risk contemplated had been essentially varied, and that the defendant was, therefore, discharged by a quasi deviation; but the learned Judge held, that upon this policy the risk did not attach till the vessel commenced her voyage, and left it to the jury to say whether the vessel had been lost in the voyage intended. The jury found for the plaintiff, and also, that the risk had not been varied.

Wilde, Serjt., obtained a rule nin to set aside the verdict, on the two objec-

tions urged at the trial, and also, as against evidence.

Merewether, Serjt., showed cause. The proof that no other person was interested in the vessel, connected with the statement on the policy subscribed by the defendant, that it had been effected by M'Ghie and Page as agents, is sufficient

evidence that they were agents for the plaintiff.

As to the alleged deviation, or variation of risk, the learned Judge correctly left it to the jury to say whether the vessel had been lost in the course of the voyage intended; for upon insurances at and from a given place, the risk only attaches when the vessel is ready to begin her voyage from the place specified. Thus, when ships are engaged on the banks of Newfoundland in the pursuits which are termed banking, the risk on a policy on ship at and from Newfoundland to Europe, attaches only from the time when the banking ends. Vallance v. Dewar, 1 Campb. 503. So, in Williamson v. *Innes,(a) the risk on a policy at and from Algoa Bay to London, was held to attach only when the ship was in a condition to take in her homeward cargo at Algoa Bay. Here the jury have found that there was no variation of the risk, which distinguishes the case from *Mount v. Larkins, post, 108, where it was expressly found that there had been unreasonable delay.

TINDAL, C. J. This cause must be sent down to another jury. The learned Judge who tried it, did not state accurately the time at which the risk attached. The policy was at and from Bristol to London; and though there are excepted cases in which the risk would not attach on such a policy until the time of sailing, as where a ship is not finished, or is undergoing a course of repair at the time the policy is effected, yet here, where the vessel was lying in port, complete and ready for sea, the risk on the policy could only commence from its date. Besides this, the evidence was not complete as to the agency. The statute 25 G. 3, c. 44, requires that the names of persons interested shall be inscreted in the policy, or the names of persons who shall effect the same as agents for persons interested. And the declaration states, that the plaintiff, by M'Ghie and Page, his agents in that behalf, caused to be made a certain policy of insurance; but the evidence only amounts to proof of the defendant's subscription, and the plaintiff's interest in the vessel. No proof was offered that M'Ghie and Page were his agents.

Page were his agents.

GASELEE, J. In Vallance v. Dewar, and other cases where the risk on policies at and from a place has been held not to attach till the time of departure, there has been evidence of a particular usage to that effect. But there is no evidence to take this case out of the general rule. The direction to the jury, therefore, was not correct. As to the proof of agency, the admission at the

trial proved nothing more than the handwriting of the defendant.

*Bosanquet, J. I am of the same opinion. In policies at and from a given place, the risk attaches while the vessel is at the place, unless in certain excepted cases, of which this is not one. The risk here attached on the vessel as long as she was at Bristol. Williamson v. Innes was a policy on freight, which could not take effect till the cargo was on board. Here, also, there was an entire failure in the proof of agency. It was not sufficient to prove the defendant's subscription of the policy; the plaintiff was bound to show for whom M'Ghie was agent.

Rule absolute.

(a) WILLIAMSON v. INNES.

Sittings in London. Exchequer. 13th May, 1831.

Coram LYNDHURST, C. B.

Homeward policy on freight, at and from Algoa, attaches, when the ship is at A. in a condition to begin to take in her homeward cargo.

Assumpsir on policy, on freight at and from Algoa Bay and Table Bay, both or either, to London.

Declaration stated that the ship arrived, and was in good safety, at Algoa Bay, that a home-ward cargo was ready for her under her charter-party, and that before it was put on board she was lost by perils of the sea.

Plea, general issue.

At the trial, the captain proved his arrival at Table Bay; the discharge of that part of the cargo which was destined for that place; and that he took in about sixty tons of goods for Algoa Bay, where he arrived on the 30th of September and came to anchor. Till the 8th of October he was engaged in discharging his outward cargo, but on that day he gave orders that no more of the outward cargo should be discharged till some of the homeward cargo should be on board, as his load was reduced to about seventy tons, which, in his judgment, was necessary for the safety of the ship, of 144 tons register; and he intended to take in, the next morning, part of the homeward cargo, which was ready for him.

Before that time, however, the ship was lost in a hurricane.

For the defendant, it was contended, that at the time of the loss, the ship was not in a state to begin to take in her homeward cargo, and consequently that the voyage at and from Algon

Bay had not commenced.

Several captains of vessels were called, who stated that, in their judgment, thirty tons were quite sufficient to keep in the ship for her safety, and that with seventy tons of her outward cargo on board she could not be ready to take in her homeward cargo.

Lord Lyndrust, C. B., told the jury that if the ship was in a condition to begin to take in

her homeward cargo, the plaintiff was entitled to recover; if not, then the verdict ought to be for the defendant.

Verdict for the plaintiff.

F. Pollock and Cresewell, for the plaintiff. Cumpbell and Maule, for the defendant.

ELWOOD v. PEARCE. Nov. 25.

Where nearly a sixth was taken off an attorney's bill upon taxation, the Court refused to allow him the costs of taxation.

WILDE, Serjt., obtained a rule nisi to allow the attorney in this cause the costs of taxing his bill; less than a sixth having been taken off. The claim had been made, and disallowed by the prothonotary.

Andrews, Serjt., who showed cause, objected, that upon an amount of 1841. 14s. 8d., 25l. 14s. 8d. had been taken off, being nearly a sixth; that the applicant had received the amount of his bill since taxation; and that therefore the

application was too late. Whitfield v. James, 1 Bingh. James, 207.

Wilde. In Whitfield v. James the attorney omitted to claim the costs at the *84] time of taxation. In Barker v. *Bishop of London, Barnes, 147, it is said, "By statute 2 G. 2, c. 23, s. 23, if a sixth part of an attorney's bill be deducted, the Court are not left to their discretion, but are obliged to award costs of the taxation against the attorney; where a sixth part is not deducted, the Court are left to their discretion. The statute is a good guide; what it directs in one case seems to be a right rule in the other: ever since the statute, costs of taxation have been reciprocally given to the party charged, and to the attorney, as a sixth part has, or has not, been taken off." By the statute, too, the discretion is reposed in the Court according to the reasonableness or unreasonableness of the bill; and it is not alleged here that the bill is unreasonable.

TINDAL, C. J. The act of parliament says, that if less than a sixth part of the bill be taken off upon taxation, the Court at discretion may charge the attorney or client with such costs according to the reasonableness or unreasonableness of the bill. This is a case in which the Court may exercise its discretion: and if the amount taken off the bill approaches so nearly to a sixth, we ought not to be called on by an officer of the Court to allow the costs of taxation.

Rule discharged.

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*PARKER and Others v. BOOTH. Nov. 25.

Practice. Protection of sheriff.

Upon a rule calling on the plaintiffs to show cause why the time for returning the fi. fa. in this case should not be enlarged till the sheriff should be indemnified by one of the parties, the Court made the following order, being the first proceeding under the statute 1 & 2 W. 4, c. 58, for the protection of the sheriff:—

"Upon reading a rule made in this cause, Monday, 14th of November instant, the affidavit of Henry Broomhead, gent., and the affidavit of Andrew Duncan, gent., and upon hearing counsel as well for the sheriff of the county of York as for the plaintiffs, it is ordered, that the said sheriff do pay over to the plaintiffs the money levied under the writ of fs. fa. issued in this cause, minus the poundage, upon the plaintiffs giving security, by bond or otherwise, to the satisfaction of one of the prothonotaries of this Court, that they the said plaintiffs will pay over such sum of money to the assignees when chosen under the commission of

bankrupt issued against the defendant, provided such assignees shall be found entitled to the same; or, in case the said plaintiffs shall not give such security as shall be satisfactory to the said prothonotary, then that the said sheriff do pay the said sum of money into the hands of the prothonotaries of this Court, to abide the event of the question as to who is entitled to the said. And it is further ordered, that the question as to who is entitled to the said sum of money be tried by a feigned issue, in which the said assignees of the defendant are to be plaintiffs, and the said plaintiffs are to be defendants; and that the question of poundage and costs are to be reserved until the event of such issue. And it is further ordered, that all further proceedings against the said *sheriff for not returning the said writ of fi. fa. be stayed until the further order of this Court."

In a similar case in K. B. the rule had been drawn up in the same terms. In another case of the same description in this Court, Northcote v. Beauchamp and Others, the Court refused the assignee his costs of the rule; and with respect to the sheriff's costs, which were claimed, took time to confer with the Court of K. B.

GINGELL v. GLASCOCK. Nov. 23.

Plaintiff remitted to defendant the price of some hay he had sold for defendant, before the money had been paid by the purchaser, and then sent defendant's servant with the hay to the purchaser. The servant having been cheated of the hay before he arrived at the purchaser's: Held, the defendant was liable to refund the money remitted.

THE plaintiff, a hay salesman, sold for the defendant a load of hay, to a person named Sumner, and remitted 4l. 16s., the price of the hay, to defendant, before Sumner paid the money. In the mean time the servant, whom the defendant sent up to London with the hay, being charged by the plaintiff to deliver it to the purchaser, was imposed upon by some cheat who personated Sumner, and in that way got possession of the hay, and had not since been discovered. Sumner, not having received the hay, could not be prevailed on to pay, and the defendant refused to return the money which he had received from the plaintiff, who accordingly brought an action; but by consent the case was submitted to an arbitrator, who awarded for the plaintiff.

Jones, Serjt., now moved for a rule to show cause why the award should not be set aside. He argued, that the man who delivered the hay to the wrong person, was not then acting as the servant of the defendant, who had sent him only to the market, but as the servant of the plaintiff, who had employed him to carry the hay to Sumner; and that the plaintiff was responsible for the hay, or the price of it from the moment when it was taken out of the market

by his direction.

The Court was of opinion that the arbitrator had decided rightly; that the servant who made the mistake was, at the time, acting as the servant of the defendant; and, accordingly, the award was confirmed.

Rule refused.

ARNELL the Younger. v. BEAN and Another. Nov. 25.

A., being distrained on for rent arrear, applied to defendant, to whom he was already indebted, to advance him money; defendant refused to do so unless upon security; whereupon A assigned to him all his personal estate and effects in trust to pay defendant and other creditors: Held, not a voluntary conveyance within 7 G. 4, c. 57, s. 32.

TRESPASS and assault.

Pleas, son assault demesne, and that the plaintiff was wrongfully and unlawfully, and without leave or license, in a certain dwelling-house, farmstead, and closes, belonging to defendant Bean and one W. Park, and because he refused to go out upon request, the defendant Bean and his servant gently laid their hands upon him to prevent his continuing there.

Replication, de injuria, and issue thereon.

At the trial before Vaughan, B., last York assizes, it appeared that the plaintiff's father, who occupied a farm, was, on the 6th of April last, about to be distrained on by his landlord for 70l., when he applied to the defendant Bean and W. Park to relieve him from his difficulties.

As he already owed Bean and Park nearly 600%, on a warrant of money and promissory notes, they refused to make any further advance without security; whereupon the plaintiff's father, by deed, reciting his debts, and that Bean had further paid 70l., assigned to them all his personal estate, growing crops and effects, in trust by sale or otherwise to pay themselves, and the *surplus, if any, to various other creditors. Bean then paid the 70% to the landlord, and took possession of the premises. About a fortnight afterwards, suspecting the conduct of their debtor, Bean and Park sold the property by auction, with the exception of the growing crops, of which they retained possession, when the plaintiff's father went to prison at the suit of an alleged creditor, petitioned to be discharged under the insolvent debtors' act, and assigned all his estate and effects in the usual way to the provisional assignee. Bean and Park opposed the insolvent's discharge, and his son, the plaintiff, refused to quit the farm, alleging that he had authority to remain from the provisional assignee. defendants insisting on his departure, the assault complained of took place.

On the part of the plaintiff it was contended, that the conveyance by his father to Bean and Park was void under 7 G. 4, c. 57, s. 32, which enacts, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, behefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed, and is hereby declared to be, fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this act; provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or *intention by the party so conveying, transferring, charging, delivering, or making over, of petitioning the said Court for his or her

discharge from custody under this act."

A verdict was found for the plaintiff, damages 1s., with leave for the defendants to move to set it aside and enter a nonsuit instead.

Wilde, Serjt., having obtained a rule nisi to that effect,

Cross and Adams, Serjts., who showed cause, contended that the deed was voluntary within s. 32; void, as being a conveyance to parties who were already his creditors; and false and fraudulent in the recital that Park had joined in advancing the 701., which, according to the evidence, was paid by Bean only. If the plaintiff's father had been a trader, the conveyance would have amounted to an act of bankruptcy; and if it could be supported in the present instance, a mode was pointed out by which the operation of the insolvent debtors' act might be successfully eluded.

Wilde. A voluntary deed within the meaning of s. 32, 7 G. 4, is a deed executed without any present and pressing consideration; a deed purely spontane-A debt, however, is a good present consideration; and here, in addition to the debt, the deed was executed upon the emergency of a distress which the landlord was in a condition to enforce, and from which the tenant was relieved by the advance of 70% at his urgent entreaty, the advance being refused unless the deed were executed. Bean and Park, therefore, were not volunteers, but purchasers. Even if it were true that Park contributed nothing towards the 70%, in Morgan v. Horseman, 3 Taunt. 241, it was held that a deed, whereby a debtor, being pressed, *conveyed estates in trust to sell and pay the pressing creditor, with a further trust to pay debts to certain relations, in order to give them an undue preference in contemplation of bankruptcy, was valid so far as related to the protection of the urgent creditor. Under the bankrupt laws it has always been holden, that a conveyance or payment made upon pressure by a creditor, is not voluntary. (a)

TINDAL, C. J. The question reserved by the learned Judge who tried this cause, was, whether the assignment made by Arnell the elder, to Bean and Park, bearing date the 6th of April, 1831, was a voluntary assignment, within the meaning of the thirty-second section of the insolvent act, the 7 G. 4, c. 57. By that section it is enacted, that if any prisoner who shall file his petition for his discharge under that act, shall, before or after his imprisonment, being in insolvent circumstances, voluntarily assign any real or personal property, goods, or effects whatsoever, to or in trust for any creditor, every such assignment shall be deemed, and is hereby declared to be, fraudulent and void as against the pro-

visional or other assignee appointed under the act.

Now the word "voluntary" in that section must have some proper meaning of its own, distinguishable from that of fraudulent; in the first place, because there could be no occasion to make an enactment that a fraudulent deed should be void, which the common law would have itself declared it to be; and, in the next place, because this very section declares that assignments voluntarily made under the circumstances therein *mentioned, should be deemed, and shall be, fraudulent and void. We think the word "voluntarily" is used in the statute to denote either an assignment made without such valuable consideration as is sufficient to induce a party acting really and bona fide under the influence of such considerations, or an assignment made in favour of a particular creditor spontaneously, and without any pressure on his part to obtain it. If in any case a doubt arises as to the real value of the consideration, or as to the real motive of the debtor in making the assignment, such question must be decided by the jury, who will determine whether it is a bona fide transaction, or a mere collusion to evade the statute.

Now, upon the present occasion, no fraud was suggested, and therefore it was unnecessary to leave that point to the jury; and the question, whether voluntary or not, arises upon the legal result of the evidence in the cause. But when it is found that Bean and Park were creditors of Arnell to a considerable extent, and that Bean advanced to Arnell the further sum of 70*l*., to induce him to assign over his property to them as security, as well for the 70*l*. as also for their debts; in a case where no fraud is suggested, we cannot otherwise consider this than as a purchase of a security by the further advance of the sum of 70*l*., and therefore, as an assignment, not voluntary within the meaning of the statute. If there had been any doubt as to the real nature of the transaction, or as to the real object of the parties, that point should have been left to the jury. But we think, which is all that it is necessary to decide on this occasion, that this assignment afforded a sufficient justification to the defendants under the special plea, and that the verdict should be set aside, and a nonsuit entered.

We have the less reluctance in doing this, as it will not prevent the raising the question as to the right to the property between the assignee under the insolvent act,—against which assignee, the statute declares the *voluntary assignment to be void,—and the present defendants, if it shall be thought right to try the question. The present form of action is not brought for the purpose of recovering the property for the benefit of the creditors.

Rule absolute.

⁽a) See Crosby v. Crouch, 11 East, 256. Thompson v. Freeman, 1 T. R. 155. Hartsborn v. Slodden, 2 B. & P. 584. Hunt v. Mortimer, 10 B. & C. 44. Vacher v. Cocks, 1 B. & Adol. 145.

IN THE EXCHEQUER CHAMBER.

MILLER v. GREEN. Nov. 25.

Defendant made cognisance in replevin, under a power of distress for an annuity granted by G. T. to H. in September 1806. Plaintiff pleaded that in May 1806, G. T., for securing another annuity, and in consideration of 3000l., granted, bargained, sold, and demised the premises in which, &c., to F. for ninety-nine years:

Held, no bar, without alleging entry by F., or that F. elected that the deed should enure by

way of bargain and sale.

Held, also, that standing crops cannot be taken under a power to distrain for the arrears of an annuity.

Green, the plaintiff below, declared in replevin for taking goods, and standing wheat, peas, and hops.

Miller, the defendant below, as bailiff of one William Hodgson, made cogni-

First, that one John Taylor, theretofore and before the said time when, &c., was seised of and in the said premises, with the appurtenances in the declaration mentioned, and in which, &c., in his demesne as of fee, and being so seised before the said time when, &c., to wit, on the 10th of July, 1797, at, &c., duly made and published his last will and testament in writing, bearing date the day and year last aforesaid, and signed by him the said John Taylor, and attested and subscribed in the presence of the said John Taylor by three credible witnesses, according to the form of the statute in such case made and provided; and thereby, amongst other things, gave and devised the said premises, in which, &c., with the appurtenances, unto Charles Haddock and George Bythsea, their heirs and assigns, to hold the same and *every part thereof, with the appurtenances, unto the said Charles Haddock and George Bythsea, their heirs and assigns, to the several uses, upon the several trusts, and to and for the several ends, intents, and purposes in the said will mentioned, expressed, and declared of and concerning the same; that is to say, subject to and charged and chargeable with the payment of the several annuities and legacies thereinafter by him given, and to the powers and remedies therein contained for securing the same, to the use and behoof of George Taylor and his assigns, for and during the term of his natural life: that the said John Taylor afterwards, and before the said time when, &c., to wit, on, &c., died so seised of the said premises in which, &c., with the appurtenances as aforesaid, without altering his said will as to his said devise of the said premises, with the appurtenances; whereupon and whereby the said George Taylor then and there became and was seised of the said premises in which, &c., for his natural life; and being so seised, afterwards, and before the said time when, &c., to wit, on the 25th of September, 1806, at, &c., by a certain indenture then and there made between the said George Taylor of the first part, Wm. Hodgson of the second part, and one Thomas Crosse of the third part, which said indenture, sealed with the seal of the said G. Taylor, the defendant below, brought there into court, the date whereof was the day and year last aforesaid, he, the said G. Taylor, for the consideration therein mentioned, did give, grant, and confirm unto the said W. Hodgson, his executors, administrators, and assigns, one annuity or clear yearly sum of 166l. 2s. of lawful money of Great Britain, to be charged and chargeable upon, and issuing, payable, had and received, and taken from and out of the said premises, in which, &c., and in the said indenture more particularly described, and from and out of every part and parcel of the same, with their and *every of their appurtenances; to have, hold, receive, take, and enjoy the said annuity or yearly sum of 166l. 2s., and every part thereof, unto the said W. Hodgson, his executors, administrators, and assigns. thenceforth for and during the term of ninety-nine years, if the said G. Taylor should so long live; the said annuity or yearly sum of 166l. 2s. to be payable and paid to the said W. Hodgson, his executors, administrators, or assigus, upon the 25th day of December, the 25th day of March, the 25th day of June, and

the 25th day of September in every year for and during the said term of ninetynine years, determinable as aforesaid, without any deduction or abatement whatsoever out of the same or any part thereof. And the said G. Taylor did thereby also grant unto the said W. Hodgson, his executors, administrators, and assigns, that from time to time, when and as often as it should happen that the said annuity or yearly sum of 1661. 2s. thereby granted, or intended so to be, or any part thereof, should be in arrear and unpuid in the whole or in part by the space of twenty-one days next over and after any one of the days or times wherein the same was thereinbefore appointed to be paid as aforesaid, then and so often and from time to time it should and might be lawful to and for the said W. Hodgson, his executors, administrators, and assigns, into and upon the said messuages, lands, or premises thereby charged and made chargeable with the said annuity or yearly sum of 1661. 2s., or into or upon any part thereof, to enter, and distrain for the said annuity or yearly sum, and all arrears thereof; and the distress and distresses then and there found to detain, manage, sell, and dispose of in the same manner in all respects as distresses for rents reserved upon leases for years might, were, and ought to be detained, managed, sold, and disposed of, and as if the said annuity or yearly sum of 166%. 2s. thereby granted was a rent reserved upon a lease for *years; to the intent that the said W. Hodgson, his executors, administrators, or assigns, should and might thereby, therewith, or otherwise be fully satisfied and paid the said annuity or yearly sum of 166l. 2s. thereby granted, or intended so to be, and all the arrears thereof, and all costs, charges, and expenses to be occasioned by the non-payment thereof at the days and times thereinbefore appointed for the payment of the same; as by the said indenture, reference being thereunto had, would, among other things, more fully and at large appear. And the defendant, in fact, said, that afterwards, and during the life of the said G. Taylor, to wit, on, &c., at, &c., a large sum of money, to wit, the sum of 539l. 16s. 6d. of the said annuity or yearly sum, for the space of three years and one quarter of a year, ending on, &c., became and was due, and in arrear, and unpaid from the said G. Taylor to W. Hodgson, and so continued due and in arrear for the space of twenty-one days next over and after the day and year last aforesaid, and from thence until and at the time when, &c., remained and was wholly unpaid, the said G. Taylor, at the said time when, &c., being alive, to wit, at, &c.; wherefore he, the said defendant, as the bailiff of the said W. Hodgson, well acknowledged the taking of the said goods and chattels, corn, pulse, and hops, in the declaration mentioned, in the said premises in which, &c., and justly, &c., as, for, and in the name of a distress for the said annuity or yearly sum so due and in arrear to the said W. Hodgson as aforesaid, which said annuity or yearly sum still remained due, in arrear, and unpaid; and that he, the said defendant, was ready to verify. Wherefore, &c.

There was a second cognisance, differing from the first only by the omission

of J. Taylor's will.

The plaintiff pleaded in bar, that the said George Taylor, before the sealing and delivery of the said *indenture in the first cognisance mentioned, and before and at the time of making the said indenture thereinafter mentioned, to wit, on the 7th of May, 1806, at, &c., being so seised in his demesne as of freehold for the term of his natural life of and in the said premises in the declaration mentioned, theretofore and before the making of the said indenture in the first cognisance mentioned, to wit, on, &c., at, &c., by a certain indenture made between the said G. Taylor of the first part, one Margaret Watton the elder, one Margaret Watton the younger, one James Dempster, and Daniel Watney, of the second part; one Jackson Watton of the third part, and one George Fletcher of the fourth part, after reciting as therein mentioned, in pursuance of the agreement therein mentioned, and in consideration of a certain sum of money, to wit, the sum of 3000l. to the said G. Taylor paid by Jackson Watton, as agent, as in the said indenture in that behalf was mentioned, did give, grant, and confirm unto Jackson Watton, his executors, administrators, and assigns, one annuity or clear yearly sum of 4131. 12s. of lawful money of Great

Britain, to be charged and chargeable upon, and issuing, payable, had, received, and taken from and out of certain premises in the said last indenture mentioned, and, amongst others, from and out of the said premises in which, &c., in the declaration mentioned, To have, receive, take, and enjoy the said annuity, and every part thereof, unto the said Jackson Watton, his executors, administrators, and assigns, from thenceforth for and during the term of ninety-nine years, if the said G. Taylor should so long live: In trust nevertheless for the said Margaret Watton the elder, Margaret Watton the younger, James Dempster, and Daniel Watney respectively, and their respective executors, administrators, and assigns, as tenants in common in the shares and proportions in the same indenture *mentioned. And for the better securing the same annuity, for the considerations in the same indenture mentioned, and of 10s. to the said G. Taylor paid by the said George Fletcher, the said G. Taylor, on the nomination and by the direction and appointment and with the privity of the said Margaret Watton the elder, Margaret Watton the younger, James Dempster, and Daniel Watney, testified as therein mentioned, did grant, bargain, sell, and demise unto the said G. Fletcher, his executors, administrators, and assigns, certain premises in the said indenture particularly mentioned, and amongst others, the said premises in which, &c., in the declaration mentioned, to have and to hold the same unto the said G. Fletcher, his executors, administrators, and assigns, from the day next before the day of the date of the same indenture, for and during and unto the full end and term of ninety-nine years, if the said G. Taylor should so long live, without impeachment of waste, as far as the said G. Taylor could grant the privilege; upon the trusts in the said indenture expressed and declared, and, amongst others, upon trust that in case and when and as often as the said annuity of 4131. 12s., or any quarterly payment thereof, should be in arrear or unpaid, in the whole or in part, by the space of thirty days next after any one of the days or times thereinbefore appointed for payment thereof, the said G. Fletcher, his executors, administrators, or assigns, should out of the rents and profits of the said hereditaments and premises thereby granted or demised, or otherwise assured, or intended so to be, or by mortgage or sale thereof, or of a competent part thereof, in case there should not be sufficient distresses on the premises, for all or any part of the said term of ninety-nine years, determinable as therein mentioned, or by bringing actions against or making distress upon all and every *98] or any one or more of the then present or future tenants *of the said hereditaments and premises, for recovery of the rents in arrear, or by making entries upon the said hereditaments and premises, in and by all and every or any one or more of the said ways and means, or by any other lawful and reasonable ways and means whatsoever, levy and raise such arrears of the said annuity of 4131. 12s. as from time to time should become due and remain unpaid, together with all such damage, costs, charges, and expenses as the said Jackson Watton. his executors, administrators, or assigns, should incur, expend, or be put unto by reason of the non-payment of the said annuity of 413l. 12s., or any part thereof, together with the costs, charges, and expenses attending the execution of the said term of ninety-nine years, and the annual or other premiums which should become due and payable for keeping on foot the benefit of any policy or policies of insurance on the said premises thereby demised, or any part thereof, in the sum of 40001. from loss or damage by fire, or obtaining any new or other policy or instrument of insurance for the same or the like amount. The plaintiff then averred that the same indenture and the term of ninety-nine years thereby created and granted of and in the said premises in which, &c., in the declaration mentioned, at the time of the making of the said indenture in the said cognisance mentioned, and from thence continually until and at the same time when, &c., in the said declaration mentioned, and from thence continually hitherto, had been and were in full force and effect. And the plaintiff further said, that upwards of thirty days before the making of the said distress, and until and at the time of the making of the said distress, there was due and owing under and by virtue of the said indenture of the 7th of May, 1806, aforesaid, a large sum

distress, and for that part of the distress only; with a judgment for the plaintiff for damages for taking and detaining the standing crops.

Judgment reversed.

MOUNT v. LARKINS. Nov. 25

Defendant executed, 28th of February, 1824, a policy of assurance on freight from Sincapore to Europe, with liberty to sail to, touch, and stay at any places whateoever, to load, unload, reload, and for all necessary purposes whatever. The ship sailed from London in September 1823, and having been detained by the captain for his own purposes at Van Dieman's Land, did not arrive at Sincapore till the 30th of March, 1825; she sailed thence on the voyage insured the 3d of May, 1825:

Held, that by so long a postponement of the risk the defendant was discharged, a jury having found the delay unreasonable.

Assumpsit on a policy of insurance on ship Aquila, at and from Sincapore and Batavia, both or either, to the ship's port of discharge in Europe, with liberty to sail to, touch, and stay at any ports and places whatsoever and where-soever, particularly at the Cape of Good Hope, St. Helena, or elsewhere, to load, unload, and reload goods and passengers or otherwise, and for all or any other necessary purposes whatsoever. The policy was declared to be on freight, and valued, and a loss was averred by perils of the sea on the voyage from Sincapore to London.

By a special verdict it was found that the policy of insurance was made and entered into between the plaintiff and the defendant on the 28th of February, 1824; that the ship sailed from England in the beginning of September, 1823, having on board thereof divers passengers and goods, bound for and deliverable at the Cape of Good Hope, Van Dieman's Land, and *Sydney, New Holland, and was under the command of Joseph Thomas Watson, the master thereof; that by charter-party, dated the 26th of May, 1823, the ship, after discharging her cargo at New Holland, was to proceed to Sincapore, and from thence to Malacca and Penang, both or either, or to Batavia only, to take on board a cargo for Europe, on account of the freighters; and that before the ship sailed from England as aforesaid, the plaintiff caused instructions to be delivered to the said J. T. Watson, the master of the said ship, of which the following was copy:-

"You having the command of the ship Aquila, bound on a voyage to the Cape of Good Hope, Van Dieman's Land, and New South Wales, and from thence w Sincapore and other ports of lading as per charter-party, and having shipped twenty-four hogsheads of stout and a quantity of deals, consigned to yourself for sale on my account,—copy of invoice at back of this,—you will please dispose of them to the best account, taking care not to leave them behind you As you have a small quantity of goods to deliver at the Cape, should you be able to procure any goods and passengers from that place to New Holland, &c., to the amount of not less than from 300l. to 400l., and at the same time to be able to dispose of my investment at about the invoice price, by detaining the ship not more than ten days, you will use your own discretion, but think it will answer your purpose so to do. On your arrival at Van Dieman's Land, as you will have a very considerable sum of money to receive as freight and passage money, beg your particular attention to the same. You will please to caulk the half deck and between decks as soon as convenient, fearing any leak might damage the cargo stowed below; and think the less water there is used for washing below the better, fearing the consequences above stated.

* "After leaving Van Dieman's Land you will proceed to New Holland, [*110 making every exertion in your power at that port to enable you to proceed to Sincapore, at which port hope and trust you will be fully loaded; and on your arrival at said port or ports you will give the earliest information to commence your lay days; and let me beg of you to make all the interest you can with the merchants for heavy goods, to extend, from 200 to 300 tons, your ship requiring a large proportion, and will prove a great advantage in point of freight; and as you are not likely to get many passengers home, and should suppose you will have a large proportion of light goods, you will make the best you can with your accommodation, and, if necessary, take down the aft bulk heads, but the after cabin would advise you not to disturb;—proportion of cabin freight you will of course be entitled to. Shall be happy to hear from you at every convenient opportunity, at sea or in port.

RICHARD MOUNT."

The ship arrived at the Cape of Good Hope on the 3d of December, 1823, and

sailed the 24th of the same month.

On the second day after the ship anchored at the Cape of Good Hope, part of her cargo belonging to the said J. T. Watson was discharged. At the time of making the said policy of insurance the ship was at Hobart Town, Van Diemau's Land, having arrived there on the 4th of February, 1824. Part of the outward cargo of the ship and three of the passengers were landed at Hobart Town, and some delay was occasioned at Hobart Town by the difficulty in getting at different parts of the cargo. The ship sailed from Hobart Town on the 27th of March, 1824, arrived at George Town, Port Dalrymple, in Van Dieman's *111] Land, on the 6th day of April, *1824, and there landed others of the said passengers, and other parts of the cargo. The said passengers and cargo were necessarily conveyed by the boats of the ship a distance of forty miles from the ship up the river there. The ship sailed from George Town for Sydney, New Holland, on the 29th of July, 1824; arrived at Sydney on the 5th of August, 1824; there landed the remainder of her passengers, and of her said outward cargo, and sailed from Sydney on the 18th of November in the same year for Sincapore. She met with very bad weather; was twice driven back; once to Sydney and once to Hobart Town; and arrived at Sincapore on the 30th of March, 1825, where the risk intended to be insured by the said policy was to commence. She sailed from Sincapore on the voyage intended to be insured on the 3d of May, 1825; arrived at Penang on the 17th of May in the same year, and remained there until the 23d of June in the same year, when she proceeded on her voyage towards London.

At the time when the risk by the policy intended to be insured against was to commence, the ship was well and sufficiently manned, and in all respects seaworthy. And whilst she was proceeding upon the voyage in the policy mentioned, and during the continuance of the risk intended to be insured against thereby, she was by the perils of the sea wholly lost, as in the declaration was

alleged.

It was then found that the said J. T. Watson, master of the ship, after his arrival at Hobart Town as aforesaid, was ashore, and came on board the ship frequently, and was building a house upon some land belonging to him there. That the said J. T. Watson also, whilst at Hobart Town, purchased a schooner, which he fitted out and sent to sea on a sealing voyage in the early part of April 1824. That the said schooner was fitted out from the stores of the ship Aquila, was partly manned with *mariners, part of her crew, was commanded by the chief mate of the Aquila, and was absent about two months. That the said schooner returned from the sealing voyage on which she had been despatched, and was again sent upon a second sealing voyage. the said schooner had not returned from her second sealing voyage before the Aquila left Sydney on the 18th of November, 1824; and the said mate and the crew of the schooner never again found the Aquila. That there was unreasonble and unjustifiable delay between the making of the policy of insurance and the commencement of the risk intended to be insured against as aforesaid. That the plaintiff was, at the time of the making of the said policy of insurance, and continually, until and at the time of the loss of the ship as aforesaid, interested in the same to the amount of the sum insured thereon as aforesaid.

The case was argued in Trinity term.

Taddy, Scrjt., for the plaintiff. The question is, whether, upon a policy such as the present, there is any implied warranty that the ship shall sail from the port where the risk is to commence, within any certain time; for the assured is not bound by a mere representation without fraud. Bise v. Fletcher, Dougl. 288, Pawson v. Barnevelt, Dougl. 12, in note. The general rule is, that if the insurer wishes to confine the risk, he must state on the policy the time within which he proposes the voyage shall commence. Emerigon (vol. ii. c. 13, s. 2, p. 16) states the following case:--" Les sieurs Garnier, Mallet, et Dumas, de Cadix, s'étaient rendus assureurs sur le corps du vaisseau Nostra Senora Oranzasa, capitaine Joseph Ventura, de sortie de Cadix jusqu'à Cumana, et de retour à Cadix Le 19 Decembre, 1752, ils se firent réassurer *à Marseille 18,000 liv. avec clause qu'en cas de perte ils ne seraient tenus de produire d'autre sorte d'écriture que le seul acquit du paiement qu'ils en auraient fait au premiers Ce navire arriva heureusement à Cumana, dans l'Amérique Méridion-Il y fit un long séjour. En 1756 Garnier, Mallet, et Dumas, se pourvurent au consulat de Cadix, en résiliation du risque, attendu le trop long séjour que le navire faisait à Cumana; ils furent déboutés de leur requête. Enfin, ils apprirent que le navire était devenu innavigable à Cumana. Cet accident fut notifié aux réassureurs de Marseille, par exploit du 2 Juin 1761.

"Le consulat de Cadix condamna Garnier, Mallet, et Dumas à payer la perte. Ils la payèrent par quittance du 26 Avril, 1762. Le 4 Septembre suivant, les sieurs Kick et Durantet, porteurs de la police de réassurance, se pourvurent contre les réassureurs, et communiquèrent la quittance dont je viens de parler.

"Les réassureurs opposaient que le risque s'étoit évanoui par le laps de dit années; et qu'un navire qu'on laisse croupir pendant si long-tems dans un por

ne peut que devenir innavigable.

"Sentence du 26 Juin, 1764, qui régla la cause à droit sur le fond et principal, et qui condamna les réassureurs au paiement provisoire des sommes réassurées. Ceux-ci appelèrent de cet sentence au chef du provisoire. Ils obtinrent décret de surséance. Arrêt du 26 Juin, 1765, au rapport de M. de Fortis, qui révoqua le décret de surséance, et qui confirma la sentence, avec amende et dépensensuite de cet arrêt, tous les réassureurs, à l'exception de B., qui avait fait faillite, payèrent les sommes par eux réassurées, en principal, intérets et depenset renoncèrent à la poursuite du fond.

"Seconde sentence rendue le 15 Novembre, 1766, qui condamna les administrateurs de la faillite de B. à payer définitivement la somme de 2000 liv. par lui souscrite, et qui les y condamna sous l'hypothèque du 12 Décembre, 1752, [*114] jour de la réassurance reque par courtier. Cette dernière sentence fut

acquiescée."

Upon which he observes, "On ne saurait disconvenir que les réassureurs étaient non recevables à contester le remboursement d'une perte payée par les premiers assureurs, dont ils étaient garans. Mais il parait dur qu'un navire deveuu innavigable dans un port lointain, où on le laissoit oisif pendant plusieurs années, soit à la charge des assureurs. Cependant, s'il n'y a aucune fraude de la parte des assureurs assurées, la règle générale est pour ceux-ci. La loi n'a établi sur ce point aucun délai fatal; et les assureurs doivent s'imputer de n'avoir pas limité le tems de l'assurance. Car si la police renferme quelque pacte particulier, au sujet de tout ce que dessus, il faut s'y tenir."

And this is the rule of the law of England. In Beckwith v. Sidebotham, I Campb. 118, it was held, that if the owner of a ship receives a letter from the captain, written on her arrival in a foreign port, giving such an account of her as to render it probable that she must remain there for the purpose of being repaired, beyond the time that would be necessary for her to take in her cargo, that letter need not be communicated to the underwriters in effecting a policy of insurance upon her, at and from the foreign port to a port in England, unless information on the subject be particularly called for. And Lord Ellenborough said, "that if it was necessary to have disclosed this letter as governing the time when

the ship would sail, it would in all cases be necessary to inform the underwriters where any repairs were wanting, and he believed it very frequently happened, that a ship must have something done to her before she would sail on her home*115] ward-bound voyage. If the underwriters wish *to have particular information upon this subject, they ought to ask for it; and if they were disposed only to insure a voyage made during a particular season of the year, they should (as was commonly done with Jamaica ships) insert a warranty in the policy that the ship shall sail on or before a certain day."

Emerigon states another case in the same page: "En 1753, un negociant s'était fait assurer in quovie, 8000 liv., en espèces d'or et d'argent qu'il attendait de Buenos Aires. En 1764, les assureurs requirent que les risques fussent déclarés fines. L'assuré soutenait que ses fonds n'étaient pas encore arrivés, et que la police ne renfermait aucune terme. Sentence de l'Amirauté de Paris, qui décharges les assureurs, sur le fondement que les risques ne doivent pas être

éternels, et que onze ans d'attente doivent suffire."

But there the insurers applied to the Court under a peculiar law to end the risk. Independently of such an application, Emerigon says (p. 18), that nothing will discharge them but the contract coming to an end: not even the change from peace to war. The same law is laid down by Potier (Contrat d'Assurance, pl. 63, s. 2, c. 1, p. 102)—"Que si le tems qui doivent durer les risques des retours qu'on fait assurer n'était pas limité arbitrio judicis, les assureurs seraient exposés à être trompés tous les jours; car la rentrée de ces retours étant le plus souvent inconnue aux assureurs, un négociant de mauvaise foi, après avoir reçu en entier les retours qu'il a fait assurer, pourrait long tems après faire valoir l'assurance sur des marchandises qu'il aurait perdues, en disant, contre le vérité, qu'elles font partie des retours qu'il a fait assurer."

Here the jury have not found that there was fraud; that the plaintiff was accessory to the delay; or that the delay has increased the risk. There is *116] nothing here to determine the contract but the assumption, that the *vessel did not arrive at Sincapore in reasonable time. What is reasonable time ought to be determined, not by the jury, but by the Court; and how can the Court determine, when the insurer has engaged to insure from Sincapore, without stipulation for any time by which the vessel should arrive at that port? The Court cannot interpolate a warranty, which the insurer has not thought fit

to require.

Spankie, Serjt., contrà.

It is an implied condition in every contract of assurance, that the assured shall begin his voyage within a reasonable time, otherwise the insurer might never be exonerated from his risk; and if his risks do not regularly evolve, how is he to calculate his funds and conduct his business? Emerigon, c. 1, s. 3, lays it down, "La condition dépend de l'expédition maritime plutôt que de la volonté de l'assuré;" and in c. 13, s. 9, "Si le voyage est autre que celui qui a eté assuré l'assurance reste caduque."

The application to the Court, under the law of France, to end the risk, proceeds on this principle; the arbitrium judicis supplying the place of the finding of the jury here as to what shall be a reasonable time; Potier, pl. 63, c. 1, s. 2; a question which cannot be determined in any other way when there is no ex-

press stipulation on the subject.

Emerigon (c. 13, s. 10) discusses the lawfulness of undertaking another voyage pending the insurance. After citing two old cases in which it had been decided by the French Courts that such voyage might lawfully be undertaken, he observes: "Mais cette jurisprudence était contraire au principe établi dans la précédente section, et à la doctrine de tous nos auteurs, qui nous apprennent que si, avant que le voyage assurée soit commencé, le capitaine en entreprende au autre, *l'assurance est nulle, et la prime doit être restituée." To commence the voyage insured within a reasonable time is, therefore, a condition in the contract; and all conditions, for the performance of which no time is specified, must be performed within a reasonable time. Co. Lit. 208 a,

Bothy's case, 6 Rep. 31, 5 Vin. Abr. Condit. (C. b,) pl. 11. A principle which pervades the whole of the law. Promises of marriage, notices of dishonour, and notices of abandonment, must be all attended to within a reasonable time; and what is a reasonable time is a question for the jury, subject to the direction of the Judge. Anderson v. Royal Exchange Assurance Company, 7 East, 38. So when goods do not correspond with sample, they must be returned within a reasonable time. Parker v. Palmer, 4 B. & A. 389.

In Ougier v. Jennings, 1 Campb. 505, note, where the question was, whether by usage, ships in the Newfoundland trade might make intermediate voyages before the policy attached, Lord Eldon said, "If the evidence leads to this, that the ship may make an intermediate voyage of several years, it is too dangerous for you to give it effect. If several ships belonging to a merchant arrive together at Newfoundland, and finding cargoes for some only, he bonā fide sends the rest on an intermediate voyage, it seems reasonable." Thus putting it altogether upon the reasonableness of the time employed. And Vallance v. Dewar, I Campb. 503, proceeded on the ground that this usage was generally known. In Hull v. Cooper, 14 East, 479, it was held, that if a ship be insured at and from a certain place, where, in fact, she was not at the time, but arrived there after some interval (but the fact was not communicated to the underwriters, who did not call for information on the *subject), it was a question for the jury, [*1]8 whether the delay which intervened materially varied the risk.

In Smith v. Surridge, 4 Esp. 25, Lord Kenyon said, "that if there was a voluntary delay on the part of the plaintiff, there was no doubt it would avoid the policy." And in Hartly v. Buggin, 1 Park Ins. 513, Lord Mansfield considered delay as a quasi deviation, because it places the underwriter in a different position. Beckwith v. Sidebotham turned only on the necessity of a certain

communication, and does not affect the present question.

Taddy. Hartly v. Buggin, Driscol v. Pasmore, 1. B. & P. 200, Smith r. Suridge, Ougier v. Jennings, and Vallance v. Dewar, are cases either of deviative or of alleged delay after the commencement of the risk, and do not apply when the question is, whether delay before the risk attaches, will avoid the contract But in Hull v. Cooper, as in Beckwith v. Sidebotham, Lord Ellenborough decide that it rests with the insurer to ascertain or fix when the risk shall commence.

The authorities to show that a condition must be performed within a reasonble time are equally inapplicable, for the question here is, whether the condition exists in the contract, and if not, whether the Court can interpolate it. Emergen, in discussing the question of an intermediate voyage, only proposes to show that the insurance must be confined to the voyage contracted for: the period which the risk is to commence must be left to the parties contracting, and ought not to be fixed by the interposition of a court. Time is not of the essence of the policy, and the insurer may always protect himself by inquiry and stipulation. Besides, the delay here, was on the outward voyage, with the conduct of which the underwriter had no concern.

Cur. adv. rult.

*TINDAL, C. J. This was the case of an action brought upon a policy made at London on the 28th of February, 1824, upon the ship Aquila, "at and from Sincapore and Batavia, both or either, to the ship's port or ports of discharge in Europe, not to the northward of Hamburgh, with liberty to call at Cowes for orders." A liberty was also given in the policy "to sail to, touch and stay at any ports or places whatsoever and wheresoever, particularly at the Cape of Good Hope, St. Helena, or elsewhere, to load, unload, and reload goods and passengers or otherwise, and for all or any other necessary purposes whatsoever." The policy was declared to be on freight, and the freight, valued. The declaration then stated a total loss of the ship while proceeding on the voyage from Sincapore to London, being the voyage mentioned in the policy, by the perils of the sea, whereby the freight became wholly lost to the plaintiff.

Upon the trial of the cause the jury found a special verdict, of which the only facts material for the consideration of the question which has been argued before the Court, are the following:—That the policy was made on the 2cth of

February, 1824, at which time the ship was at Hobart's Town, Van Dieman's Land. That the ship sailed from England in the beginning of September 1823, under a charter-party, by which the ship, after discharging her cargo at New Holland, was to proceed to Sincapore, from thence to Malacca and Penang, both or either, or to Batavia only, to take on board a cargo for Europe. The special verdict, after stating the course of the ship's voyage from England, to the Cape of Good Hope, to Hobart's Town, to George Town in Van Dieman's Land, and to Sydney in New Holland, found that she arrived at Sincapore on the 30th of March, 1825, where the risk intended to be insured against was to commence.

And after setting out many particular instances of delay in the course of the voyage on the part of the captain, there is an express finding by the jury, "That there was unreasonable and unjustifiable delay between the making of the said policy of assurance and the commencement of the risk intended to be

insured against."

Upon this special verdict it has been argued before us on the part of defendant that the unreasonable and unjustifiable delay on the part of the captain in completing the outward voyage on which he was then engaged, and commencing the homeward voyage on which the risk was intended to attach, discharged the underwriters from this policy; and we are of opinion that such unreasonable and unjustifiable delay on the part of the insured, in commencing the voyage insured against, is in the nature of a deviation, and does amount to such an alteration of the risk insured against, as to discharge the liability of the underwriters

upon this policy.

That an unreasonable delay in commencing the voyage insured against, after the policy has actually attached, discharges the underwriter from the policy, appears, not only from the reason of the thing itself, but from the opinion of Lord Kenyon in Smith v. Surridge, 4 Esp. 25. In that case, the ship Resolution being insured "at and from Pelew to London," it was proved she remained a considerable time at Pelew to complete her repairs before she commenced her voyage. An objection was taken, that such delay avoided the policy; and Lord Kenyon said, "If there was any unreasonable delay on the part of the insured, there was no doubt it would avoid the policy:" though he afterwards observed, "the delay in that case was not a voluntary delay, nor such as amounted to a discharge of the policy."

*121] *Again, that an unreasonable delay in performing the voyage insured is equivalent to a deviation, was expressly ruled in the case of Hartley v. Buggin, Mich. 11 G. 3, Park. 513, where a ship, insured, "at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves," stayed several months beyond the usual stay of ships in that trade. The Court of King's Bench decided, this was equivalent to a deviation. And Lord Mansfield said, "The single point before the Court is, whether there has not been what is equivalent to a deviation, whether the risk has not been varied, no matter

whether the risk has or has not been thereby increased."

The same principle is admitted in the cases of Vallance v. Dewar, 1 Camp. 305, and Ougier v. Jennings, in a note to that case; in both of which it is admitted, that a delay in the commencement of the risk, by the interposition of an intermediate voyage not communicated to the underwriters, would discharge the policy, unless such intermediate voyage was one which was made usually and according to the course of the trade in which the ship was then engaged, which

would be equivalent to notice to the underwriters.

In the present case, at the time the policy was effected, the ship was then actually in the course of performing her outward voyage under her charter, and the risk upon the policy was not to commence until the outward voyage was completed by the arrival of the ship at Sincapore. And it is argued by the assured that although unjustifiable delay before commencing, or in performing the voyage itself which is insured, amounts to a deviation, no such delay in completing the outward voyage upon which the ship is then known to be engaged, will have

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the same consequences, inasmuch as with that voyage the policy in question has no concern.

*But if the principle above laid down be sound, where the delay takes place after the risk has actually commenced, in reason and sense it applies [*122] also to the case of the voyage insured, where the risk is not to commence until

the completion of the outward voyage.

The reason upon which a deviation discharges the insurer, is not that the risk is thereby increased, but because the insured has, without necessity, substituted another voyage for that which was insured, and thereby varied the risk which the underwriter took upon himself. It must be admitted that, if the policy had been effected upon this ship at and from Sincapore, the ship then being at Sincapore, unreasonable and unjustifiable delay at Sincapore would have avoided the policy. Why, but because the voyage, commenced after an unreasonable interval of time, would have become a voyage at a different period of the year, at a more advanced age of the ship, and, in short, a different voyage than if it had been prosecuted with proper and ordinary diligence; that is, the risk would have been altered from that which was intended by all parties when the policy was effected.

But what is the difference with respect to the alteration of the voyage, whether this unreasonable and unjustifiable delay takes place in the course of the ship's voyage to Sincapore, or after the ship is at Sincapore? The underwriter has as much right to calculate upon the outward voyage, on which the ship is then engaged, being performed in a reasonable time, and without unnecessary delay, in order that the risk may attach, as he has that the voyage insured shall be commenced within a reasonable time, after the risk has attached. In either case the effect is the same, as to the underwriter, who has another risk substituted instead of that which he has insured against; and in both cases, the [*123 *alteration is occasioned by the wrongful act of the assured himself.

But the principle contended for by the defendant seems to be established as law by the case of Hull v. Cooper, 14 East, 475. In that case, Lord Ellerborough says, "When a broker proposes a policy to an underwriter, on a ship at and from a certain place, it imports either that the ship is there at the time, or shortly will be there." In that case, the question turned upon the point of concealment, the situation and circumstances of the ship being known to the assured, but not communicated to the underwriter. In the present case, it is true, no such question can arise, the assured, at the time the policy was effected, being ignorant of the precise place where the ship was, and of the misconduct of the captain. But the principle stated by Lord Ellenborough, in his judgment on that case, namely, that a delay in the arrival of the vessel at the place where the risk is to attach, alters the risk of the insurer, applies to the present case. And, as in the present case, the jury have expressly found that the delay before the ship arrived at the port where the policy was first to attach, was unreasonable and unjustifiable, we must intend that the risk was in fact varied, and, consequently, the underwriter is discharged from the policy.

We therefore give

Judgment for defendant.

*FREEMAN v. TAYLOR. Nov. 25.

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Plaintiff, owner and captain of a ship, agreed by charter-party to proceed to the Cape, and having delivered goods there, to proceed with all convenient speed to Bombay, where the freighter engaged to put on board a cargo of cotton for England. The plaintiff was to have the cabins and between decks for his own benefit. Plaintiff arrived at the Cape, and might have proceeded on his voyage in two days, but he remained there ten, taking in cattle for the Mauritius on his own account: he went round by the Mauritius in his way to Bombay, and arrived at the latter place six weeks later than he would have done if he had proceeded thither direct. Other ships had arrived in the mean time. The freighter refused to load: and in an action on the charter-party, the jury were directed to consider whether the deviation was such as to have deprived the freighter of the benefit of the contract; and a verdict being found for the defendant, a new trial was refused.

THE declaration stated, that by a certain charter-party of affreightment made between the plaintiff, therein described as owner of the ship or vessel called The Edward Lombe, of the burden of 347 tons' registered measurement, or thereabouts, whereof the plaintiff was commander, then lying in the port of London, of the one part, and the defendant, therein described as freighter of the said ship, of the other part, it was witnessed that the said owner, for the consideration thereinafter mentioned, did thereby promise and agree with and to the said freighter, his executors, administrators, and assigns, that the said ship,—being tight, staunch, and strong, and every way properly fitted, victualled, and manned, as was usual for vessels in the merchant service, and for the voyage thereinafter named,—the commander of the said ship, or some other proper person in his stead, should and would receive and take on board the said ship in the West India Dock in the aforesaid port of London, such quantity of lawful merchandise as the said freighter might think proper to ship, not exceeding what the said ship would reasonably stow and carry in the lower hold, reserving sufficient space for fifteen chaldrons of coals, which the owner was allowed to stow therein on his own account; the *cabins and between decks of the vessel being also reserved for the benefit of the owner and commander; and that having received the same on board, and being despatched therewith not later than the 20th day of May then next ensuing, the said commander, or some other proper person in his stead, should and would, wind and weather permitting, set sail and proceed with the said vessel to Madeira and the Cape of Good Hope, where having discharged or disembarked any goods or passengers destined for those places, she should, with all convenient speed, proceed to Bombay, and being arrived there, or so near thereto as the said ship could safely get, and being ready to discharge the aforesaid goods, the said commander, or some other proper person in his stead, should and would give immediate notice thereof to the correspondent or assigns of the said freighter at Bombay aforesaid, and should make a right and true delivery of the whole of the said outward goods, excepting such goods, if any, as should have been shipped by the agents of the said freighter at the Cape of Good Hope for Bombay and London, as thereinafter provided for, freight free, and agreeably to bills of lading which should have been signed for the same; and that having completed such delivery, the said commander, or some other proper person as aforesaid, should and would receive and take on board the said ship such a quantity of cotton and other lawful goods, both or either, together with a sufficient quantity of goods to fill up the broken stowage, and no more, as would not exceed in the whole, including any goods shipped at the Cape of Good Hope for Bombay and London, if any should have been so laden, what the said vessel could reasonably stow and carry in the lower hold, the space occupied by the fifteen chaldrons of coals on the outward voyage being again reserved on the homeward bound voyage, *estimating the said space as equal to thirty-six pipes of wine or eighteen tons of measurement goods, together with the cabins and between decks, for the benefit of the said owner; and that having received the said goods on board, and completed the loading of the between decks, the said commander, or some other proper person as aforesaid, should and would, wind and weather permitting, set sail and proceed with the said vessel to the Cape of Good Hope, and thence to London, or direct to London, as the case might be; and having arrived at London, the said commander, or some other proper person as aforesaid, should and would make a right and true delivery of the said homeward cargo in the West India or London Docks, as directed by the said freighter, agreeably to bills of lading which should have been signed for the same, and there end the said intended voyage; the acts of God, the king's enemies, restraints of princes and rulers, fire, and all and every other the dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted: And the said owner did thereby further agree with and to the said freighter, his executors, administrators, and assigns, that the said ship should lie in the port of London aforesaid for receiving the said outward goods until the 20th day of May then next ensuing, if Vol XXI.-60 2 R 2

required by the said freighter, and at Bombay, for delivering the said outward goods and receiving on board the said homeward cargo, and at the Cape of Good Hope, in case the said ship should call there on her homeward voyage, for the purpose of the said freighter, as thereinafter provided, for the space of fifty running days in the whole, if not sooner despatched, such lay days to commence and be accounted from the days on which the said ship should respectively be ready to discharge the said goods at Bombay and the Cape of Good Hope aforesaid, and *notice therefore should be given as aforesaid; and the said owner also agreed to provide sufficient ballast for the said vessel at Bombay, in case the correspondents of the said freighter should not provide any or sufficient heavy or dead weight goods for that purpose; and also that the said ship should be addressed to the correspondents of the said freighter at Bombay aforesaid, who were to be allowed the usual commission upon all freight or passengers procured by them for the benefit of the said owner in the between decks and cabins: in consideration whereof and of everything thereinbefore mentioned, the said freighter did therefore, for himself, his executors, administrators, and assigns, promise and agree with and to the said owner, his executors, administrators, and assigns, that he the said freighter, his executors, administrators, correspondents, or assigns, some or one of them, should and would, at his and their own costs, expense, and risk, send alongside the said ship in the aforesaid port of London, such quantity of lawful goods as he might think fit to load, not exceeding as aforesaid, in sufficient time to enable the said ship to clear outwards at that port on or before the 20th day of May then next ensuing, and receive the same from alongside the said ship at Bombay as aforesaid, and at their or his like costs, expenses, and risks, send alongside the said ship at Bombay as aforesaid such quantity of cotton and other lawful goods, both or either, as should be sufficient to load the lower hold of the said vessel, together with a sufficient quantity of goods to fill up the broken stowage, and no more,—the space occupied therein by the fifteen chaldrons of coals on the outward voyage, estimating the said space as equal to thirty-six pipes of wine, or eighteen tons of measurement goods, being again reserved on the homeward voyage for the benefit of the said owner as aforesaid,—and *despatch her therewith to London, or to the Cape of Good Hope and London, within the days thereinbefore limited for those purposes, or days of demurrage thereinafter granted; and in like manner receive the said homeward cargo in the port of London with all possible despatch; and should and would well and truly pay or cause to be paid unto the said owner, his executors, administrators, and assigns, in full for the freight of the lower hold of the said ship for the said voyage out and home, and including the freight of all goods discharged and reladen at the Cape of Good Hope as therein stipulated, at and after the rate of 71. sterling money of Great Britain per ton for each and every ton stowed in the lower hold when the ship was despatched from Bombay, or by the said charter-party engaged to be provided for stowing therein—always excepting the freight of the space reserved for stowage of thirty-six pipes of wine or eighteen tons of measurement goods for owner's account,—such freight to be paid as follows: 3001. part thereof, deducting two months' interest at the rate of 51. per cent. per annum in cash in London, to be paid on the day on which the said vessel should clear outwards at the aforesaid port of London; 3501. further part thereof by the acceptance of the said freighter at two months' date from the same day; and the remainder on a right and true discharge of the said goods, by a good and approved bill payable in London at two months' date from the day on which the said ship should report inwards at the custom-house, London, after deducting such moneys as might have been advanced to the commander of the said vessel by the correspondents of the said freighter at Bombay aforesaid, together with the premium of insurance to be effected by the said freighter on freight to the amount of such last-mentioned advance:

And the plaintiff, in fact, said, that the said ship *being tight, staunch, and strong, and every way properly victualled and manned, as was usual for vessels in the merchants' service, and for the voyage in the said charter-

party named, the plaintiff, as commander of the said ship, did afterwards, to wit, on, &c., at, &c., take on board the said ship in the West India Docks, in the said port of London, such quantity of lawful merchandise as the defendant thought proper to ship in her lower hold; and having received the same on board, the said ship was afterwards, to wit, &c., at, &c., despatched therewith, and the said plaintiff then and there set sail and proceeded with the said vessel, with the said goods so on board thereof as aforesaid, to Madeira and the Cape of Good Hope, &c., and afterwards, to wit, on, &c., at, &c., arrived at Madeira and the Cape of Good Hope, and then and there discharged and disembarked all the goods and passengers destined for those ports, to wit, at, &c.; and did afterwards, to wit, on, &c., at, &c., proceed with all convenient speed to Bombay; and did afterwards, to wit, on, &c., at, &c., arrive at Bombay aforesaid; and the said ship was then and there addressed to the correspondents of the said freighter at Bombay aforesaid, and the said plaintiff was then and there ready to discharge the said goods from the said ship, and did then and there give immediate notice thereof to the correspondents and assigns of the said defendant at Bombay aforesaid, to wit, at, &c., and did then and there make a right and true delivery of the whole of the said outward bound goods, except such goods as were shipped by the agents of the said defendant at the Cape of Good Hope for Bombay and London, freight free, and agreeably to bills of lading which had been signed for the same, according to the terms of the said charter-party, to wit, at, &c.; and having completed such delivery, the said plaintiff was then and there ready to receive and take on board *in the lower hold of the said ship at Bombay aforesaid, from the said freighter, his correspondents or assigns, all such quantity of cotton or other lawful goods, both or either, together with a sufficient quantity of goods to fill up the broken stowage as the said freighter, his correspondents or assigns, at Bombay aforesaid, should think fit to ship and load on board of the said ship; of all which said several premises the said defendant afterwards, to wit, on, &c., at, &c., had notice; yet the said defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending to deceive and defraud the said plaintiff in that behalf, did not, nor would within the said lay days or days of demurrage in the said charter-party mentioned, or either of them, nor did nor would any other person or persons in his behalf, at his or their costs, expense, and risk, send alongside the said ship at Bombay aforesaid, such a quantity of cotton or other lawful goods, together with a sufficient quantity of goods to fill up the broken stowage, as would have been sufficient to have loaded the lower hold of the said ship, excepting the space so reserved for the benefit of the owner and commander as aforesaid, or any quantity of cotton or other goods, or any goods for broken stowage whatsoever, but wholly neglected and refused so to do, and otherwise wholly failed and made default, to wit, at, &c.; by means of which said several premises, the plaintiff not only lost and was deprived of all the profit and advantage which he might and otherwise would have made by the freight and primage of the said homeward bound cargo, amounting to a large sum of money, to wit, the sum of 3000l., but was also put to great charges and expenses in and about endeavouring to procure and procuring another freight for the said ship for her homeward voyage, amounting to a further large sum of money, to wit, the sum of 500l.; and also, *by reason of the premises, the said ship or vessel of the plaintiff was kept and detained at Bombay aforesaid, divers, to wit, fifty days longer than she otherwise would have been detained at Bombay aforesaid, whereby the plaintiff was not only hindered and prevented from taking divers, to wit, fifty passengers in the said cabins and between decks in the said homeward voyage, which he might and otherwise would have taken, and thereby lost and was deprived of divers great gains and profits, which he might and otherwise would have made thereby, amounting to a further large sum of money, to wit, the further sum of 1000l., but was also forced and obliged to pay, lay out, and expend a large sum of money, to wit, the sum of 2001., in and about maintaining, provisioning, and paying the crew of the said ship during the said fifty days, to wit, at, &c.

The defendant pleaded the general issue.

At the trial before Tindal, C. J., London sittings after Trinity term 1830, it appeared that the ship sailed from London on the 20th of May, 1828, with a cargo shipped by the defendant for Bombay, and arrived at the Cape of Good Hope on the 28th of September following. She might have proceeded on her voyage on the 30th, but the captain detained her till the 8th of October, being occupied in stowing the between decks, on his own account, with a cargo of mules and cattle for the Mauritius. On the 4th of October, the defendant's agents at the Cape protested against the delay, and against the ship's going to the Mauritius, on the ground that it was out of her course. The captain, however, insisted that it was not out of the course, nor any violation of the terms of the charter-party. He proceeded accordingly; arrived at the Mauritius on the 10th of November; and remained there till the 19th, discharging his mules and On the 19th he sailed for Bombay, where he *arrived on the 9th cattle. of January, 1829; six or seven weeks later than he would have arrived. if, on the 28th of September, he had sailed direct from the Cape of Good Hope to Bombay. In the mean time several ships had arrived at Bombay which left England subsequently to The Edward Lombe; and the defendant's agents refused to procure a cargo of cotton to freight that ship back. The captain remained at Bombay till the 17th of March, during which time he took on board, on his own account, whatever goods he could procure, and then proceeded to Ceylon for further cargo, with which he returned to London.

The plaintiff by this action sought to recover the difference in value between the freight so earned and that which would have accrued from the defendant's cargo of cotton. The freight for the voyage out had been paid, partly in advance.

The Chief Justice told the jury, that inasmuch as the freighter might bring his action against the owner, and recover damages for any ordinary deviation, he could not, for such a deviation, put an end to the contract: but if the deviation was so long and unreasonable that, in the ordinary course of mercantile concerns, it might be said to have put an end to the whole object the freighter had in view in chartering the ship, in that case the contract might be considered at an end; and he left it to the jury to decide, whether the delay here was of such a nature as to have put an end to the ordinary objects the freighter might have had in view when he entered into the contract.

The jury found for the defendant.

Taddy, Serjt., obtained a rule nisi to set aside the verdict, on the ground that the defendant's remedy for the alleged deviation, if he had been injured by it, was *by cross action; and that he was not at liberty, in the exercise of his own discretion, to put an end to the contract between him and the The engagement to sail from the Cape with all reasonable speed was not a condition precedent, but an independent covenant, for the breach of which the defendant might be entitled to sue; it did not go to the whole of the consideration for the defendant's contract, as was manifest from the circumstance that the defendant had not shown that his object in hiring the ship had been defeated by the plaintiff's delay. Unless it went to the whole consideration, it was not a condition precedent, the neglect of which would entitle the defendant to determine the contract. In Bornmann v. Tooke, 1 Campb. 376, by a charterparty between the plaintiff, the captain of a ship, and the defendant's agent abroad, for the carriage of timber from Riga to Portsmouth, at a stipulated rate per load, the former bound himself, after receiving his cargo on board, to sail with the first favourable wind direct to the port of Portsmouth. The ship, however, unnecessarily entered the harbour of Copenhagen, where she was detained several weeks, by means whereof the defendant was put to considerable expense in having fresh insurances done upon her cargo. In an action of indebitatus assumpsit for the freight, it was held that the plaintiff's covenant to sail direct to Portsmouth was not a condition precedent; and that the deviation could not be given in evidence, either as a bar to the action or to diminish the damages. So, in Havelocke v. Geddes, 10 East, 555, it was held that a covenant in a

charter-party of affreightment that the owner should at his expense forthwith make the ship tight and strong, &c., for a voyage for twelve months, &c., and keep her so, was *not a condition precedent to the recovery of the freight, *134] after the freighter had taken the ship into his service and used her for a certain period: but if the freighter should be afterwards delayed or injured by the necessity of repairing her, he would have his remedy in damages. Davidson v. Gwynne, 12 East, 381, where the master of a vessel covenanted with the freighter (inter alia) that the vessel should proceed with the first convoy from England for Spain and Portugal, or either, as he should be directed by the freighter or his agents, and there make a right and true delivery of the cargo, agreeably to the bills of lading signed for the same, and then take in a home cargo, and return and make a right and true delivery thereof at London, &c., in consideration whereof, and of everything above mentioned, the freighter covenanted (inter alia) to load the vessel out and home, and pay certain freight per ton per month, part before, and the remainder on the right and true delivery of the homeward cargo at London; it was held, that the master having proceeded with the outward cargo to Lisbon, and brought home a return cargo, and delivered the same to the freighter at London, was entitled to his freight for the voyage, though he had not sailed with the first convoy; the sailing with the first convoy not being a condition precedent to his recovering freight for the voyage actually performed, but a distinct covenant for the breach of which he was liable in damages.

Wilde, and Bompas, Serjts., showed cause. The verdict of the jury, coupled with the previous direction, amounts to a finding that the object of the charterer's contract was entirely defeated by the unjustifiable delay of the plaintiff:

terer's contract was entirely defeated by the unjustifiable delay of the plaintiff: *it follows, therefore, that the engagement to proceed from the Cape with all reasonable speed was a condition precedent, going to the entire consideration for the contract; and as such, while the contract remained executory, the breach of it was an answer to the plaintiff's demand. Boone v. Eyre, 2 W. Blacks. 1312, Duke of St. Alban's v. Shore, 1 H. Blacks. 270. The plaintiff having by his wilful act defeated the object of the defendant, has no longer any claim against him. Thus, in Soames v. Lonergan, 2 B. & C. 564, where the charterers of a ship for a voyage from Cadiz to St. Blas, and thence to Guayaquil, to take in a homeward cargo, caused another ship to be chartered on their account to go out in ballast and bring home a cargo from Guayaquil, with a proviso that in the event of the non-arrival of the first-mentioned ship at Guayaquil, then the second charter should be void: it was held, that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not having been attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her. In Touteng v. Hubbard, 3 B. & P. 291, where a British merchant chartered a Swedish ship on a voyage to St. Michael's for a cargo of fruit, and the charter-party contained the usual exception against the restraint of princes, the ship having been prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British government, it was held the Swedish owner could not, by proceeding on the voyage after the embargo was taken off, entitle himself to recover the freight against the British merchant.

*136] *So in Shadforth v. Higgin, 8 Camp. 883, where a ship was freighted to go in ballast to Jamaica, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her in time for the July convoy, provided she arrived out and was ready by the 25th of June; it was held, that as she did not arrive out till after the 25th of June, the freighter was entirely discharged from his contract to furnish a cargo.

In the cases relied on for the plaintiff, either the stipulation was no condition precedent, or it did not appear, as in the present case, that the party had been deprived of the benefit of the contract. Thus, in Bornmann v. Tooke, there was

no finding that the object of the defendant had been defeated. In Havelock v. Geddes the defendant made use of the ship, and thereby waived the right of insisting on seaworthiness as a condition precedent. In Davidson v. Gwynne the benefit of the voyage was obtained, although the ship did not sail, according to agreement, with the first convoy. Whether or not a stipulation shall operate as a condition precedent, and goes to the entire consideration, depends, says Lord Ellenborough, not on any formal arrangement of the words, but on the sense and reason of the thing, as it is to be collected from the whole contract; Ritchie v. Atkinson, 10 East, 306; and on that principle all the cases may be reconciled; Thomas v. Cadwallader, Willes, 496, Goodisson v. Nunn, 4 T. R. 761, Porter v. Shepherd, 6 T. R. 665, Campbell v. Jones, 6 T. R. 570, Cook v. Jennings, 7 T. R. 381, Glazebrooke v. Woodrow, 8 T. R. 366, Smith v. Wilson, 8 East, 437, Storer v. Gordon, 3 M. & S. 308, Fothergill v. Walton, 8 Taunt. 576.

*Com. Dig. Condition Precedent (G. 5), is express that it ought to be performed within a reasonable time.

The defendant having had the benefit of the outward voyage, and having adduced no proof of loss occasioned by the late arrival of the ship at Bombay, it was not competent to the jury to find that the whole object of the contract was defeated. In Touteng v. Hubbard, Scames v. Lonergan, and Shadforth v. Higgin, nothing was done for the benefit of the charterer on the outward voyage; the ships went out in ballast. And in Havelock v. Geddes Lord Ellenborough said, "Had the plaintiff's neglect precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar; but as the defendants have had some use of the vessel, notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a part only; the consideration has not wholly failed, and the covenant cannot be looked upon as having raised a condition precedent, but merely gives the defendants a right under a counter-action to such damages as they can prove they have sustained from such neglect." [TINDAL, C. J. The plaintiff here has been paid for the outward voyage.] Still Bornmann v. Tooke and Constable v. Cloberie, Palm. 397, are express authorities to show that the stipulation here as to proceeding direct to Bombay was not a condition precedent. Goodisson v. Nunn, Glazebrook v. Woodrow, and Kingston v. Preston, (a) there cited, were all cases of sale and purchase, involving concurrent conditions, which could not be pleaded one against the other, and inapplicable to the present case; but Campbell v. Jones, 6 T. R. 570, is in point for the plaintiff. There A., in *consideration of 250l. paid by B., and of the further sum of 250l. to be paid, &c., covenanted that he would, with all possible expedition, instruct B. in a certain mode of bleaching linen (for which he had obtained a patent); and B. covenanted that he would, on or before the 25th of February, 1794, or sooner, if A. should before that time have instructed him, &c., pay the further sum of 250l.; it was held, that the covenants of A. and B. were independent covenants; and that A. might sue B. for the 2501., without averring that he had taught B. the mode of bleaching linen, &c. Cur. adv. vult.

TINDAL, C. J. This was an action of assumpsit, upon a charter by the plaintiff to the defendant of the ship Edward Lombe, from London to Madeira and the Cape of Good Hope, and thence to Bombay and back; the plaintiff claiming a compensation in damages against the defendant for not loading the ship with a cargo of cotton at Bombay.

At the trial it appeared in evidence, that, instead of proceeding by the direct and usual course from the Cape of Good Hope to Bombay, the captain made a deviation to the island of Mauritius; and that the defendant's agents at Bombay,

in consequence of such deviation, refused to find a cargo.

The point left to the jury at the trial was, whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered; the jury being told that if such was their opinion,

the defendant was excused, by the act of the plaintiff's captain, from furnishing

a cargo.

The jury having determined that question in the affirmative, and having found a verdict for the defendant, a motion was made to set the verdict aside, and for

a new trial, on the ground of misdirection.

*139] *But, after hearing the arguments against and in support of the rule, we are of opinion, upon the same principle as that which was laid down in the case of Mount v. Larkins, antè, p. 108, and which we therefore think it is unnecessary to repeat, that the direction was right; and we therefore think the rule for a new trial must be discharged.

Rule discharged.

MEMORANDUM.

Pursuant to a statute passed in the last session of Parliament, His Majesty issued his letters patent, dated the 5th December, 1831, constituting a Court to be called "A Court of Bankruptcy;" and appointed the Honourable Thomas Erskine to be Chief Justice; Albert Pell, John Cross, and George Rose, Esquires, to be Puisne Judges. The Chief Justice to take precedence in rank next to the Puisne Judges of the other Courts, and after him the other Judges.

Six Commissioners were also appointed; viz. C. F. Williams, J. H. Merivale, J. Evans, R. G. C. Fane, E. Holroyd, and J. S. M. Fontblanque, Esquires.

Mr. Serjt. Ed. Lawes was appointed Chief Registrar.

END OF MICHAELMAS TERM

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

Bilary Cerm,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV. 1882.

MEREDITH v. DREW. Jan. 13.

By the Bath court of requests act, a plaintiff who sues in another court for a debt he might have recovered in the Bath court, shall not, by reason of a verdict for him, be entitled to costs. This Court refused to stay proceedings before verdict, upon payment of debt without costs, upon the ground that the action ought to have been brought in the Bath court.

THE plaintiff had declared in debt for 7l.

Merewether, Serjt., moved to stay proceedings upon payment of the debt without costs, the defendant carrying on his business in the city of Bath, and claiming to be within the jurisdiction of the Bath court of requests act, 45 G. 3, c. 67, by which commissioners are authorized to decide all disputes and differences between party and party, for any sum not exceeding 10l. in all actions *or causes of debt; and it is made lawful for any persons, whether they reside within the jurisdiction of the said Court or not, having any debts not exceeding the value of 10l., due by or from any persons whatever, inhabiting, residing, or being within the said city, or the liberty and precincts thereof, to proceed by summons in the said court; and if any action for any debt recoverable in the said court shall be commenced in any other court, the plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to any costs.

Although the case had not proceeded to verdict, this Court, he contended, would interfere at once to prevent unnecessary expense. In Dunster v. Day, 8 East, 239, it was held, that after judgment by default, and the damages assessed upon a writ of inquiry, the defendant might come into court and move to stay proceedings on payment of the damages assessed, without costs. That case was under the London court of requests act, but the language in both acts is the same, and an application before verdict, comes as much within the reason of the

act as an application after.

PARK, J. I think not: the party is not in the stage of proceeding contemplated by the act, and that is a sufficient reason for us not to interfere;

besides, he who asks for justice should do justice.

ALDERSON, J.(a) The defendant might be compelled to go on at the expense of paying his own costs in any event: he comes here to ask for a favour, and ought at least to do justice himself.

Rule refused.

*1437

*PIRIE v. IRON. Jan. 14.

Practice. Examination of witnesses by prothonotary.

On the 12th instant a rule had been obtained under 1 W. 4, c. 22, for examining, this day, before the prothonotary, certain witnesses for the plaintiff, upon an affidavit that they were immediately about to sail for India.

The defendant's agent had notice of the rule the day it was obtained, and immediately wrote to the defendant's attorney at Dover, but no answer having

arrived this day by return of post,

Merewether, Serjt., moved that the examination of the witnesses might be deferred till the defendant's attorney could be present to cross-examine them, without which great injustice might be done to the defendant.

The Court observed that such delay might defeat the object of the act of parliament; and it was then asserted that the witnesses were about to sail on the

morrow; upon which,

Merewether contended that the preparations for a voyage to India requiring much time, the plaintiff must have been long apprised of the witnesses' probable departure, and must have deferred his application to the last moment, in order to elude a cross-examination.

Sed per Curiam. Let the examination be taken provisionally; the plaintiff to satisfy the Court by affidavit that the application has not been delayed with any sinister intention.

*1447

*GWILT v. CRAWLEY. Jan. 14.

Defendant's attorney had notice, Nov. 26th, that his cause was set down for trial; five days afterwards it was called on and tried as an undefended cause, no one appearing for the defendant

The defendant's attorney having on the day of trial delivered no briefs, the Court refused a new trial upon any terms.

This was an action against the defendant for running over the plaintiff in a

The cause was set down for trial at the Middlesex sittings on the 26th of

November last, and was called on, the 2d of December.

No one appeared on the part of the defendant; but the case having been fully

proved, a verdict was taken for the plaintiff.

Storks, Serjt., now moved, on payment of costs, for a new trial, on an affidavit that the cause was the last of fifteen appointed for trial on the 2d of December; that the defendant's attorney did not expect it could come to his turn on that day; that he had examined a number of witnesses who could prove the innocence of the defendant; and that the application was not made for delay. It appeared, however, that the defendant's attorney had notice on the 26th of November that the cause stood for trial, and that his clerk attended in court to watch the progress of the causes two or three days; but it did not appear that he had delivered any brief to counsel, or had examined any witnesses before the cause had been actually tried.

TINDAL, C. J. The rule cannot be granted. The defendant's attorney knew on the 26th of November that the cause was set down for trial; and though it was not called on till the 2d of December, he had not up to that time delivered a brief or examined the defendant's witnesses. It would be a gross injustice to *145] fendants to lie by, and after learning the particulars of the plaintiff's

case to harass him with a new trial and evidence got up in answer.

PARK, J., concurred.

ALDERSON, J. If the defendant's attorney had been present when the cause Vol. XXI.—61 2.8

was called on, the Court before putting off the trial would have required him to show that he had delivered a brief, or had taken some steps to prepare for trial: he does not depose that, even now; and as a new trial would necessarily occasion delay to the plaintiff, the rule must be

Refused.

MACARTHY v. SMITH. Jan. 14.

DECLARATION for goods sold and delivered, money had and received, &c.

Bill of particulars for goods sold only, appended to the record pursuant to the late rule.

At the trial the defence was, that the goods had been delivered to the defendant as an agent upon sale and return. It appeared, however, that he had sold

some of them to the amount of 3l. 18s.

After the Chief Justice, before whom the cause was tried, had done summing up, the counsel for the defendant objected that the bill of particulars contained no demand for money had and received, to which it was answered, that the delivery of the bill of particulars had not been proved; but the learned Judge thought this unnecessary since the adoption of rule for appending the *particulars to the record, and nonsuited the plaintiff, with leave to move the Court.

Heath, Serjt., accordingly now moved to set aside the nonsuit, contending, that the rule for annexing the bill of particulars did not dispense with the necessity for proving the delivery of them to the defendant; and that, at all events,

the objection on the part of the defendant was taken too late.

TINDAL, C. J. The Court cannot interfere. The object of the late rule was to save the trouble of proving the bill of particulars. The plaintiff here was out of Court upon his demand for goods sold, and then resorted to a ciaim for money had and received. The defendant might fairly say, that if such a claim had been presented on the bill of particulars, he would not have gone to trial.

Rule refused

DOE dem. SCRUTON v. SNAITH. Jan. 17.

A mortgage deed for 3000*l.* contained a power of sale and leasing to secure the principal and all expenses, with interest; there was also a covenant to pay principal and interest, and all expenses, with interest on the amount of them:

Held, not a security for an uncertain and indefinite amount under 55 G. 3, c. 184, and that a it stamp was sufficient.

EJECMENT on a mortgage deed, by which, in consideration of 1700l. paid by the lessor of the plaintiff to discharge a former mortgage, and of 1300l. actually advanced to the mortgagor, the mortgagor on the 6th of April, 1828, conveyed the premises in question to the lessor of the plaintiff in fee; provided always, that if the mortgagor should pay to the *mortgagee 3000l. and all sums that if the mortgagee should expend or disburse for or in respect of those presents, with interest after the rate of 4l. 10s. per cent., on the 6th of October then next, the conveyance should be void; but if, after notice, three months should elapse without such payment, the mortgagee should be at liberty to enter and receive rents, and should be invested with a power to make leases, and to sell, and pay the expenses and 3000l. and interest, and after payment hold in trust for the mortgagor. There was a covenant from the mortgagor to pay 3000l. and interest, and all costs with interest.

The deed was stamped with a stamp of 9l.

Upon which it was objected at the trial before Parke, J., that the deed was made as a security for the repayment of money uncertain and unlimited in amount, and that therefore the stamp ought to have been 25*l*. under 55 G. 3, c. 184, sched. tit. *Mortgage*.

A verdict having been taken for the plaintiff, with leave for the defendant to

move to enter a nonsuit,

Jones, Serjt., obtained a rule nisi to that effect.

Wilde, Serit., showed cause.

By the statute 9*l*. is the amount of stamp on a mortgage "where the same shall be made as a security for the payment of any definite and certain sum of money advanced or lent at the time, or previously due or owing, or forborne to

be paid, being payable, exceeding 4000l. and not exceeding 5000l.

"And where the same shall be made as a security for the repayment of money, to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as *148] the case may be; other than and except *any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage, or security against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in any deed, whereby any annuity shall be granted or secured for such life or lives, if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit, 251."

The sum secured to the lessor of the plaintiff is the definite and certain sum of 3000l. It is true that he is empowered to defray his expenses; but if the deed had omitted to give him that power, it would not have secured 3000l., but 3000l. minus the expenses. And it makes no difference that the lessor of the plaintiff is to receive interest upon the amount of those expenses; for in Pruessing v. Ing, 4 B. & A. 204, a stamp applicable to a note not exceeding 30l. was held applicable to a note for the payment of 30l. at three months after date, with interest from the date; and Lord Tenterden, C. J., said, "The object of the legislature was to impose a pro rata stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of that money." So in Deardon v. Binns, I Mann. & Ryl. 130, it was held, that a bond conditioned for the payment of money and interest, and also for the performance of collateral acts, required only the ad valorem stamp, appropriated to the principal sum, where that stamp exceeded the 1l. 15s., which the collateral matter would require if it stood alone.

In Dickson v. Cass, 1 B. & Adol. 343, indeed, where a bond was given for *149] 2000l.; the condition of which,—after reciting that A. *and B. had opened an account with D., E., F., and G., as bankers, and that the bankers had agreed to discount bills and pay in advance for A. and B. any sum of money not exceeding 1000l. in the whole,—was, that A., B., and C. should satisfy and pay the bankers all such sums as they should advance on account of the accepting or paying any bills, &c., together with such lawful charges and allowances for advancing and paying such bills as are usually charged by bankers in such cases, and interest, it was held that that being a bond to secure not only 1000l., but a further sum for the bankers' charges for commission, &c., the stamp of 5l. required by the 55 G. 3, c. 184, sched. part i. tit. Bond, given to secure a sum

exceeding 500l., but not exceeding 1000l., was not sufficient.

But there the bond was to be a security, not only for the 1000? to be actually advanced, but for such commission as bankers usually charge on such advances. The sum payable on commission was something to be gained beyond the sum of 1000?; and upon that ground Bayley, J., rested his judgment that the stamp was insufficient. Here the reimbursement of costs would be no gain to the mortgagee, although the non-payment of them would be a loss. If there had been no stipulation on the subject the mortgagee would be entitled to hold the estate till he was satisfied all his expenses as well as the money lent.

Jones. Without an express stipulation he could never require or obtain inte-

rest upon the amount of his expenses; that interest, therefore, renders the sum secured uncertain and indefinite, and the higher stamp is necessary. But it may be considered, that the sum secured is rendered uncertain by the stipulation that the expenses are to be secured as well as the 3000%; for sums advanced for insurance against fire of property *contained in a mortgage, or for insurance of lives upon an annuity-deed, being expressly excepted, when added to the principal sum, it may be inferred the legislature meant to include every

other charge which might be added to a mortgage.

TINDAL, C. J. On the proper construction of the act of parliament, I think a stamp of 9l. was sufficient in this case. The question arises on a clause in the act under the term mortgage in the schedule. On looking at that clause, it is obvious that the main intention of the legislature was to impose a stamp proportioned to the sum advanced or lent; and the only question is, whether it was intended to affect a security against a contingent loss to the lender. The words of the act are—"Where the same shall be made as a security for payment of any definite and certain sum of money, advanced or lent at the time, or previously due or owing, or forborne to be paid, being payable, exceeding 4000l and not exceeding 5000l., 9l.; and where the same shall be made as a security for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; other than and except any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage, or security against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in any deed whereby any annuity shall be granted or secured for such life or lives, if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncer-

tain and without any limit, 25l."

These two latter clauses must be taken to pursue the intention of the legislature as expressed in the first, namely, to cover money actually advanced on security. *Looking at the deed in question, the object of the parties appears to have been to secure two sums, one of 1700l., the other of 1300l.; and the question is, whether a proviso and subsequent covenant to indemnify the lender against expenses which he may possibly incur to recover the money lent, can be so blended with that money as to impose the necessity of a stamp of higher amount: and we are of opinion that such a stamp is not necessary; for this deed contains no power which the mortgagee might not enforce under a ordinary mortgage. By a condition subsequent the mortgagee is authorized to recover expenses which, without such condition, he would be allowed in the Master's office. We cannot put upon this condition subsequent the construction of an unlimited advance requiring a 251. stamp, unless we put the same construction on an ordinary mortgage deed. It has been contended that the exemption in the statute, of the expense of insurance, implies an intention on the part of the legislature that all other expenses should be included in the amount for which the stamp is to be paid; but insurance is a different and collateral security, and the expense incurred in effecting it could not be claimed under the ordinary form of mortgage. The case of Dickson v. Cass is clearly distinguishable from the present. There, a bond was given for 2000l., the condition of which,—after reciting that A. and B. had opened an account with D., E., F., and G., as bankers, and that the bankers had agreed to discount bills. and pay in advance for A. and B. any sum of money not exceeding 1000% in the whole,—was, that A., B., and C. should satisfy and pay the bankers all such sums as they should advance on account of the accepting or paying any bills, &c., together with such lawful charges and allowances for advancing and paying such bills as are usually charged by bankers in such cases, and interest; and the Court held, that that being a bond to secure, not only *1000%, but a further sum for the bankers' charges for commission, &c., the stamp of 5l. required by the 55 G. 3, c. 184, sched. part i. tit. Bond, given to secure a sum exceeding 500l., but not exceeding 1000l., was not sufficient.

The charge for commission was necessary, in the first instance, to render the instrument available, and without it the borrower could not obtain the sum he required. The expenses provided for in the present deed have no relation to the borrowing of the money, but may subsequently become necessary to make the security complete to the lender. Those charges for commission on the advances the bankers would not have been entitled to unless by express stipulation; the charges here, the mortgagee might have recovered whether he had stipulated for them or not. Therefore, as all stamp acts, being a burden on the subject, must be clearly expressed wherever they impose the burden, I should say, that even if there were doubt, we should take the smaller sum; but that in this case, as it is plain that no more than 3000l. was advanced to the mortgagee, the stamp which has been affixed to the deed must be deemed sufficient.

PARK, J. I am of the same opinion. We must look to the precise words of these revenue acts, because, in some degree, they operate as penalties. Now, in this case, the sum named in the deed was not a security for the payment of any "sum of money thereafter to be lent," or "uncertain in amount." The true way to consider the question is, whether these expenses would not necessarily follow the power of lease and sale. In a court of equity, they would be considered incidental to the mortgage; and after the mortgagee shall have been reimbursed all expenses he may incur, the principal sum secured to him here is no more than 3000l. As to the *argument drawn from the exception in favour of insurances against fire, the answer has been given by the Chief Justice; and in Dixon v. Cass the borrower could not raise the money he proposed to obtain without adding the previous charge of the banker's commission.

BOSANQUET, J. I am of opinion that the stamp upon this deed was sufficient. The question turns on the construction of a statute imposing a duty, and we must take care that no higher duty is imposed than the legislature intended. It appears to me that the deed in question is a security for a definite, and not for an uncertain sum. Pruessing v. Ing is a decisive authority to show that the reservation of interest is not to be considered an addition to the sum advanced. The question therefore remains, whether a stipulation for reimbursing the mortgagee his expenses is to be considered as making an addition to the sum advanced or secured, or as rendering it of uncertain amount. Now, in Dixon v. Cass, which has been referred to in support of the argument for a higher stamp, the expenses secured were expenses attending the advance of the money, and not expenses attending its recovery. Here the expenses are the expenses of recovery, and it was not necessary that they should have been mentioned at all. Expenses which are incurred only for the purpose of recovering the principal money lent will not take the deed out of the operation of that clause of the act which applies to securities for a sum certain, because, when they are all defrayed, the mortgagee will have no more in pocket than the sum he originally advanced.

ALDERSON, J. I think the stamp was sufficient. The case is governed by the decision in Pruessing v. Ing, where the reservation of interest upon the face
*154] of a promissory note was held to make no difference in the *amount of
the stamp, Abbott, C. J., saying, "the object of the legislature was to impose a pro rata stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money." The mortgagee here would have been in no worse situation if the deed had contained no stipulation for the expenses; and expressio illorum qua tacité insunt nihil operatur.

In Dixon v. Cass the defendant would not have been responsible for the banker's commission and other charges without an express stipulation to secure That case, therefore, does not apply to the present, and the rule for a Discharged. nonsuit must be

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ACRAMAN v. HARRISON. Jan. 17.

It is too late to move to bring up an insolvent under the compulsory clause of the Lord'
Act on the seventh day of term.

MEREWETHER, Seajt., moved on the part of the plaintiff, a creditor, to bring up the defendant, a prisoner, under the compulsory clause in the Lords' act, 32 G. 2, c. 28, s. 16, by which creditors are authorized and empowered to require prisoners, on giving twenty days' notice in writing, to give in to the court of law, from which the writ or process issued, on which any such prisoners are charged in execution, or into the Court in the prison of which such prisoners have been or shall be removed by habeas corpus, or shall remain or be charged in execution, within the first seven days of the term which shall next ensue the expiration of the said twenty days, a true account in writing of the estate of such prisoners.

But this being the seventh day of the term, and it *being impossible to bring up the defendant in the course of the day, the Court held the application too late, and Merewether

Took nothing.

PALMER v. MARSHALL. Jan. 21.

In an action on a policy of insurance, the Court refused upon a new trial to change the example from Dorset to London, upon the ground that both the parties lived in London, and that all the witnesses came from London on the first trial.

This was an action on a policy of insurance on a yacht at and from Bristol London, and the plaintiff had laid the venue in Dorsetshire, where the cause was tried at the last assizes, when a verdict was found for the plaintiff, upon which the defendant afterwards obtained a rule absolute for a new trial. (See ante, p. 79.)

The plaintiff's witnesses at the first trial were all from London, where both

the parties resided; and, upon affidavit of these facts,

Wilde, Serjt., on the part of the defendant, obtained a rule nisi to change the venue to London, for the purpose of saving expense, and obtaining a jury more conversant in matters of insurance.

Merewether, Serjt., who opposed the rule, urged that no sufficient reason had been assigned for changing the venue. The change would now, when the assizes were so near at hand, operate as a delay to the plaintiff, who had the privilege of laying the venue where he pleased; and

The Court, assenting to this, although they admitted, that in some cases circumstances might be sufficiently strong to induce them to change the venue, the Rule was discharged.

*COMBE and Others v. WOOLF. Jan. 21.

Defendant guarantied the payment of porter to be delivered by plaintiff to J.: the guarantee contained no stipulation as to the credit to be given to J. The custom of the plaintiff was to give six months, and then, sometimes, to take a bill at two. The plaintiff having without the knowledge of the defendant, given J. eleven months' credit, Held, that the defendant was discharged from his guarantee.

THE declaration stated that on the 23d of May, 1827, at Westminster, by a certain memorandum or undertaking made and given by the defendant to the plaintiffs, the defendant guarantied and engaged to see the plaintiffs paid for any

porter which the plaintiffs might send to one Abraham Joseph of the town of Penzance, until the plaintiffs should receive notice to the contrary from the And the said memorandum or undertaking being so made as aforesaid, to wit, at, &c., in consideration thereof, and that the plaintiffs, at the special instance and request of the defendant, had then and there undertaken and faithfully promised the defendant to perform and fulfil the terms of the said memorandum or undertaking in all things on their part and behalf to be performed and fulfilled, the defendant undertook, and then and there faithfully promised the plaintiffs to perform and fulfil the terms of the said memorandum or undertaking in all things on his part and behalf to be performed and fulfilled. plaintiffs then averred that they, confiding in the said undertaking of the defendant, did afterwards, to wit, on, &c., sell, send, and deliver to the said Abraham Joseph certain porter of great value, which the said Abraham Joseph had occasion for and required of the plaintiffs, and at and for certain reasonable prices then and there agreed upon by and between the plaintiffs and Abraham Joseph, amounting in the whole to a large sum of money, to wit, 150l.: and although the said Abraham Joseph was, on the 1st of April, 1831, at, &c., requested by the plaintiffs to pay the said sum of money, yet the said Abraham *Joseph had not as yet paid said sum of 150%. or any part thereof, but had hitherto wholly neglected and refused so to do; of all which said premises the defendant on the day and year last aforesaid, had notice; yet the defendant had not as yet paid the plaintiffs the said sum of money or any part thereof for the said porter or any part thereof, but still neglected and refused so to do, and said sum of 150l. still remained due and unpaid.

At the trial before Park, J., Middlesex sittings in last Michaelmas term, it appeared that the defendant had executed the following guarantee to the plaintiffs,

who were brewers:-

"Penzance, May 23, 1827.

"Messrs. Combe, Delafield, and Co.

"I hereby guarantee and engage to see you paid for any porter you may send Mr. Abraham Joseph of this town, until you receive notice to the contrary from me.

LEMAN WOOLF."

According to the invoices, the course of the plaintiffs' business was to give six months' credit, or cash 2½ discount; and it was their custom to extend the credit by taking at the end of the six months a two months' bill. Casks charged in the invoice, but allowed for if returned. After the guarantee had been given, the plaintiffs furnished Joseph with porter from time to time; and on the 1st of December, 1829, there was a balance due of 45L for that article. The plaintiffs applied to Joseph in June 1830, for the amount, and again in August, when, failing to obtain it, they threatened Joseph on the 29th of September, that they would proceed against the defendant; upon which Joseph sent them his promissory note, dated 4th of October, payable two months after date. On the 18th of November, Joseph became bankrupt, whereupon this action was brought against his guarantee.

*158] *The plaintiffs also claimed 17th. 5s. for casks not returned; but these, though furnished subsequently to the defendant's guarantee, were not the identical casks which had contained the porter in respect of which this action was brought. It was left to the jury to say whether the course of dealing between

the parties had been altered, and time had been given to the debtor.

The jury found that the course of dealing, prescribed by the invoices, had been altered, but that, as practical men, they thought the credit to Joseph had not been extended; whereupon the verdict was found for the plaintiffs, with leave for the defendant to move to set it aside, on the ground that he had been discharged by the time granted to Joseph, and that, at all events, he was not liable for the casks, having guarantied only the porter furnished to Joseph.

Wilde, Serjt., having obtained a rule nisi accordingly,

Taddy, Serji., showed cause. The defendant not having stipulated by his guarantee that the credit to Joseph should be limited to any particular time, is

not discharged by the indulgence which has been given. It has, indeed, been established in courts of equity, that if a creditor give time to his debtor, he cannot sue the surety till that time is expired. But the surety is not discharged entirely; his liability is only suspended, and revives when the period of indulgence has expired. Thus, in The London Assurance Company v. Buckle, 4 B. M. 153, where a bond was executed by an insurance broker, as the principal obligor, and two sureties, with a condition, that if they should pay the obligees such premiums as should become due for assurances on ships at sea, to be made with the obligees by the insurance broker, within six months after the making of the insurances, *the bond was to be void: the broker became bankrupt, [*159] and was indebted to the obligees in a considerable sum for premiums, and they received a dividend of six shillings in the pound under the commission: the premiums were due three years before the bankruptcy, and the obligees did not call on the surcties until after the bankruptcy: but it was held that the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond. So, in Goring v. Edwards, 6 Bingh. 94, in April 1825, defendant guarantied the payment of money due from his son to the plaintiff upon a sale of timber: the plaintiff received part payment of the son, and made repeated unsuccessful applications to him for the residue till December 1817, when the son became bankrupt: the plaintiff never disclosed to the defendant the issue of these applications; but in December 1827, sued him on his guarantee: it was held, that the defendant was not discharged by the time that had elapsed, nor by want of notice of the applications made to his son.

It is true, the creditor must conduct himself towards his debtor in the same way as he would have done if the guarantee had not been given; for if he conduct himself otherwise it is a fraud on the surety: thus in English v. Darley, 2 B. & P. 61, the endorsee of a bill, having sued the acceptor to judgment, and taken out execution, received of him a sum of money in part payment, and took his security for the remainder, with the exception of a nominal sum only; he was holden to be thereby precluded from afterwards suing the endorser. But if the creditor merely extend the credit given, the surety is still liable when the credit is at an end. And he is not injured by the indulgence shown to the debtor.

*In Bastow v. Bennett, 3 Campb. 220, there was, in effect, a fraud upon the surety. But upon the guarantee in this case there was no previous dealing, nor any stipulation to limit the credit given to the debtor.

And the defendant's guarantee extends to the casks as well as the porter. One who guaranties the expense of liquors necessarily guaranties the vessels in which they are contained, as an inseparable accessory; just as one who contracts to admit another to the opera, contracts by implication to admit him with the clothes he wears on his back.

Wilde, Serjt., contrd, was stopped by the Court.

TINDAL, C. J. This rule must be made absolute. The case presents two subjects for our consideration: the demand for 45*l*. in respect of porter furnished by the plaintiffs to Joseph, and the demand for 17*l*., the value of casks, which had contained, not the porter in question, but porter furnished at some other time.

As to the demand for 45*l*., we think the defendant was discharged from his guarantee by the plaintiffs giving time to Joseph, the indulgence never having been assented to by the defendant. It is clear from the evidence that time was so given. The course of the plaintiffs' business was to give credit for six months, or allow 2½ per cent. discount for cash. This credit was sometimes extended by a bill at two months. In the present instance the plaintiffs allow three months to elapse after the six, and are then paid by a note at two; thus virtually giving a credit of eleven months; and this, not as a matter of favour which they might afterwards repudiate, but as a right on which Joseph might insist, for after the receipt of the note, payment could no longer be demanded till it had run its time.

*161] *The surety, therefore, is exonerated on this general principle, that the plaintiffs have, without his assent, altered the situation in which he had

a right to expect he should be placed when he gave the guarantee.

It has been contended, that though the surety has sometimes, under such circumstances, been held to be discharged in equity, such is not the rule in courts of law. But except where a surety has entered into a bond for payment in default of the principal debtor, courts of law, as well as courts of equity, have always held the surety to be discharged where, without his assent, time has been given to the principal debtor. Where the surety has entered into such a bond, and by a parol agreement time has been given to the principal debtor, the surety is compelled to resort to a court of equity, because by the rules of law a parol agreement cannot be pleaded in discharge of an instrument under seal.(a)

In the present case, although no specific time of payment is fixed by the guarantee, yet it must be implied that the guarantee was given on the supposition

that the debtor would not have more than the usual credit.

But how, it is said, is the situation of the surety altered by this? At the end of eight months he had a right to inquire whether the debt due to the plaintiffs had been discharged, and if he found it still due, to take his measures against the debtor accordingly; whereas if the creditor could, without his assent, extend the credit to an unlimited time, the surety might be deprived of all remedy by the subsequent insolvency of the debtor; a danger to which he would equally *162] be exposed, although he should be remitted to his right *against the debtor, provided the creditor forbore to sue till the extended term had expired.

With respect to the casks, if the action had been brought for the identical casks in which the porter had been contained, perhaps they might be considered as accessory, and falling within the same rule as the principal demand; but as the casks in question were furnished on a different occasion, they are not within the meaning of the guarantee, and, at all events, are not within the terms of

the declaration.

I agree that this rule must be made absolute. In coming to this Park, J. decision we do not in ringe on the cases which have decided that mere laches on the part of the creditor will not discharge the surety. The distinction taken in all the cases is between mere laches or omission to press the debtor, and giving him a right to farther time. As in English v. Darley, where the endorsee of a bill having sued the acceptor to judgment, and taken out execution, received of him a sum of money in part payment, and took his security for the remainder, with the exception of a nominal sum only; he was held to be precluded from afterwards suing the endorser. In Orme v. Young, Holt, N. P. C. 84, it was contended that the surety should have had notice of the creditor's abstaining to proceed; but Gibbs, C. J., held that the mere want of notice did not discharge the surety, and said, "What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refraining; not exacting the money at the time; but it is the act of the creditor, depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a court of equity for relief; because, the principal having tied his *1637 *own hands, the surety cannot release them. Here there is no contract to forbear; no impediment to the suit. A neglect to give notice to the surety that the debtor has made default, does not discharge him." In the present case there was a positive prevention of any suit by the principal creditor; for when he had tied up his own hands for months, the surety could make no claim at the expiration of the usual time; and it is by the risk that the debtor may become insolvent in the intermediate time, that the surety is injured.

As for the casks, if the defendant were liable at all, I think he would be liable for the casks also, supposing the porter in question to have been contained in them; but these were sent at a different time, and are neither mentioned in

the guarantee nor in the special count.

⁽a) Davey v. Prendergrass, 5 B. & A. 187, and see Rees v. Berrington, 2 Ves. jun. 542. VOL. XXI.—62

BOSANQUET, J. The rule must be absolute. Although the surety has not stipulated for any particular credit, the course of dealing between the plaintiffs and their debtor was altered, and the usual time of credit extended. It is admitted that the surety could not be sued during the time of the extended credit, which has been given without any notice to him, but it is contended that his liability revives after the extended credit has expired. But how is the claim against the surety supposed to be suspended? not by agreement between the parties but by operation of law; in other words, if an action were brought against him during the extended time, the indulgence given would be a bar to the action. If, however, it would, under such circumstances, be a bar at any time, it is a bar for ever, although the case would be very different if the action had been suspended by agreement. It has been urged that the surety is not injured by the indulgence shown to the debtor. But he may be materially injured if the circumstances of the debtor decline during the time of the extended credit: the surety, *who might have been reimbursed at the earlier period, may be without remedy at the later.

As to the 17*l*. claimed for the casks, I think the plaintiffs are not entitled to recover it at the hands of the defendant. It seems there was a distinct course of dealing with respect to the porter and with respect to the casks; it may be doubted, therefore, whether a guarantee which mentions porter only can be applied to casks; but whether that be so or not it was at least incumbent on the plaintiff to state in alleging the breach of contract, that the casks were not returned; this he has altogether omitted, and therefore is not entitled to recover.

ALDERSON, J. I am of the same opinion. The first question has been decided by the case of Orme v. Young, and the principle there laid down. Delay on the part of the creditor is no discharge to the surety, but the creditor's binding himself down not to sue the debtor is a discharge for all time as well as for the period during which indulgence is extended to the debtor.

As to the question touching the casks, on which I entertain some doubt, it is sufficient to say that the demand in the declaration does not apply to them.

Rule absolute.

*SUTTON v. CLARKE. Jan. 24.

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Judgment of non pros cannot be signed for omission to deliver particulars pursuant to a Judge's order.

On the 25th of November the plaintiff having declared as of Michaelmas term, was ordered to deliver, within a week, a further and better particular of demand. On the 3d of December the defendant died. On the ninth, the particular not having been delivered, the defendant's attorney, although no plea had been filed, signed judgment of non pros, which

Jones, Serjt., obtained a rule nist to set aside, as irregular; a defendant not being entitled to sign judgment for want of a particular, nor after his own

death.

Ludlow, Serjt., who showed cause, contended that the irregularity being complete on the 2d of December, the judgment might be signed at any time after, notwithstanding the death of the party; and that omission to deliver a particular must be treated in the same light as omission to declare, the particular being, in effect, substituted for the declaration. In Burgess v. Swayne, 7 B. & C. 485, Lord Tenterden said, "The defendant might have obtained a Judge's order for the delivery of the particulars within a given time; and then, if the particulars were not delivered within the time specified, he might have signed judgment." Unless some penalty be attached to the omission to deliver a particular, the plaintiff will have no motive for delivering it.

Sed per Curiam. The judgment has been signed prematurely, and must be *166] set aside. The penalty *incurred by the plaintiff for not delivering particulars is, the stay of his proceedings. In Burgess v. Swayne the plaintiff had omitted to declare in due time.

SELBY v. HILLS. Jan. 24.

A petitioning creditor attending commissioners of bankrupt, is protected from arrest, eundo, morando, et redeundo.

If he shows that he is on his way home, it is for the party who arrests to prove a deviation.

GOULBURN, Serjt., obtained a rule nisi to discharge the defendant out of cus-

tody, upon an affidavit that a commission of bankrupt having been issued at his instance, he, as petitioning creditor, attended the court of commissioners in Basinghall Street on the 30th of December to propose himself as an assignee, and to watch the proceedings; that he set off to return to his home (Beckenham in Kent) when the proceedings of the day concluded, and that he was arrested

at the suit of the plaintiff as soon as he had crossed London Bridge.

Jones, Serjt., showed cause, on an affidavit that the defendant was not arrested till two hours after he had left the commissioners' court, nor till after he had called at several places in the city and Westminster, which were in a direction opposite to his residence. Upon which Jones contended, first, that a petitioning creditor attending commissioners of bankrupt had not such an interest in the proceedings as privileged him from arrest eundo et redeundo: Secondly, That the application should have been made to the Court of Chancery; for which he relied on Ex parte List, 2 Rose, 24, and Kinder v. Williams, 4 T. R. 377, where it was said, that the Court of King's Bench would not discharge a person in *167] custody by process of the sheriff's *court in a cause afterwards removed into that court, because he was arrested while attending commissioners of bankrupt to prove a debt. Thirdly, he contended, that at all events the defendant could only be privileged in his direct course to and from the court, and not in unnecessary deviations.

Goulburn, in support of his rule, was requested to confine himself to the question of deviation, when he contended that the privilege from arrest having always been supported to a liberal extent, it was for the plaintiff to show distinctly that the defendant had deviated from his course, and not to leave the Court to collect it by inferences from ambiguous premises. In Lightfoot v. Cameron, 2 W. Bl. 1113, the defendant was allowed to dine unmolested; and in Willingham v. Matthews, 2 Marshall, 57, Gibbs, C. J., said, "With respect to the insolvent debtor's court being such a tribunal as to privilege a party from arrest, considering that it is a judicature created by the legislature, I think that parties attending the Court must be considered as privileged from arrest." The same principle was acted on with reference to arbitrators in Spence v. Stuart, 3 East, 89.

TINDAL, C. J. This rule must be made absolute. As to the first point, that the petitioning creditor on a commission of bankruptcy does not, when attending the commissioners, fall within the principle which exempts suitors from arrest while resorting to and returning from courts of justice, I think the objection is untenable, and that the defendant, as petitioning creditor, had as much interest in attending before the commissioners as a creditor attending the insolvent debtates ors' court to *oppose the discharge of a debtor. Then, as to the second point, I think this was the Court to which the defendant ought to apply, because the process was issued out of this Court, and we have a right to see that it is not improperly enforced. Willingham v. Matthews is a case in point.

The third is the only question which requires discussion, namely, whether in this case the privilege has been claimed bond fide, or only set up as a pretence

to defeat a creditor. Now all the cases say that this privilege is not to be strictly scanned, and I think the affidavit of the plaintiff does not sufficiently establish that the defendant was abusing the privilege he claims. It appears that the defendant was in a line leading to his home, and that throws upon the plaintiff the labouring oar to show that the defendant was there improperly. Although two hours had elapsed after he quitted the Court, they might have been devoted to refreshment, and the calls, at which the plaintiff does not depose he was present, might, compatibly with what is sworn, have taken place before the defendant attended the commissioners.

PARK, J. I have no doubt that the defendant, when attending the commissioners' court, going thither, and returning thence, was entitled to the privilege of exemption from arrest. He had an interest in being present, and the bond he entered into as petitioning creditor requires that he shall cause the commission to be duly prosecuted. And it is equally clear that this is the court he ought to apply to to enforce the privilege. As to the alleged deviation from his direct route homewards, the privilege ought to be dealt out with a liberal hand. Lightfoot v. Cameron and Willingham v. Matthews are strong cases to that effect. In answer to an application of this kind the Court must be fully satisfied, *and not left merely to draw an inference that the party was out of [*169 his direct course.

BOSANQUET, J. I am of the same opinion. I think that the defendant had a sufficient interest in attending the commissioners to protect him eundo, morando, et redeundo, and that this is the proper court to enforce his privilege. The only question is whether or not he has abused that privilege. He is arrested two hours after he has left the commissioners, on the Surrey side of London bridge, in a direct line towards his home. That circumstance calls on the plaintiff, if he would vindicate the arrest, to show clearly, and not by mere inference, how the two hours were disposed of by the defendant.

ALDERSON, J. It is clear that the defendant, in attending the commissioners, must be considered as a party concerned in his own cause. And Willingham v. Matthews is decisive to show that the application for discharge is properly made to this Court. Upon the last point I have not been without doubt. But I think the circumstance, that the defendant was in a direct line towards his home, throws it upon the plaintiff to account for the time which had elapsed before the arrest.

Rule absolute.

*WOODCOCK v. NUTH. Jan. 27.

[*170

Use and occupation. Defendant, who had occupied under a lease which expired at Lady-day 1829, paid a quarter's rent on Midsummer day 1829, deducting something for repairs; he was not afterwards seen on the premises, but the rent was paid at irregular intervals by L., who was in occupation for the ensuing two years: Held, that it was correctly left to a jury to find whether the lessor had accepted L. as a tenant, and the jury having found for defendant, the Court refused to set aside the verdict.

Use and occupation. The plaintiff sought to recover 25l. for two quarters'

rent alleged to be due from the defendant at Lady-day 1831.

At the trial before Park, J., Middlesex sittings after Michaelmas term, it appeared that the defendant had held the plaintiff's premises under a lease which expired at Lady-day 1829; that on Midsummer-day 1829, the last time he was seen on the premises, he paid 2l. 10s. for a quarter's occupation, over and above 10l., which he was allowed to retain for repairs. Since that time rent had been paid at irregular periods by one Lewis, who occupied the premises.

The collector stated that Lewis paid on account of the defendant, but assigned no reason for such statement. The defendant, since Midsummer 1829, had

resided at Hammersmith, a fact with which the plaintiff was acquainted.

The learned Judge having left it to the jury to say whether the plaintiff had accepted Lewis as his tenant, a verdict was found for the defendant, which

Jones, Scrjt., moved to set aside on the ground of misdirection. The plaintiff, by proving the defendant to have been in possession, and to have paid rent, showed enough to raise a presumption of a yearly tenancy, and to cast on the defendant the burthen of showing by what means such tenancy had been determined: Ward v. Mason, 9 Price, 291. In Harland v. Bromley, 1 Stark. N. R. *171] 455, it was held *that where a defendant has been shown to be in possession, the continuance of the tenancy is to be presumed until the contrary appears; and by Bull v. Sibbs, 8 T. R. 327, and Harding v. Crethorn, 1 Esp. 57, it is established that for the purposes of an action by the lessor, the occupation of an under-tenant is the occupation of the lessee.

A rule nisi having been granted,

Wille, Serjt., showed cause. The evidence is not sufficient to raise a presumption that the defendant is tenant. From the circumstance of his having made a payment on a precise quarter day, and having never been on the premises since, the presumption is rather the other way. In Freeman v. Jewry, 1 M. & M. 19, A being in possession under a lease for years, underlet the premises from year to year to the defendants, who knew the extent of his interest; the plaintiff afterwards took a lease of the same premises, expectant on the determination of A.'s term; and the defendants, after the determination of A.'s term, continued in possession for a quarter of a year, when they paid the rent for that period, and claimed to give up the premises; and it was held, in an action for use and occupation for a subsequent period, that there was no evidence of a tenancy continuing beyond that quarter of a year. In Ward v. Mason the only question was, whether there were any facts to go to the jury in discharge of the defend-In the present case the occupation and payment by Lewis, coupled with the absence of the defendant, were sufficient to warrant the direction of the Judge and the finding of the jury. In Harland v. Bromley it did not appear that the defendant was out of possession.

*172] *Jones. In Freeman v. Jewry, the defendants had claimed to give up the possession at the end of the term, and the premises remained unoccupied. So in Hall v. Burgess, 5 B. & C. 332,(a) a tenant, who paid rent half yearly, having quitted at the end of a year, and the landlord having relet the premises to a new tenant before another half year expired, it was held he could not recover from the old tenant for the interval between his quitting and the entry of the new tenant. But here the defendant is shown to have been in possession and to have paid rent; and there is nothing to show that Lewis was not his servant or under-tenant, or that the plaintiff had accepted Lewis as tenant

instead of the defendant.

TINDAL, C. J. There is no reason for setting aside this verdict. It is not necessary to determine whether at the expiration of his term Nuth became tenant from year to year. Assuming that he did, which is the most favourable supposition for the plaintiff, the question is, whether there was any evidence of a new tenancy. The plaintiff contends there was none; but I think there was enough to be left to a jury, and to warrant the conclusion they have drawn.

The premises in question were originally let to Nuth, and at Midsummer-day 1829, precisely a quarter after his term had expired, he paid a quarter's rent, deducting 10t. for certain repairs. That is the only time he has been seen on the premises, since the term expired, and the rent has never since been paid upon the precise quarter-day. What is the reason of this difference? It is natural that, during the continuance of a tenancy, the lessor should not be rigid to exact payment on the precise day when it becomes due; it is natural that, *173] *when the parties come to a settlement upon the tenant's quitting, the settlement should take place upon a quarter day. It is also to be observed, that Nuth, ever since the payment in question, has lived at Hammersmith, and

that all the subsequent payments have been made by Lewis or his wife. It is true the witness says he received them on account of Nuth, but he gives no reason for such an assertion, which seems to have been no more than an inference of his own. That being so, and no application having been made to Nuth, although the landlord knew he was living at Hammersmith, I cannot say there

was not evidence to go to a jury that Lewis was really the tenant.

Bosanquet, J. I am of the same opinion. The case has gone to the jury with the consent of the plaintiff's counsel, and the question is, whether there was reasonable evidence to support the verdict, the plaintiff insisting that Nuth was his tenant during the time for which rent has been demanded. No doubt, payment of rent is primâ facie evidence of a continuing tenancy, but it is evidence which may be rebutted; and what are the facts here? Nuth makes a payment of rent, deducting something for repairs, at a precise quarter day; and it must be taken that he quitted the premises on that day, for he is never seen there afterwards; but the business of a publican is from that time carried on in the premises by Lewis, who pays the rent for four successive quarters. During this time Nuth's residence was known to the plaintiff, and yet he was never applied to. As to the collector's saying that he received the rent on account of Nuth, that appears by the learned Judge's report to have been his own inference, and not a statement grounded on any fact within his knowledge.

*ALDERSON, J. If this case depended on the principle said to have been laid down by Lord Tenterden in Freeman v. Jewry, I should pause before I gave it my assent. But it is not necessary to decide that point; for though under some circumstances a man may become tenant by act of law, the lessor may afterwards accept another tenant in his stead. The plaintiff's case here rests altogether on the testimony of the collector, to which the jury were entitled to give what degree of credit they chose. He thought fit to append to his statement of the receipt of rent the qualification, that he received it on account of Nuth. The jury might believe the payment, and yet see grounds to

disbelieve the qualification appended by the witness.

PARK, J. There is great weight in the circumstance, that the last time Nuth paid rent it was on the exact quarter day; that he was never afterwards seen on the premises, and that the payments of Lewis were at irregular periods. The allegation of the collector, that the money was received from Lewis on account of Nuth, was merely his own inference, unsupported by any fact which he could mention.

Rule discharged.

CANTWELL v. Earl of STIRLING. Jan. 25.

It is no ground for a plea in abatement, that a defendant, sued as a Scotch peer, is also described as having privilege of parliament.

To an action on a bill of exchange, the defendant pleaded as follows:—
And the Right Honourable Alexander Earl of Stirling and Dovan, of that part of the United Kingdom of *Great Britain and Ireland called Scotland,—whom the plaintiff by his said declaration admits to be Earl of Stirling and Dovan, but alleges, that he, the said plaintiff, sued out his original writ against him as Alexander Humphreys Alexander, calling himself Earl of Stirling; and against whom the plaintiff has thereupon declared as the Right Honourable Alexander Alexander Earl of Stirling and Dovan, having privilege of Parliament,—comes and defends the wrong and injury, and prays judgment of the same writ and declaration thereon founded, because, he says, that he now is, and before and at the time of suing out the said writ was and from thence hitherto hath been Earl of Stirling and Dovan, of that part of the United Kingdom of Great Britain and Ireland called Scotland, and entitled to and has and had privilege of peerage; but he further says that he has not, nor had he on the

day of suing out the said writ, or at any time since hitherto privilege of parliament, as by the declaration is above supposed; and this he is ready to verify. Wherefore he prays judgment of the said writ and declaration thereon founded, and that the same may be quashed.

Demurrer and joinder.

Merewether, Serjt., in support of the demurrer. A plea of peerage ought to show in what manner the peerage was created; and, if the defendant was not the first peer under that creation, the mode in which the peerage came to and vested in him; but this plea does not even contain any distinct or positive allegation that the defendant was or is a peer of Scotland. And the defendant cannot plead in abatement of the writ, or of the declaration in respect of the form of the writ, without craving over of the writ. The allegation that the defendant has privilege of parliament is mere surplusage. And the assertion in the plea, of the defendant's *title to privilege of peerage, and the denial of his privilege of parliament makes the plea double.

Spankie, Serjt., control. This is rather a plea of misnomer in title of dignity than a plea of peerage. It is beneath the defendant's dignity to treat him as having the privilege of parliament only. Privilege of peerage is of a higher nature. Thus, if a defendant be named baronet only, where he is knight and baronet, he may plead it in abatement. Com. Dig. Abatement (F), 19.

TINDAL, C. J. In this case the defendant has been impleaded by his proper name of dignity, and has been brought into court by the proper process; but he sets up as ground of complaint that he is described as having privilege of parliament, and contends that he ought to be described as having privilege of peerage. And the question is, whether those words may not be rejected as surplusage. No authority has been adduced to show that in a case like this the words "having privilege of peerage" are necessarily to be inserted in the declaration. order to prevent a party from being sued a second time for the same cause of action, the law provides that he shall be sued by his proper title, and so be enabled to produce the judgment against him in bar of another suit. He may, therefore, plead misnomer when sued by the wrong Christian or surname, and may object to the misdescription if sued by a wrong title of dignity. defendant, however, proposes to go further than that, and complains of a misstatement in what is mere matter of addition. But at least it should appear that the addition in question is material; for it is laid down in Com. Dig. Abatement, F. 22, "If the defendant be named A. B. of P., he may say that *he is A. B. of D., and not of P. So, if he be named A. B., smith, he may say he is A. B., carpenter, and not smith. But if the addition be immaterial, a mistake cannot be pleaded in abatement: as, in an action against A. B., citizen of Y., one of the company of M., it is no plea that he was not of the company; or against J. M., attorney of Peter de Medicis, it is no plea that he is not his attorney; or against A. M., dominam de B., when she is not a lady." are cases of mere idle description, the name of itself being sufficient to distinguish the defendant. In like manner, and for the same reason, we may throw out of the declaration here the words "having privilege of parliament."

PARK and BOSANQUET, Js., concurred.

ALDERSON, J. The real question is, Whether these additions constitute any part of the name. By the authorities which have been referred to it is plain that, when immaterial, they are considered no part of the name, and may be rejected as surplusage. There must, therefore, be judgment of

Respondeat ouster.

SAME v. SAME. Jan. 31.

A party has in general four days' time to plead after judgment of respondent ouster.

Pursuant to the above decision, judgment of respondent ouster was signed

by the plaintiff in this cause, and notice thereof given to the defendant's attorney on the 25th of January.

On the 27th, at six in the afternoon, the plaintiff signed judgment for want

of a plea.

At eight on the same evening the defendant filed a *plea of non [*178 assumpsit, and now moved to set aside the last judgment for irregularity, contending that he had four days' time to plead after the judgment of respondent ouster.

Merewether, Serjt., opposed the motion on an affidavit which stated that the last judgment had been signed under the advice of an officer of the Court, and that the action was brought on a bill of exchange due May 31, 1831, being a renewal of a previous bill dishonoured by the defendant. At all events the defendant should have applied for time to plead, as he was bound to plead instanter, having delayed the plaintiff by a nugatory plea in abatement. But

The Court thought that in general after judgment of respondent ouster, the party has four days to plead, and made the rule

Absolute without costs.

DOE dem. PEARSON v. RIES and KNAPP. Jan 23.

" Sept. 21, 1829.

"K. agrees to let, and P. to take, a house in its unfinished state, for the term of sixty years, being the whole term that K. has the same leased to him, at the rent of 5251. payable quarterly, the first payment to be made for the half quarter at Christmes next; P. to insure the premise, and to have the benefit of an insurance lately paid: a lease and counterpart to be prepared at the expense of P., and to contain all the clauses, covenants, and agreements K. entered into in the lease granted to him:"

Held, an actual demise, and not a mere agreement for a lease.

THE lessor of the plaintiff sought to obtain possession of certain premises in

the Strand by virtue of the following

"Memorandum of an agreement made this 21st day of September, 1829, between Messrs. John, James, William, *and Henry Knapp, of Cirencester Place and Foley Street, in the parish of St. Mary-le-bone, and county of Middlesex, builders, on the one part, and Mr. William Pearson, of London Wall

in the city of London, auctioneer, on the other part.

"The said John, James, William, and Henry Knapp agree to let, and the said William Pearson agrees to take, all that house and premises, exhibition-room, vaults, and cellars, in the unfinished state they are now in, situate on the south side of the Strand, and known as numbered 101 and 102, the same being in depth from the Strand to Fountain Court, and in the parish of St. Clements Danes, and county aforesaid, for the term of sixty years or thereabouts; being the whole term that they the aforesaid John, James, William, and Henry Knapp have the same premises leased unto them; at the yearly rent or sum of 5251., clear of the land-tax, sewers rate, and all other rates, taxes, and assessments whatsoever, that now are or may be hereafter imposed by act of parliament or otherwise, whether parliamentary or parochial; the said rent to be paid quarterly on the four most usual days of payment of rent; the first payment to be made for the half quarter at Christmas next. The said William Pearson also agrees to insure the whole of the premises in the Westminster Fire Office in the sum of 5000%, in the joint names of William Pearson and John, James, William, and Henry Knapp, or such other name or names as they may appoint. The said(a) lease and countries terpart to be prepared by the attorney of the said John, James, William, and Henry Knapp, and at the expense of the said William Pearson, and to contain all the clauses, covenants, and agreements that they the said John, James, William, and Henry Knapp have entered into and agreed upon in the lease grante! unto them of the aforesaid premises.

*180] *"Mr. Pearson to have the benefit of the insurance which has been lately paid, without any charge or expense to himself for the same. In witness whereof the aforesaid parties have hereunto set their hands the day and year first above named.

W. PEARSON.

J., J., W., and H. KNAPP."

At the time of the agreement the Knapps had mortgaged the premises. They were partly unfinished, and stood in need of considerable repairs, and the lessor of the plaintiff was let into immediate possession, to finish them at his own expense.

The defendants resisted the action on the ground that the above instrument was only an agreement for a lease, and not a demise per verba de præsenti; and a verdict having been obtained for the plaintiff at trial before Tindal, C. J.,

Middlesex sittings after last term,

Storks, Serjt., obtained a rule nisi to set it aside on the ground urged at the trial.

Wilde, Serjt. (Bompas, Serjt., was with him), showed cause, and relied on the stipulation to pass the whole of Knapp's term upon the covenants under which they themselves held it, coupled with the words "agree to let and agrees to take," as indicating an intention that an immediate interest should pass; when

the Court called on

Storks (Stephen, Serjt., was with him), to support the rule. They cited Goodtitle d. Estwicke v. Way, 1 T. R. 735, Doe d. Coore v. Clare, 2 T. R. 739, Morgan v. Bissell, 3 Taunt. 65, Poole v. Bentley, 12 East, 168, Tempest v. *181] Rawlings, 13 East, 18, Hamerton v. Stead, 3 B. & C. 478, *Dunk v. Hunter, 5 B. & A. 322; but the point in question having been so repeatedly and recently discussed (see Staniforth v. Fox, 7 Bingh. 590, where all the authorities are collected), it would be superfluous to state more than that the stipulation for a lease, of which the covenants were undefined,—and for the payment of only half a quarter's rent at Christmas, though the agreement bore date September 21st,—and the circumstance of the Knapps having mortgaged the premises,—were relied on, as showing an intention that an immediate interest should not pass.

TINDAL, C. J. Both on the form of the instrument itself, and on the authority of decided cases, I think this agreement is not executory, but conveys a present interest to the lessor of the plaintiff. Upon the general and leading principle in such cases, we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties. The instrument in question undoubtedly does contain a stipulation for a future lease and counterpart, and that rent shall not be paid for the first half quarter after the date of the instrument. Those are the points chiefly relied on by the defendants. The lessor of the plaintiff contends that the instrument contains words which have been decided to be words of present demise; (a) that the agreement for a future lease is not incompatible with a present demise, (b) particularly where, as in the present case, the party is let into immediate possession, although no precise day is mentioned from which rent is to commence.

*182] *First, then, as to the stipulation for a future lease. In all the cases in which such a stipulation has been held to render the agreement containing it executory, the terms of the future lease have been unascertained at the time of entering into the agreement, whereas here, the future lease is to be prepared by the attorney of the defendant Knapp, and to contain "all the clauses, covenants, and agreements that they, the Knapps, have entered into and agreed upon in the lease granted to them of the aforesaid premises:"

 ⁽a) See Staniforth v. Fox, 7 Bingh. 590.
 (b) Doe dem. Walker v. Groves, 15 East, 244. Barry v. Nugent, cited in Roe v. Ashburner, T. R. 165.

clauses, therefore, which were either in the possession of the Knapps, or, at least, within their knowledge. This agreement for a future lease, therefore, leaves nothing uncertain, and does not fall within the principle of those cases which have held an agreement with a clause for a future lease executory, on the

ground of present uncertainty.

The next point is, that no precise day is fixed from whence the rent is to commence. If that had been left quite uncertain, there might, perhaps, have been some ground for contending that the lessor of the plaintiff took no interest in the premises till the time when rent was to accrue. But taking all the circumstances of the case together, the observation rather makes the other way. For on the execution of the agreement at the end of September the party is put into immediate possession of premises requiring considerable repairs, and at the Christmas following he is to pay half a quarter's rent. We cannot but infer from this that he was to be excused paying any rent for the half quarter which he would probably be obliged to devote to repairs, and during which, consequently, he would have no enjoyment of the premises.

" Agrees to let and agrees Now, what are the arguments on the other side? to take," have been held words of present demise from the case of Goodtitle d. Estwicke v. Way to the present time. Then, the party *is put into immediate possession; and what circumstance can guide us with more certainty to the conclusion that it was intended to pass an immediate interest? If the landlord meant that the instrument should be only executory, at least by giving possession, he furnishes the strongest evidence the other way. But there are other circumstances to lead us to the same conclusion. The premises were unfinished; the tenant was to put them in repair. If the agreement were only executory, the landlord might exclude the tenant before he had derived my benefit from the expense incurred; a risk to which no prudent person would be likely to expose himself. Then, there is a stipulation that the tenant is to insure, and to have the benefit of an insurance lately made. What does that show, but that, as he takes the former insurance, he is to be responsible for the premises from the time of the transfer; and he could only be called on to be so responsible on the supposition of his taking an immediate interest. There is indeed, good reason to contend, that the agreement was meant to be an absolute assignment of all the interest the Knapps had in the premises.

It was, at all events, a legal demise, with a right to immediate possession, and therefore, the rule which has been obtained on the part of the defendants, must

be discharged.

The intention of the parties must be collected from the instrument they have executed, and looking at that, as far as the term is concerned, there seems to have been an intention to assign it. But the lessor of the plaintif was to complete the premises, to have the benefit of an insurance already effected, and those circumstances, taken together, are almost conclusive to show an intention to pass an immediate interest. I refrain from going into the cases, because we have so *recently considered them in Pinero v. Judson, 6 Bingh. 206, and Staniforth v. Fox, where they were all collected. In Roe d. Jackson v. Ashburner, 5 T. R. 163, Ashhurst, J., said, "I entirely agree to the position, that whether an agreement of this kind shall or shall not be considered as a lease, ought to depend on the intention of the parties; which must be collected from the words of the agreement, and from collateral circumstances. Where the words are de præsenti, 'I demise, &c.,' or an agreement that 'the party shall hold and enjoy,' and the party is immediately put into possession, the landlord shall not afterwards turn him out of possession, and say that it was not a present demise; for the permitting the party to enter is strong evidence to show that the landlord intended to give a present interest." That is the ground on which we decide here. If these be words of present demise, it is immaterial whether the instrument be called a lease, an agreement, or a memorandum of agreement. In Goodtitle d. Estwicke v. Way, the duration of the term was not settled, nor the covenants of the lease. In Doe d. Coore v. Clare the leasor had

no power to grant a lease. In Tempest v. Rawlings the covenants for the future lease were not ascertained, and the party was not let into possession; but Poole

v. Bentley is not distinguishable from the present case.

BOSANQUET, J. I am of the same opinion. The question is, whether it was the intention of these parties that the lessor of the plaintiff should take an immediate interest, or wait till the execution of a future lease. However desirable it may be to find some certain criterion for ascertaining the intention of parties upon such occasions, the difference between instruments is so great that none such has yet been discovered. The *stipulation to grant a future lease has been considered insufficient for that purpose, for though a circumstance to be looked at, it is of itself inconclusive. The language adopted in the present instrument has always been held to import a present demise, and that inference is borne out by the acts of the parties. The lessor of the plaintiff takes a large unfinished house at a considerable rent; he enters immediately, and at the end of the first quarter is to pay only half a quarter's rent: but nothing is more common than an abatement out of the first payment of rent, where the tenant is to begin by laying out money on the premises. Then, the transfer of the existing assurance could scarcely have been agreed on if the tenant was not to take an immediate interest in the premises. And there is no validity in the objection that the covenants in the future lease were left uncertain, for it was to contain the same covenants as that which the Knapps either had in their possession, or had the means of referring to.

ALDERSON, J. There is nothing in the circumstance that the rent was not to commence from the date of the agreement. It is accounted for by the fact, that the lessor of the plaintiff was to complete an unfinished house; and it was the obvious intention of the parties that an allowance should be made for the time

during which he should have no useful occupation.

It would be most unjust to hold, that on this account the immediate interest did not pass; for, if that were so, the party might incur expense in repairs, and

then be deprived of the fruits.

There are many parts of the agreement which go to show an intention to pass an immediate interest, and there is nothing but the stipulation for a future lease that has an aspect the other way. A stipulation to that effect, however, has *186] been holden to show an intention of *giving further security, but not of deferring the interest to be acquired, unless where the terms of the future lease are left in uncertainty. Here the terms of the lease may be said to be comprised within the four corners of the agreement; for reference is there made to a lease in the possession of the grantors, the terms of which are to be transferred to the lease to be granted to the lessor of the plaintiff.

Rule discharged.

ANTHONY v. HANEYS and HARDING. Jan. 25.

Trespass for entering plaintiff's close. Plea, that certain goods of defendants' were there, and that they entered to take them, doing no unnecessary damage:
Held, ill.

TRESPASS. The declaration stated, that defendants, on the 8th of November, 1830, and on divers other days, &c., between that day and the commencement of the suit, broke and entered plaintiff's close at Much Haddon in the county of Hertford; and with feet in walking trod down, trampled upon, and consumed and spoiled plaintiff's grass, and with cattle and wheels of divers carts, &c., crushed, damaged, and spoiled other grass; and with the feet of the cattle and the wheels of the carts subverted, &c., the earth and soil of the close, and then and there put, placed, and laid down divers quantities, to wit, 5000 bricks, &c., in and upon the said close, and kept and continued the same without the leave

or license and against the will of the plaintiff, and thereby greatly encumbered the close, and pulled down, prostrated, and destroyed one barn, three outhouses, and three lean-tos of plaintiff, and in so doing dug up and subverted the earth, and made divers holes therein, and seized, took, and carried away the materials of the said barn, outhouses, and lean-tos.

*There was a second count for seizing, taking, and carrying away a cart, and divers goods and chattels of plaintiff; and a third count for breaking and entering a certain other barn, outhouses, and lean-tos of plaintiff, &c.

Plea, first, the general issue, on which issue was joined; second, that before and at the said times when, &c. in the said first count mentioned, the defendant John Haney was the owner of and entitled unto a certain barn, three outhouses, and three lean-tos, and divers goods and chattels, to wit, 10,000 bricks, 10,000 tiles, 5000 planks of wood, 5000 joists, 5000 ties, 5000 girders, 5000 pieces of wood, 5000 loads of timber, and 1000 weight of iron, of great value, to wit, of the value of 2001. then respectively standing and being in and upon the said close of the said plaintiff in which, &c.; wherefore the said defendant, John Haney, in his own right, and James Haney and Joseph Harding, as the servants of the said John Haney, by his command, at the said several times, when, &c., in the said first count mentioned, entered into and upon the said close in which, &c., in order to pull down, remove, take, and carry away the said barn, outhouses, and lean-tos, and to take and carry away the said goods and chattels, and did then and there pull down the said barn, outhouses, and lean-tos, and did take and carry away the materials thereof, and the said goods and chattels, in the said carts, wagons, and other carriages drawn by the said cattle, from and out of the said close in which, &c., and in so doing, they, the said defendants, at the said several times when, &c., in the said first count mentioned, did necessarily and unavoidably with their feet in walking, a little tread down, trample upon, consume, and spoil a little of the grass there then growing and being, and did, with the wheels of the said carts, wagons, and *other carriages, a little crush, damage, and spoil other the said grass there also growing, and with the feet of the said cattle, and with the wheels of the said carts, wagons, and other carriages did a little subvert, damage, and spoil the earth and soil of the said close, and did necessarily and unavoidably put, place, and lay in and upon the said close in which, &c., the said bricks, tiles, wood, and rubbish in the said first count mentioned, being part of the materials of the said barn, outhouses, and lean-tos, and there keep and continue the same for a short time, to wit, until the same could be put in the said carts, wagons, and other carriages to be removed from the said close, doing no unnecessary damage to the said plaintiff on the occasions aforesaid, as they lawfully might for the cause aforesaid, which are the said several supposed trespasses in the introductory part of this plea mentioned. Demurrer and joinder.

Stephen, Serjt., was to have argued in support of the demurrer, but the Court called on

Bompas, Serjt., to support the plea.

Although, without license or lawful warrant, a man cannot enter the house of another, because every man's house is his castle, yet he may enter the close of another to recover his own goods, provided he be guilty of no breach of the peace; and the authorities, if any, which militate against this position are founded on a misconception or misapplication of the case of Tayler v. Friskin, Cro. Eliz. 246,(a) where a plea that the defendant entered the plaintiff's house by leave of his wife, to take goods sold to him by the wife, was held ill. But with regard to a *close, supposing goods to be lawfully on it,—and it is not to [*189 be assumed that they are there unlawfully,—the owner of the close is bound to permit the owner of the goods to enter and take them: he enters, therefore, under an implied license. In the present case the demurrer admits that the barns and outhouses belonged to the defendant, and the plaintiff not having

⁽a) See also Holdringshaw v. Rag, Cro. Elis. 876, as to license by a servant; and Higgins c. Andrews, 2 Roll. Rep. 55.

averred that they were affixed to the freehold or unlawfully on the close, it must be taken that they were chattels, and lawfully there. Now, if trees be blown down, it is no trespass for the owner to enter the land into which they fall, to take them: Millen v. Hawery, Latch. 13, Vin. Abr. Tresp. H. a 2. So, if a fruit tree grow in a hedge, and the fruit fall into another's land, the owner may go upon the land and fetch it. Vin. Abr. Tresp. L. a. So, if a man is to lop his tree, and he cannot do it unless it fall upon the land of another, he may justify the felling of it upon the other's land; Dyke v. Dunstan, 6 Ed. 4, 18. In like manner he may justify chasing sheep upon another's ground if he cannot otherwise drive them off his own. Millen v. Fandry, Poph. 161.(a) There "the point singly was but this; I chase the sheep of another out of my ground, and the dog pursues them into another man's land next adjoining, and I chide my dog; and the owner of the sheep brings trespass for chasing them: and it was argued by Whistler, of Gray's Inn, that the justification was not good, and he cited Co. lib. 4, 38 b., that a man may hunt cattle out of his ground with a dog, but cannot exceed his authority; and by him an authority in law which is abused is void in all; and to hunt them into the next ground is not justifiable. per Crew, C. J. It seems to me that he might drive the sheep out with the *190] dog, and he *could not withdraw his dog when he would in an instant, and therefore it is not like to the case of 38 E. 3, where trespass was brought for entering into a warren, and there it was pleaded that there was a pheasant in his land, and his hawk fiew and followed it into the plaintiff's ground, and there it seems that it is not a good justification, for he may pursue the hawk, but cannot take the pheasant. 6 E. 4. A man cuts thorns, and they fall into another man's land, and in trespass he justified for it; and the opinion was, that notwithstanding this justification trespass lies, because he did not plead that he did his best endeavour to hinder their falling there, yet this was a hard case. But this case is not like to these cases, for here it was lawful to chase them out of his own land, and he did his best endeavour to recall the dog, and, therefore, trespass does not lie." The same principles are laid down in Com. Dig. Pleader, 3 M 42. In the Year Book, 17 H. 6, it is said to be a lawful cause to enter a man's park, to show him evidence to avoid a suit. In all such cases the defendant may be said to have a sort of way of necessity: as where he pursues goods which have been stolen. So, where a common highway is out of repair by the overflowing of a river or other cause, passengers have a right to go upon the adjoining land. Absor v. French, Show. 28, Henn's case, Sir W. Jones, 296. Or, if A. makes a lease for years, excepting the trees which he would afterwards sell, the law gives the lessor and those who would buy power to enter and look at the trees, for without sight none would buy, and without entry none would see. Lifford's case, 11 Rep. 52 a. And a man may enter the land of another to abate a nuisance. Com. Dig. Pleader, 3 M 38.

*191] If the defendant have no right to enter, he may be *without remedy, for peradventure upon his demanding the goods the plaintiff may decline to make answer, or in anywise to stir in the affair, and without refusal on the part of the plaintiff as well as demand on the part of the defendant, trover will not lie.

TINDAL, C. J. The second plea in this case cannot be supported in law; and it is bad on a ground much short of that which has been argued to-day. The defendant Haney states, as the ground of his right for entering the plaintiff's close, that he was the owner of a certain barn, three outhouses, three lean-tos, and certain chattels standing and being on the plaintiff's close, and then goes on to justify the trespass in question. I cannot collect from this statement but that the barn, lean-tos, &c., were standing on the close in the ordinary acceptation of the term, that is, were affixed to the freehold; and the rather, because the defendant admits that he dug up the soil of the plaintiff in order to remove the barn; in other words, that he entered the soil of another and broke it up to get what he claimed as his own. That would be to take the law into his own hands, and

⁽a) See Sutton v. Moody, 1 Ld. Raym. 250. Churchward v. Studdy, 14 East, 249.

to render an action of ejectment unnecessary. If so, the plea which is bad in part, is, under the common rule, bad for the whole, and judgment must be given for the plaintiff. But we are unwilling to decide the case on so narrow a ground; for even if the burn had not been affixed to the freehold, the defendant has shown on this plea no justification of his entering to take it away. In none of the cases referred to has the plea been allowed, except where the defendant has shown the circumstances under which his property was placed on the soil of Here the defendant has confined himself to the statement that they were there, without attempting to show how. To allow such a statement to be a *justification for entering the soil of another, would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace. Let us examine two or three of the cases which have been cited on the part of the defendant. And first, that of fruit falling into the ground of another: that falls under the head of an accident, for which the defendant is not responsible, and which he shows by his plea before he can make out a right to enter. So in the case of a tree which is blown down, or through decay falls into the ground of a neighbour, the owner may enter and take it. But the distinction is taken by Latch, who says that if it had fallen in that direction from the owner's cutting it, he could not justify the entry. As to the cases where goods have been feloniously taken and the owner pursues to obtain possession, the principle is laid down by Blackstone, 3 Comm. 4, who says, "As the public peace is a superior consideration to any one man's private property, and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law." A case has been suggested in which the owner might have no remedy where the *occupier of the soil might refuse to deliver up the property, or to make any answer to the owner's demand; but a jury might be induced to presume a conversion from such silence, or at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit.

Park, J. I am of the same opinion. The distinction is clearly laid down by Blackstone in the case of goods feloniously taken, who says, "If my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law." Upon these pleas it rather appears that the property claimed by the defendant was attached to the freehold, than that it was a chattel in the nature of a Dutch barn, for it is admitted that he dug holes in order to remove it. The defendant is not, as it has been contended, without remedy, for he might sue in trover after a proper demand, and if his application were met with continued silence, the jury might

from that presume a conversion.

Bosanquet, J. I am of opinion that this plea is no answer to the trespass with which the defendant is charged. It is put broadly and nakedly that the defendant has a right to enter the soil of another to take his own property without showing the circumstances under which it came there. The case has been argued on the ground of necessity: but on that ground, at least the necessity should be shown. There are, no doubt, various cases in which it has been held that the party is entitled to enter, but in all of them the peculiar circumstances have been stated on which the party has rested *his claim to enter. It [*194] would be too much to infer that the party may enter in all cases where

his goods are on the soil of another, because he may enter in some where he shows sufficient grounds for so doing.

ALDERSON, J. I am of the same opinion. The difficulty suggested as to an action of trover, would apply to all cases of trover where a demand is necessary.

Judgment for plaintiff.

In the Matter of PAYNE, a Prisoner. Jan. 27.

A prisoner brought up under the compulsory clause of the Lords' Act, allowed time, on an allegation that he had petitioned the insolvent debtors' court.

Andrews, Serjt., had moved to proceed against the prisoner under the compulsory clause of the Lords' Act, when the court gave time, upon the prisoner's alleging that he had petitioned the insolvent debtors' court.

He was now brought up again, and Andrews renewed his application, on the ground that the insolvent debtors' court had rejected the prisoner's petition.

It appearing, however, that the petition had been rejected for informality only, the prisoner prayed for further time; whereupon, Andrews contended, that the jurisdiction of this Court was not superseded by that of the insolvent debtors' court; and if the prisoner had further time allowed him, he might omit to proceed in the insolvent debtors' court, and so defeat the creditors altogether.

Sed per Curiam. If the prisoner is fairly endeavouring to make a distribution of his funds among all his creditors, we ought, in the exercise of a judicial discretion, to allow him further time.

*195] *MOUNT v. LARKINS. Jan. 30.

Subsistence allowed in costs in a policy cause, to the master of a ship insured, a material witness from the time of subpassa to the time of trial, although the witness resided in England, was not examined, was a master in the royal navy, and did not show the permission of the admiralty for him to engage in the merchant service.

THE questions to be tried in this cause were, the seaworthiness of the ship Aguilar, and whether a voyage on which she had been insured had been entered on without unreasonable delay.

The cause was appointed for trial on the 28th of October, 1829, but was not tried till the 22d of April, 1830, when a verdict was found for the plaintiff; but a rule was obtained for a new trial on the question of seaworthiness, and a special case was argued on the question of unreasonable delay. Judgment upon the latter question having been given on the 25th of November, 1831, in favour of the defendant (see ante, 108), it became unnecessary for him to proceed to a new trial.

Watson, the captain of the ship, had been subpænaed by the defendant on the 6th of October, 1829, to give an account of the delay in the voyage, one of the points on which the defendant rested his case. And upon the taxation of costs the defendant claimed 219t. paid by him to Watson, for his subsistence from the 6th of October 1829 to November 25, 1831, alleging, that Watson had been detained after the trial in April 1830, to secure his attendance upon the new trial, for which a rule absolute had been obtained; and that in the beginning of 1831, he had refused an offer of employment in the merchant service in consequence of this detention.

The plaintiff objected to the sum claimed for Watson, on the ground that he had not come from a place where he was out of the reach of a subpana, but had, during the whole time in question, been living at Hackney; that he was an officer in the royal navy, receiving half-pay, and not allowed to engage in the

merchant service *without express permission from the Admiralty; and that, though in attendance, he had not been examined on the trial of the cause.

The prothonotary allowed 94l. for the expense of Watson's subsistence from October 6, 1829, to the time of the trial, April 22, 1830; whereupon, a rule was obtained on the part of the plaintiff to reduce that sum, and on the part of the defendant to increase it.

Taddy, Serjt., urged the reduction. The defendant had no right to detain a witness for such a length of time at the expense of the other party, upon the mere speculation that the Court might order a new trial, especially when he was not examined on the first trial. And the witness here being a half-pay officer, and having the means of subsistence, was not entitled to anything even for the time that elapsed before the trial. He cannot claim for loss of employment in the merchant service, since it is illegal for him to enter into that service without the express consent of the Admiralty. That distinguishes the present case from that of Lonergan v. Royal Exchange Assurance, 7 Bingh. 725, and Berry v. Pratt, 1 B. & C. 276, where the witness, by his attendance on the cause, was deprived of his only means of subsistence. The witness, too, might have been examined on interrogatories.

Wilde, Serjt., in support of the increase, relied on the affidavit stating the witness to be a material and necessary witness, and on the recent decisions of Lonergan v. Royal Exchange and Berry v. Pratt. According to the former of those cases, the party was not bound to examine upon interrogatories where the appearance of the witness at the trial was likely to be more beneficial. If *tne party was justified in detaining the witness for the first trial, he was capably justified in detaining him for the second. The necessity for putting him into the box must depend upon the accidents of the trial; but that did

not lessen the necessity for having him ready.

TINDAL, C. J. It seems to the Court that there is no sufficient reason for reviewing the prothonotary's taxation on the one side or the other. As to the motion to reduce the sum allowed the witness, or to refuse him anything, there is no reason for doubting that he was a material witness,—(a point upon which the Court ought not to speculate too nicely, when there is a fair and reasonable ground for coming to such a conclusion,)—and if so, the prothonotary is the proper officer to determine the quantum of allowance. In the case of Berry to Pratt, the Court of King's Bench affirmed an allowance for the subsistence of a common mariner; and although the witness here was a master in the royal navy, he was in the habit of obtaining employment in the merchant service, and his case cannot be distinguished from that of the mariner. On the other hand, we see no reason for increasing the sum which has been allowed. It has been contended, that it was necessary to detain him till the result of a motion for a new trial should be known; but very early in that proceeding the Court intimated that the new trial should be confined to the question of seaworthiness, a point to which the defendant did not propose to examine the witness. There is no ground, therefore, for sending the case back to the prothonotary; and the circumstance that both parties complain on opposite grounds, is, in some degree, an indirect proof that the prothonotary is right. Rule discharged.

*ELTON v. LARKINS. Jan. 31.

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The announcement in the foreign lists filed at Lloyd's of the sailing of a ship out of the port from which she is insured, does not, where such communication is material, dispense with the assured's disclosing a letter received from his captain before the policy is effected, announcing the day of his intended departure.

insurance on the brigantine Fanny from Cadiz to London, with leave to touch

at Exmouth, at 30s. per cent. premium.

On the 17th of December the plaintiff had received a letter from the Captain of the Fanny, dated Cadiz, November 21st, stating that the Fanny was nearly loaded; would probably sail for London the next day, and that the schooner Traveller had sailed for London on that day.

This letter was not communicated to the underwriter.

But in Lloyd's List of December 20th it was announced that the Traveller had been towed into Kinsale in distress, and that the ship William which had left Cadiz on the 30th of November, had arrived at Gravesend.

On the 22d of December a printed list from Cadiz was received and filed in the inner room at Lloyd's, containing the words following:—"25th Nov., bergantin Fanny, John Taylor, para Londres."

The voyage from Cadiz to London varies from sixteen to sixty days, but the

average length is twenty-one.

The Fanny never having been heard of, the plaintiff sued on his policy, and at the trial before Bosanquet, J., London sittings after Trinity term, the defence set up was, that the letter received by the plaintiff on the 17th of December from his captain at Cadiz, was a material communication, and ought to have been disclosed to the underwriter. Evidence was given that though underwriters are in the habit of referring to the announcements in Lloyd's books, and the English *199] lists printed *from them, they do not, except under peculiar circumstances, resort to the foreign lists which are filed in that establishment: that if the time of sailing of the Fanny had been known, in conjunction with the fact that the Traveller had arrived at Kinsale, and the William at Gravesend, by the 20th of December, after leaving Cadiz on the 21st of November, or later, the Fanny would have been deemed a missing ship, and not insurable at 30l. per cent.

The learned Judge left it to the jury to say whether the letter in question was material, and if so, whether the disclosure of it was rendered unnecessary by in-

formation aliunde within the reach of the underwriter.

A verdict having been found for the plaintiff,

Spankie, Serjt., obtained a rule nist for a new trial, on the grounds above stated. He cited Kirby v. Smith, 1 B. & A. 672, where a ship had sailed from Elsineur on her voyage home six hours before the owner, who followed in another vessel on the same day, and, having met with rough weather on his passage, arrived first, and then caused an insurance to be effected on his own ship: it was held that those circumstances were material to be communicated to the underwriter, and that it was not sufficient to state merely that the ship insured was "all well at Elsineur on the 26th of July," the day of her sailing.

Wilde, Serjt., showed cause. The assured is no doubt bound to communicate every fact within his knowledge, material towards estimating the risk, unless it be actually or impliedly within the knowledge of the underwriter. The time of a ship's sailing is not, in general, of itself a material fact; it may, however, become material in conjunction with other facts. The only fact which could *make the time of the Fanny's sailing material, is the arrival of the *200] Traveller at Kinsale, and the William at Gravesend. Now, the assured could not be called on to communicate those arrivals, because it does not appear that he knew of them; if he did, he knew of them only through a channel which was equally open to the underwriter, Lloyd's books, the contents of which, it has been decided, an assured is not bound to communicate. Friere v. Woodhouse, Holt, N. P. C. 572. It may be contended, however, that even combining it with the arrival of the Traveller and William, the sailing of the Fanny was not a material fact, for the voyage from Cadiz to London varying from sixteen to sixty days, the Fanny could not be deemed a missing ship on the 29th of December.

The jury, by their decision, have shown that they considered the disclosure of the letter in question immaterial.

In Friere v. Woodhouse it was the English list at Lloyd's which the assured was excused from communicating; but he ought to communicate the contents of the foreign lists, for an underwriter is not bound to know the meaning of para Londres, or to be versant in all modern languages. And the assured must at his peril disclose every material fact, whether he deems it to be material or not, and whether it is material at the time or only becomes so eventually Thus, in Bridges v. Hunter, 1 M. & S. 15, the plaintiffs effected a policy of insurance on wines from Oporto to London on the 12th of November, at which time they were in possession of two letters from their correspondents at Oporto, the first of which, dated the 11th of October, stated, "We are loading the wines on board the Stag, Captain Wheateley, who intends to sail to-morrow;" the other, dated the 13th *of October, enclosed the bills of lading, which were filled up "with convoy;" the plaintiffs did not communicate these letters to the underwriters; and it was held a material concealment. To the same effect are M'Andrew v. Bell, 1 Esp. 373, Ratcliffe v. Shoolbred, Park Ins. 290, Willes v. Glover, 1 N. R. 314. Cur. adv. vult.

TINDAL, C. J. Upon consideration of this case, we feel great doubt as to the ground upon which the jury have given their verdict for the plaintiff. They may have grounded their verdict upon the opinion which they formed, that the communication which the defendant contends ought to have been made to him by the plaintiff, was not a material communication. And if we could ascertain that this point had been distinctly found by the jury, we should not have disturbed the present verdict. But the jury may have come to their conclusion upon a different ground; namely, that, admitting the communication was material in itself, yet, that the knowledge of the facts which the defendant had in his power from the inspection of the book in the inner room at Lloyd's, dispensed with such communication being made, and that the want of such communication could not now be set up as an answer to the action. Being, therefore, uncertain as to the real ground on which the verdict proceeded, and as the evidence now stands, being dissatisfied with the verdict, if grounded on the second point, we think the cause should go before another jury; the defendant paying the costs of the former trial. Rule absolute.

*AUGUSTUS NEWTON v. CAMILLA NEWTON. Jan. 31. [*202

By order of Nies Prins, a verdict having been entered for the plaintiff, and the plaintiff having by the order agreed to pay the defendant 701., the Court allowed that sum to be set of against the plaintiff's judgment.

By order of *Nisi Prius*, it was ordered, with the consent of all parties, their counsel and attorneys, that a verdict should be entered for the plaintiff, damages 1s., costs 40s., and that the plaintiff should pay to the defendant the sum of 70l, if the defendant should state in writing that such sum was due from him to her, and should make an order for the payment thereof; and that either party should be at liberty to make the order a rule of Court.

The defendant afterwards addressed the following order to the plaintiff:—
"Sir—I hereby request you to pay to my agents, Messrs. Alexander, the sum of 701., which is due from you to me. CAMILLA NEWTON."

Alexander went to the plaintiff to demand the money, and read to him the order of Nisi Prius, when the plaintiff said it was right, and that he thought the 70l had been settled long ago by being set off against the plaintiff's costs in the action; that he was not prepared to pay, but would instruct his solicitor, if he saw no objection, to allow the set-off. Upon affidavit of these facts,

Merewether, Perjt., moved to set off the 70l. against the plaintiff's taxed costs.

Wilde, Serjt., who showed cause, contended that the sum claimed [*_03]
by the defendant was no more than a *simple contract_debt, and, there-

fore, could not be set off against a judgment. Philipson v. Caldwell, 6 Taunt.

Merewether. The debt claimed by the defendant having accrued under an order of Nisi Prius, is analogous to and stands in the same degree as a judgment debt. But the plaintiff, by consenting to pay under the order of Nisi Prius, has in effect agreed to the set-off.

TINDAL, C. J. The conclusion to which the Court comes, is on the construc-

tion of one instrument.

This is not the case of setting off a simple contract debt against a judgment. But by an order of Nisi Prius, which is almost equivalent to a judgment, the plaintiff agrees to pay a certain sum to the defendant; and the Court will supply what is a mere matter of form, the means of giving effect to that agreement.

Rule absolute.

*204] *IN THE EXCHEQUER CHAMBER.

TRAFFORD and Others v. The KING. Jan. 30.

(In Error.)

On indictment for nuisance to a public canal navigation established by act of parliament, it was found by a special verdict, among other things, that the canal was carried across a river and the adjoining valley by means of an aqueduct and an embankment, in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal, and that in times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, to the above mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed; that except for the fenders after mentioned, the arches in the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which has increased the body of water; that the defendants, occupiers of lands adjoining the river and brook, had, subsequently to the making of the canal, aqueduct, and embankment, heightened certain artificial banks, called fenders, constructed from time to time, as occasion required, on their respective properties, for the protection of their lands, so as to prevent the flood-water from escaping as above mentioned, and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal banks, as to endanger them and obstruct the navigation; that the fenders were not unnecessarily high, and that if they were reduced, many hundred acres of land would again be exposed to inundation: Held, that to enable the Court to come to any decision between the parties, it ought also to have been found,—

I. Whether the raising fenders was an ancient and rightful usage, or whether it had commenced since the construction of the canal; 2. Whether the course described by the special verdict to have been taken by the flood-water was, or was not, the ancient and rightful ceurse; and, 3. Whether or not the raising of the

Indictment for a nuisance. The first count stated, that after the passing of a certain statute of the 2 G. 3, viz. in 1763, a canal was made pursuant to the said statute, which from that time had been used by all the king's subjects with vessels not exceeding thirty tons burden, on payment of certain reasonable tolls; that the canal, by means of an aqueduct made pursuant to the act, passed over the river Mersey, near the junction of a brook called Chorlton Brook; and *205] that the defendants, on the 1st of January, 1770, and on other *days, raised divers mounds, &c., near the ancient banks of the said river and brook, viz. in parts thereof near the said aqueduct, and severally continued the same so raised, &c., whereby water was at divers times forced against the said aqueduct, and the sides and foundations of the said canal adjacent thereto, which water ought to have flowed, and, but for the said mounds, would have flowed and escaped by other ways, viz. over parts of the banks of the river and brook: by which means the said aqueduct, and the sides and foundations thereof, and of the canal adjoining thereto, had been injured, and were placed in danger of being broken down and destroyed, to the

damage and common nuisance of the subjects using the said canal, and of the inhabitants and occupiers of the lands adjacent, &c. There were other counts, charging the defendants with severally raising and erecting the mounds, &c., and wrongfully continuing mounds, &c., theretofore injuriously erected. One count stated the injury to be done by confining the water, and causing it to break down the banks of the river and damage the adjacent lands, as well as the aqueduct and canal. Plea, not guilty. At the trial before Bayley, J., at the Summer assizes for the county of Lancaster 1829, the jury acquitted some of the defendants, and, as to others, found a special verdict, stating the following facts:—In 1763 the navigable canal mentioned in the indictment was made from Longford Bridge in the township of Stretford, to the river Mersey, at a place called the Hemp Stones in the township of Halton, in pursuance of an act of the 2 G. 3, c. 11, enabling the then Duke of Bridgewater to make the same; and the king's subjects, ever since the making of the canal, have navigated it with boats not exceeding thirty tons burthen, at their free will and pleasure, paying the duty by law established. The canal extends for half a mile north and south across a vale through which the river Mersey runs in a westerly *direction; it is upon the same level throughout, and is raised by artificial embankments on each side through the whole half mile, and is carried across the river by an aqueduct of one arch (mentioned in the indictment), which was built at the time of making the canal. At the distance of 430 yards from the river, towards the north, the canal is supported upon three arches, also built at the last-mentioned time; on the south side it has two culverts at 160 and 460 yards' distance from the river, one made at the same time with the canal, the other built by the trustees of the late Duke of Bridgewater (the proprietors of the canal) in 1806. About 800 yards above the aqueduct the river is joined from the east by Chorlton Brook, the capacity of which, at the junction, is equal to one-tenth of the capacity of the river at the same point; and after this junction, the river, which had before flowed northward, turns immediately to the west.

On each side of the river, and also of the brook, there are now artificial banks called fenders, made to prevent the water, in times of flood, from overflowing the adjacent lands. These fenders have from time to time been raised, as occasion required, by proprietors and occupiers of adjoining lands; and the fenders on the banks of the river on the north side are now three feet higher than they were twenty years ago; the fenders on the northern banks of the brook two feet three inches higher than they were at the same period. Before the banks of the river and of the brook were so raised, the water of the river, in times of flood, was frequently penned back up the brook, and, together with the water of the brook, ran over the north bank of the brook, and inundating certain lands (the situation of which was particularly described in the verdict), made its way to the three arches above mentioned, on the north side of the river. through these, it flowed along a low tract of land, until it fell into the river again at a *place called Ermston, two miles from the said three arches, inundating in its course, both above and below the arches, many hundred acres of land, throwing down hedges, and otherwise doing much mischief. No regular watercourse was ever kept open for the flood water. Since the banks of the river and of the brook have been raised as above mentioned, the flood water, whenever it has overflowed or broken down the banks of the brook, has taken the same course to the three arches. The whole three arches are not necessary for any other purpose than for the passage of such flood water; one arch, of small dimensions, would be sufficient for the passage of all other water collected at that place. At times, since the making of the canal, the water of the river has overflowed the banks above its junction with the brook, and has inundated a tract of land on the south and west of the river; and by reason of the embankment on which the canal is raised, and of the want of sufficient outlets underneath, this flood water has (particularly in the year 1806) broken down the south bank of the river between the aqueduct and the brook, passed across the river, and broken down the north bank; and then, after inundating the adjoining

lands, flowed down to the three arches before mentioned. In 1806 the trustees of the Duke of Bridgewater (the then proprietors of the canal), on complaint from the landowners on the north bank of the river, made them compensation for the damage so sustained; and they have, since that time, paid an annual rent or compensation for a piece of land on the south side, which was on that occasion washed away. They have, also, from time to time repaired the south bank of the river and the fender thereon, to the extent of fifty yards eastward from the canal.

The verdict then described the particular fields and fenders belonging to the several defendants, and it appeared that every fender was much higher than the *208] land *to the north of it, and that the fenders on the banks of the river and brook had been raised from time to time within the last six years, and kept and continued so raised by the defendants severally in their respective occupations, but not jointly. It also described the level of the lands through which the flood water was accustomed to escape in the direction of the three arches as first above mentioned, and also the level of the bed of the river for some miles above its junction with the brook. A statement was then given of injuries sustained in July 1828, when the flood water broke the banks of the river and canal (the navigation of which was stopped), and ultimately flowed down to the three arches before mentioned.

The improved drainage of the country higher up the river for many miles has occasioned a greater quantity of water to flow down the river to the aqueduct than used to flow to it for several years after it was built, but the aqueduct is still wide enough for the river water to pass at all times, except in high floods. The raising of the fenders on the banks of the river and of the brook, has occasioned a much greater quantity of water to flow to the aqueduct in high floods than did or could flow to it for several years immediately after it was built, and has rendered it insufficient for the passage of the water in high floods, and thereby greatly endangered the canal. If the fenders on the banks of the river and of the brook were reduced to the height at which they were twenty years ago, a great part of the waters of the river and brook in high floods would overflow the banks of the brook, and inundate the neighbouring lands, and would take the direction in which the flood water used formerly to flow to the said three arches, and thence to Ermston; but many hundred acres of land would thereby be inundated, and great injury done to the owners and occupiers of that land. The fenders on the banks of *the river and of the brook have not been

raised more than was necessary to prevent the lands being so inundated.

The case having been removed into this court, on error, after judgment had been given for the crown by the Court of King's Bench,

F. Pollock, for the defendants below, contended that, as the bed of rivers is continually rising from the gradual deposit of matters washed down from the source to the mouth, the owners of adjoining lands must have a right of raising the banks from time to time to prevent the effects of inundation. That if the defendants below had in this case raised their embankments higher than usual, it was owing to the prosecutors' causeway, which, obstructing the passage of the waters in ordinary floods, and thereby occasioning damage to the land, it became necessary to prevent the overflow by a higher bank. By the statute which regulated the affairs of the canal, the prosecutors were bound to allow sufficient waterway.

Wightman, contrd, admitting that to a certain extent the owners of adjoining lands might have, without occasioning injury to others, the right of raising fenders to obviate the effects of ordinary floods, denied the right, if the exercise of it occasioned injury to others, as it must do supposing the banks raised to such a height as to contain all floods whatever. As upon such a supposition the banks must continually rise, no bridge could be erected high enough to carry off

the water for many years.

(As the judgment of the Court turned upon the form of the special verdict, it would be superfluous to state the argument at greater length).(a)

Cur. adv. vult.

*TINDAL, C. J. Upon this special verdict, in which judgment has [*210 been given for the crown by the Court of King's Bench, such judgment appears to have proceeded expressly on the principle, that the ancient course and outlet of the flood water had been obstructed by the wrongful raising from time

to time of the fenders therein described, by the defendants below.

Whilst, however, we agree in the principle so laid down by the Court, we are unable to discover, upon this special verdict, a finding of sufficient facts to warrant its application to the present case. In order to show the defendants to have been guilty of the offence charged in this indictment, we think, in the first place, it ought to appear distinctly upon the special verdict that the raising and heightening of the fenders on the lands of the respective defendants, was not an accustomed and rightful usage which has obtained from time to time; that it was an enjoyment commencing since the construction of the canal in 1763; not sanctioned by ancient usage, or by the ordinary right which every man possesses. primā facie, to protect his own property, provided he can do it without injury to others: and that it ought also to appear distinctly that the course which the flood-water is stated in the special verdict to have taken, and by which it was carried again into the river at a lower point, was the ancient and rightful course which it ought to take.

And we think, in the second place, it ought not to be left in doubt, upon the facts found in the verdict, whether the raising the fenders to their present height has or has not become necessary in consequence of the construction of the aqueduct and embankment. On the contrary, that it ought to appear distinctly upon the finding by the jury, either that the embankment and the aqueduct have not wrongfully penned back more water upon the low lands of the defendants than was formerly collected in times of flood; or, that the banks of *the river and brook have been raised without any necessity, and not in self-defence against the consequences of the construction of the embankment and aqueduct; or, at all events, that the banks have been raised by defendants to an unreasonable and unnecessary height. And if these facts are left in doubt upon the special verdict, we think no judgment can be given against the defendants.

Upon the point firstly above suggested, there appears no doubt but that at common law the landholders would have the right to raise the banks of the river and brook from time to time, as it became necessary, upon their own lands; so as to confine the flood-water within the banks, and to prevent it from overflowing their own lands; with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons. And if this right had actually been exercised and enjoyed by them before the passing of the act, then the construction of the aqueduct and embankment may be considered as having taken place subject to the enjoyment of such rights as the landholders possessed at the time of passing the act, unless so far as the act of parliament may have restrained the exercise of such rights.

It appears therefore to us to be indispensable, in order to determine whether the acts of the defendants stated in the indictment are wrongful or not, that the jury should find such facts as will enable us to say with certainty, whether, before the making of the canal and embankment, there was any exercise by the land-owners of the right of raising and heightening the banks from time to time, as occasion required, so as to confine the water at all times to the ordinary channel, and prevent it in times of flood from overflowing the banks; or, whether the passage over the banks in times of flood was the usual and ordinary course.

*But the present special verdict leaves the commencement of the enjoyment of this right in complete uncertainty. It states only that there "now are" on each side of the river and brook, artificial banks called "fenders," which have from time to time been raised, as occasion has required. It finds,

indeed, in one part, that these banks are not raised higher than is necessary, a fact very strongly in favour of the defendants. But it gives no date whatever to the origin of these acts of enjoyment on the part of the owners of land adjacent to the river. Upon such a finding we do not feel ourselves competent to say whether the acts complained of in the indictment amount to a nuisance or not.

Again, the jury find, that before the banks of the river and brook were raised, the water of the river and brook was frequently penned back, and flowed over the north bank, by a track or course which is described in the verdict, and which is stated to fall into the river again at a place called Ermston, about two miles below the three arches. But it nowhere appears whether the flood-water was carried in that course before the aqueduct was made; nor whether it had been so carried for such a period of years over the lands of different persons, as to constitute a right of watercourse in time of flood in the direction described by the special verdict. But in order to establish the charge against the defendants, it was essential to show that by their raising and heightening the banks of the river and brook, they prevented the water in time of flood from flowing in this particular course. We ought, therefore, to see upon the face of the verdict, that there was an existing right of this course for the flood-water over the lands described in the special verdict, before we hold the defendants guilty of the offence

charged.

Again, upon the second ground above suggested, we think this special verdict *213] deficient. The special verdict *leaves it questionable whether the nuisance complained of, i. e. the danger to the aqueduct and the canal, is not attributable in some degree at least, if not entirely, to the act of the owners of the canal. The special verdict states in terms, that since the making of the canal, the water of the river has at different times flowed over the banks much higher up the within mentioned river than the point of its junction with the brook: and then proceeds to state an instance of damage done in 1806, for which the commissioners named in the act of parliament awarded compensation on account of the insufficiency of the outlets under the canal embankments. Again, in the statement made of the levels of the river above the aqueduct, and of the fall immediately below, an inference at least is afforded that the embankment and the canal have contributed to the penning back the water, thus creating a necessity and justifiable ground for raising and heightening the banks. Without, however, in any manner asserting that such has been the case, or that such is the necessary inference from the facts stated, we only observe that this special verdict does not state with sufficient certainty what is the real cause of the penning back of the water in time of flood, nor whether the raising and heightening of the banks by the defendants had a legal and justifiable commencement, nor what is the rightful course of the flood-water, nor generally does it lay before us such facts, as will enable us to say whether the acts done by the defendants are lawful or not, or to give any judgment, satisfactory to ourselves, that should bind the rights of the contending parties.

Under these circumstances the only course we can pursue is, to reverse the judgment which has been given for the crown, and to award a venire de novo; and if another special verdict should be found, we think it would be desirable *214] that it should contain an express *finding of the jury upon the several points to which we have above adverted, rather than the statement of facts

from which the finding of the jury is only to be inferred.

Venire de novo awarded

IN THE EXCHEQUER CHAMBER.

GIBB v. MATHER and Others. Jan. 30.

Where a bill is drawn payable at a particular place, and the drawee accepts it payable at that place, in an action against the drawer, presentment to the acceptor at that place must be proved.

THE declaration stated that the defendant below, on the 27th of September, 1828, at Liverpool, that is to say, at Preston, in the county of Lancaster, according to the usage and custom of merchants, made and drew a certain bill of exchange in writing, and then and there directed the said bill of exchange to Messrs. Chapman and Fairclough, and then and there required the said Messrs. Chapman and Fairclough four months after the date thereof to pay to the order of the defendant below, in London, 1751. 10s. value received in timber; which bill the said Messrs. Chapman and Fairclough afterwards, to wit, on, &c., at, &c., accepted according to the said custom and usage of merchants, payable at Messrs. Jones, Lloyd, and Co., bankers, London. And the defendant below, to whose order the said sum of money in the bill of exchange specified was to be paid, afterwards, to wit, on, &c., at, &c., by one John Kempster, then and there being the agent of the defendant below in that behalf, endorsed the said bill of exchange according to the said custom and usage of merchants, and then and there delivered the said bill of exchange, so endorsed, to one John M'Killop; *and the said J. M'Killop afterwards, to wit, on, &c., at, &c., duly endorsed the said bill of exchange, and then and there delivered the same, so endorsed as aforesaid, to the plaintiffs below. And the plaintiffs below averred that afterwards, to wit, on, &c., at Liverpool, &c., the said bill was shown and presented to the said Messrs. Chapman and Fairclough, upon whom the said bill was drawn, for payment thereof; and the said Messrs. Chapman and Fairclough were then and there required to pay the same; but that the said Messrs. Chapman and Fairclough did not, when the said bill was so shown and presented to them for payment as aforesaid, or at any other time, pay the same, or any part thereof, but on the contrary thereof, then and there wholly refused so to do, and therein wholly failed and made default; of which said everal premises the defendant below afterwards, to wit, on, &c., at, &c., had notice; by reason whereof, and by force of the said custom and usage of merchants, the defendant below then and there became liable to pay to the plaintiffs below the said sum of money in the said bill mentioned; when he, the defendant below, should be thereunto afterwards requested; and being so liable, the defendant below, in consideration thereof, afterwards, to wit, on, &c., at, &c., undertook, and then and there faithfully promised the plaintiffs below, to pay them the said sum of money in the said bill mentioned, when he, the defendant below, should be thereunto afterwards requested.

In a second count it was alleged that the acceptors were, at Liverpool, required to pay the bill according to the tenor and effect of the bill and of the endorse-

ments thereon; and

In a third, that the bill was, at Liverpool, in due manner shown and presented

to the acceptors.

At the trial before J. Parke, J., last Lancaster assizes, *the plaintiffs below proved, that they were partners together in trade, and holders of this bill of exchange, which was as follows:—"Liverpool, 27th of September, 1828, four months after date, pay to the order of myself in London 1751. 10s. value received in timber. Duncan Gibb. To Messrs. Chapman and Fairclough, Liverpool. Payable in London." The bill was accepted as follows:—"Accepted at Messrs. Jones, Lloyd, and Co., bankers, London. Chapman and Fairclough." And endorsed as follows:—"P. pro Duncan Gibb. John Kempster." The signature Duncan Gibb to the bill was proved to be the handwriting of the defendant below; and the acceptance of the bill by Messrs. Chapman and Fair-

clough, the handwriting of Thomas Fairclough, one of the partners in the firm of Messrs. Chapman and Fairclough. The defendant below himself presented the bill for acceptance to the said Thomas Fairclough, and himself received back the bill from the said Thomas Fairclough so accepted as above stated. The endorsement "P. pro Duncan Gibb. John Kempster," was the handwriting of the said John Kempster, who, when he so endorsed the bill, was duly authorized by the defendant below to endorse it on behalf of the defendant below. The bill was presented at Liverpool to the said acceptors Messrs. Chapman and Fairclough for payment, on the 30th day of January, 1829, on which day the bill had accrued due, and the said acceptors then and there refused to pay the same; and notice was given on the same 30th of January, 1829, by the plaintiffs below to the defendant below of the presentment of the bill to the said acceptors, and of their refusal to pay the same. These facts were also admitted by the counsel for the defendant below. Parke, J., then delivered his opinion to the jury, that the said several matters so produced and given in evidence and *217] admitted to be true *were sufficient to entitle the plaintiffs below to a verdict, and with that direction left the case to the jury, who found for the plaintiffs below.

A bill of exceptions having been tendered to the above direction of the learned

Judge, it was now argued by

F. Kelly for the defendant below. The plaintiffs below have no claim on the defendant below, unless they conform to the contract into which he has entered. That contract is expressly to pay in London. Formerly, when the acceptor of a bill of exchange accepted it payable at a particular place, the Court of King's Bench held that such an acceptance was an expansion, not a qualification of his liability to pay everywhere; that a demand might be made on him in the particular place in question in addition to all other places in which he might be found; but that, as he was liable in all places, it was not necessary to aver or prove a demand at the particular place in question. The Court of Common Pleas, on the other hand, held that the designation of a particular place of payment was a qualification of the contract, and that, therefore, a demand at such a place must be averred and proved. The House of Lords in Rowe v. Young(a) decided that the Court of Common Pleas had put the true construction on such a contract, but immediately passed an act of parliament, rendering the liability of an acceptor such as it had been expounded by the Court of King's Bench, unless to the designation of a particular place of payment in his acceptance he added the words, "and not elsewhere;" which words not being found in the acceptance of this bill, the acceptance is a general acceptance: that act, however, 1 & 2 G. 4, c. 78, is, by its title, preamble, *and enactments, confined to the case of acceptor. Now, in the case of a drawer of a bill of exchange, or maker of a promissory note, the Court of King's Bench and the Court of Common Pleas always concurred in holding, that the mention of a particular place of payment in the body of such instrument was an essential part of the contract imperative on the holder, who must therefore aver and prove a demand at that place in order to charge the drawer or maker. Sanderson v. Bowes, 14 East, 500, Roach v. Campbell, 3 Campb. 247. It may be said that the bill in this case having been accepted generally before it was issued by the drawer, the latter has given currency to such general acceptance, and therefore is estopped to object that demand has not been made at the particular place specified. though an acceptor may by apt words limit his own responsibility, or make it differ from the contract of the drawer, as by accepting at a longer date, or for a part only of the sum mentioned in the bill, no case can be found in which has been allowed, under any circumstances, to enlarge the responsibility of the The fact, therefore, of the drawer's having issued the bill with this acceptance on it, may show that he did not object to the expansion of the acceptor's liability, but is no proof that he consented to the expansion of his own.

Roscoe, contrd. The statute 1 & 2 G. 4, c. 78, enacts, that an acceptance such as the present shall be deemed a general acceptance to all intents and purposes. Now those words would be superfluous, and a main object of the statute would be defeated, if a demand which would be sufficient as against the acceptor, should be held insufficient as against the drawer. In Selby v. Eden, 3 Bingh. 611, a bill of exchange was, by the drawer, made *payable in London and there accepted; and yet it was held that averment or proof of presentment in London was unnecessary; and in Fayle v. Bird, 6 B. & C. 531, that decision was confirmed.

F. Kelly. The cases referred to are both actions against the acceptor; and in Fayle v. Bird, Lord Tenterden nonsuited the plaintiff for want of a due presentment, though he afterwards acceded to the authority of Selby v. Eden for the sake of uniformity.

Cur. adv. vult.

TINDAL, C. J. This was an action by the endorsees against the drawer of a bill of exchange after non-payment by the acceptor. Upon the trial of the cause it appeared, upon production of the bill, that the drawer, in the body of the bill, required the drawees to pay to the order of himself "in London," the sum mentioned therein: that the bill was addressed to Messrs. Chapman and Fairclough, Liverpool, with the additional words "payable in London," and that it was by them accepted at "Messrs. Jones, Lloyd & Co., bankers, London." It appeared further, that on the day the bill became due, it was presented for payment to the acceptors at Liverpool, who refused payment, and that due notice of such refusal was given to the defendant below. The learned Judge who tried the cause, directed the jury that the evidence above stated was sufficient to entitle the plaintiffs below to recover, and the jury found their verdict accordingly for the plaintiffs below. The propriety of this direction now comes before us upon a bill of exceptions tendered by the defendant below; and the question raised for our consideration is this, Whether in an action against the drawer of a bill above set *forth, on the ground of non-payment by the acceptor, it is, or is not, necessary to prove a presentment for payment at the banking house in London where the same is made specially payable by the acceptance. And we are all of opinion that such special presentment is necessary, in order to enable the holder to recover against the drawer of the bill.

Before the passing of the statute 1 & 2 G. 4, c. 78, it was a subject of considerable doubt in the courts of law whether, in the case of a bill drawn generally, but accepted payable specially at a particular place, an action could be maintained against the acceptor, without averring in the declaration, and proving at the train a presentment for payment at the place where the drawee had by his acceptance made the bill payable. Upon that point the Court of Common Pleas has held a presentment of the bill at the place named in the acceptance to be necessary, on the ground that it was a qualified acceptance only; the Court of King's Bench, on the contrary, had held it was unnecessary to make any such presentment, on the ground that the acceptance was a general acceptance, with a mere intimation of a place of payment, if the holder thought proper to apply there.

The conflicting opinions of the two Courts upon that point were set at rest before the passing of the statute, by the judgment of the House of Lords in the case of Rowe v. Young, 2 B. & B. 165, by which judgment the opinion held by the Court of Common Pleas was decided to be the law of the land.

But the doubt which had been formed, was confined to the case where the question arose between the holder and the acceptor; in cases between the endorsee and the drawer, upon a special acceptance by the drawee, no *doubt papears to have existed, but that a presentment at the place specially designated in the acceptance was necessary, in order to make the drawer liable upon the dishonour of the bill by the acceptor.

Still less did the doubt ever extend to cases where the drawer directed by the body of the bill that the money should be payable at a particular place. In such a case all the courts at Westminster agreed that the presentment must be made at the place specially designated in the bill itself. This had been decided in the

Court of King's Bench in the case of a banker's promissory note, which was made payable at a place named in the body of the note. Sanderson v. Bowes, 14 East, 500. The same doctrine was also laid down in the case of Roche v. Campbell, 3 Campb. 247, where the action was brought by the endorsee of the note against the endorser. Now, no distinction as to this point can be taken between the drawer of a bill of exchange and the endorser of a promissory note. As to their liability to the holder, they stand precisely in the same situation. It is the acceptor of the bill and the maker of the note who are primarily liable to the holder: and the drawer of the bill, like the endorser of the note, does not become liable until there has been a due presentment made to the party liable in the first instance to pay. The law, therefore, which applies to the endorser of the note, will also govern the case of the drawer of a bill.

Such then being the state of the drawer's liability, at the time the statute was passed, it must still remain the same, unless that statute has made an alteration therein. But it appears to us that the statute neither intended to alter, nor has it in any manner altered the liability of drawers of bills of exchange, but that *222] it is confined in its operation to the case of acceptors alone. The title *of the act is to regulate acceptances of bills of exchange; and after reciting that it had been adjudged, that where a bill is accepted payable at a banker's, the acceptance thereof is not a general but a qualified acceptance, but that a general practice and understanding had prevailed amongst merchants, that such acceptance was a general acceptance, it proceeds to enact, that, after the passing of that act, such an acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill, unless the acceptance is restricted to payment at the particular place by the words and in the manner directed in the act.

The very reference in the statute to the adjudication by law, imports that the legislature intended the statute to apply to those cases only in which doubts had previously existed, and which had been adjudged in law; not to cases like the present, which were free from doubt at the time of passing the act. Again, the enactment comprehends in terms the case of acceptors, and acceptors only, and is silent altogether upon the subject of the liability of drawers and endorsers. It foresees the inconvenience which is cast upon acceptors by the enactment that an acceptance of a bill payable at a particular house shall thenceforth be considered as a general acceptance; and it gives the acceptor the power of protecting himself against such inconvenience by the use of restrictive words in his accept-But the inconvenience is as great to the drawer as to the acceptor. the drawer has directed his money to be paid at a particular place, and after an acceptance made payable at that place the bill should be returned to him dishonoured without a presentment to the house where it is made payable, it is as great a hardship upon him, as the act had contemplated and provided for in the case of the acceptor. If then the statute had intended the enactment to apply *223] to the case of the drawer, *we cannot but think the same protection would have been given to the drawer which has been given in terms to the acceptor of the bill.

One argument advanced on the part of the plaintiff below is, that the acceptor has varied in his acceptance from the original terms in which the bill was drawn; and as the drawer has been contented to take back the bill with such varied acceptance, it must now be considered as a general acceptance under the operation of the late statute. But the answer to this argument seems to be that the direction contained in the body of the bill is not altered or varied by the terms of the acceptance, any further than was necessary for the benefit of the drawer and of all subsequent parties. The drawer directed the drawee to pay the money in London,—the drawee accepts, specifying the particular house in London at which he intends to pay the bill. Without such specification the acceptance might be useless from its generality; and the form of the bill implies that the drawer expected and intended the drawee to make it.

We, therefore, think that as no presentment was made at the house of the

bankers in London, where the acceptor had undertaken to pay it, the liability of the drawer never arose, and, consequently, that the judgment which has been given for the plaintiff below must be

Reversed.

*MASTERMAN and Others v. JUDSON. Jan. 31. [*224

1. In an action against defendant for not obeying a subpæna, the declaration stated that the plaintiff caused to be left with defendant a copy of the writ of subpæna; Held, that a Judge at Nies Prius had authority under 9 G. 4, c. 15, to allow this allegation to be amended a follows:—"a copy of so much of the said writ of subpæna as related to the said defendant."

follows:—"a copy of so much of the said writ of subposna as related to the said defendant."

2. In such an action as the above, it is primd facie sufficient to allege that the defendant was a material witness, and that his absence caused the plaintiff to be nonsuited, without avering that plaintiff had originally a good cause of action. At all events, such allegation is sufficient after verdict.

THE declaration stated that plaintiffs before the committing the grievances by the defendant thereinafter mentioned, to wit, in Hilary term 1831, &c., before Sir N. C. Tindal, Knight, and his companions, Justices of the Bench at Westminster, impleaded one John Malin in a plea of trespass to the damage of said plaintiffs of 100l.; and such proceedings were thereupon had that afterwards, to wit, on the sittings at Nisi Prius holden at Hertford, in the county of Hertford, on the 2d of March, 1831, before the honourable Sir John Bayley and the Honourable Sir W. Garrow, Knights, a certain issue before then joined in the said plea between said plaintiffs and said John Malin came on to be tried by jury of the county; and also that on the 31st of January, in the year aforesaid, said plaintiffs prosecuted, out of the Court aforesaid, his Majesty's writ of subpæna directed to said defendant and others, commanding them and every of them that all other things set aside, &c., they should appear before the justices assigned to take the assizes, &c., at the said town of Hertford, in the said county, on Wednesday the 2d day of March then next, by nine of the clock in the forenous, and so from day to day until, &c., to testify, &c., in a certain action then in the Court before the said King's Justices depending between said plaintiffs and said John Malin of a plea of trespass, on the part of said plaintiffs, and that they or any of them should in nowise omit, under the penalty of every of them of 1001, which said writ said plaintiffs, on the 19th of February, in the year aforesaid, caused to be made known to and shown to said defendant, and caused *copy to be left with the said defendant of so much of the said writ of subpoena as related to the said defendant, and paid to said defendant the sum of 10l. for the costs of his attendance as a witness; and although said defendant could have given material evidence for said plaintiffs on said trial against said John Malin, yet said defendant would not appear on trial of said issue, although he had no lawful cause or impediment to the contrary; and by reason thereof, and on no other account whatsoever, said plaintiffs were nonsuited, and such proceedings were thereupon had, that afterwards, to wit, in Easter term, in the year aforesaid, it was adjudged by said Court that said John Malin should recover against said plaintiffs 251. 6s. for his costs and charges by him laid out in and about his defence in that behalf: by means of which said several premises said plaintiffs were not only forced to pay said John Malin said sum of 251. 6s., together with costs of levying the same, amounting to the sum of 101., but were also greatly hindered and delayed in the recovery of their damages in the plea aforesaid, and did necessarily incur a great expense, amounting to the sum of 100%, in and about prosecuting said suit; which said plaintiffs are liable to pay, and are by means of the premises otherwise greatly injured, to plaintiffs' damage of 200*l*.

At the last Hertford assizes it appearing that the original writ of subpara (for disobeying which this action was brought) was directed to the defendant

Judson and two others therein named, while the copy served on him was directed to him and John Doe, the latter name not appearing in the original subpæna at all, Lord Tenterden, C. J., before whom the cause was tried, caused the record to be amended by the insertion of the words printed above in italics, under the authority of the 9 G. 4, c. 15, which enacts, "That it shall and may be lawful for every court of record holding plea in civil actions, any Judge sitting at Nisi England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanour, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party as such judge or court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared: and in case such trial shall be had at Nisi Prius, the order for the amendment shall be endorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the court, from which such record issued, shall be amended accordingly."

A verdict having been found for the plaintiffs,

Taddy, Serjt., obtained a rule nisi to set it aside, on the ground that the learned Judge had no jurisdiction under the recent act to make the amendment in question, there being in this declaration no recital of the writ of subpæna, but merely an allegation that the plaintiffs had caused the defendant to be served. He also moved in arrest of judgment, that it was nowhere averred the plaintiffs had a good cause of action against Malin, the defendant in the original action.

Wide, Serjt., showed cause against the rule. The stat. 9 G. 4, c. 15, is remedial, and must receive a liberal construction. The circumstances of the present case fall within the mischief contemplated by the act, and ought, therefore, to be within the remedy. The allegation that the defendant was served with a sub-to correct any variance in the mere description of the instrument. In Briant v. Eicke, 1 M. & M. 359, Lord Tenterden, C. J., amended a recital that a judgment had been obtained in the Court of King's Bench by substituting,

according to the fact, Common Pleas for King's Bench.

As to the objection in arrest of judgment, it is not for the party who is primal facie injured by the misconduct or neglect of another to show that he had a good cause of action or of defence; it is for the party charged, to show, if he can, that his opponent had not. Godefroy v. Jay, 7 Bingh. 413. But at all events, the defect, if any, is cured by verdict, particularly when the declaration, after averring the defendant's disobedience of the subpæna, adds, "By reason whereof, and on no other account, the plaintiffs were nonsuited." Thus in actions for a malicious prosecution the omission of an averment that the prosecution or action is at an end is cured by verdict. 1 Wms. Saund. 228 a.(a)

Taddy and Stephen, Serjts., contra. The learned Judge has admitted into the declaration the allegation of a new fact, namely, the service of a copy of a part of the writ, instead of merely correcting a variance in the recital of the writ. And the amendment in itself contains demurrable matter; for how much of the instrument in question applied to the defendant, is matter of law, to be determined by the Judge upon the production of the instrument. It will be of dangerous consequence to extend the statute to the introduction of new allegations of fact, which may be a surprise upon the opposite party.

Then, the plaintiffs should have averred that they had a good cause of action against Malin; for without averring that, they do not show that they had any right to *subpæna the defendant. In Goodwin v. West, Sir W. Jones, 430, Cro. Car. 522, 540, it was held that the action of debt for the penalty

of 10l. on 5 Eliz. c. 9, for not appearing to give evidence after service of a subpæna is given only to the party grieved, and that if the plaintiff be not grieved he cannot bring the action. The same point was established in Maddison z. Shaw, 5 Mod. 355, where the Court said there must be a particular damage set forth. Aston's Entries, 40, 90. And the principle applies with greater force to an action on the case for general damages for a similar neglect.

So in actions against the sheriff for an escape, it is necessary to aver that the plaintiff had a good cause for arresting the party. 2 Wms. Saund. 151. Vid. Entr. 16, 60. And in Alexander v. M'Auley, 4 T. R. 611, in an action against the sheriff for an escape on mesne process, the plaintiff was nonsuited, because

he could not prove any debt against the prisoner.

The Court said, that the amendment was the only point on which they had any doubt; and as it applied to a general rule of practice they would take time to consider.

Cur. adv. vult.

TINDAL, C. J. Upon the point reserved in this case for further consideration, namely, whether the amendment made upon the record of Nisi Prius at the trial of this cause was an amendment authorized by the late act of 9 G. 4, c. 15, we think such amendment falls within the meaning and construction of the act, and

is fully authorized by the same.

The declaration, after stating that the writ of subpæna was issued in the cause, proceeded to aver "that the plaintiffs caused the said writ to be made known and shown to the defendant, and caused a copy to be left with him." Upon the trial it appeared, that there was *a variance between the copy or ticket, as it is usually termed, which had been left with the witness, and the original writ of subpæna, the former purporting to be addressed to the defendant and John Doe alone, whereas the original subpæna, when produced, appeared to be addressed, not only to the defendant, but to two other real persons. The plaintiffs praying the Judge, who tried the cause at Nisi Prius, to order an amendment to be made under the act above referred to, he directed an amendment to be made in these words; viz. "Caused a copy of so much of the said writ of subpæna as related to the defendant to be left with him." The trial then proceeded on the amended declaration, and a verdict was found for the plaintiffs.

Two objections are made by the defendant to the authority of the learned Judge to direct this amendment; first, that this is not an amendment of the record, to prevent a variance between any matter in writing produced in evidence, and the recital or setting forth thereof upon the record; but it is the insertion of a new and distinct allegation of an independent fact: secondly, that the defendant might have demurred to the allegation as it now stands, if it had appeared in the declaration originally, and that he ought not to lose that advantage by its being first put upon the record when the cause is before the jury.

As to the first objection, however, it appears to us that though the allegation introduced by that amendment may, at first sight, seem to be an allegation of a new fact, yet, upon looking more accurately at the effect of the amendment, it is not so, but is in substance an amendment to prevent "a variance between the matter in writing produced in evidence and the recital or setting forth thereof upon the record." For when the plaintiffs allege that they left a copy of the writ of subpæna with the defendant, they do, by that word, * "copy," represented compendiously by that same word; and, inasmuch as the production at the trial, of the written paper actually left with the defendant, varied from the subpæna itself in the particulars above referred to, it seems to us the alteration directed to be made was an alteration which prevented the variance between the evidence and the record. Suppose the declaration, instead of alleging that the plaintiffs had left a copy of the writ of subpæna with the defendant, had alleged that he had left with him "the following written paper," &c., setting out the subpæna according to the tenor; there can be no doubt but that the case would then have fallen directly within the act; and that, upon the production

of the paper actually left with the defendant, the statute would have authorized an amendment by striking out those parts in the declaration which were not found in the paper itself. The amendment, which was directed, appears to produce the same effect, though in a more compendious manner. Looking to the object of this act, which was, according to its title, to prevent a failure of justice by reason of variances between records and writings produced in evidence in support thereof, we think it should receive a construction as liberal as the words will admit; and that the amendment now under consideration falls within the fair interpretation of the words of the act.

The second objection urged by the defendant was, that if the plaintiffs had originally made this allegation in the declaration, he might have demurred to the declaration. Now, without determining the question, whether such demurrer would have been sustainable or not, we think, as it does not appear by the evidence that the defendant took any such objection at the time the amendment *231] was directed, he cannot avail himself of it *in this stage of the proceedings. For if they had, in the first instance, made that their ground of objection, it is by no means improbable that the Lord Chief Justice would have directed the plaintiffs to set out at length on the record the written paper which they left with the defendant; and by so doing, though the cause could not but proceed as the act directs, the defendant might have taken the objection afterwards, if such objection is available in arrest of judgment; or he might have refused to make the alteration, and thereby compelled the plaintiffs to be non-suited; or, at all events, such terms might have been imposed on the plaintiffs as would have met the justice of the case.

On the whole, we think we should very much abridge the benefit of a most useful act if we were to hold the present amendment to be unauthorized by it.

Rule discharged.

MEDEIROS v. HILL. Jan. 27.

It is no defence to an action on a charter-party for not sailing on the voyage towards a port agreed on, that the port was in a state of blockade, if the defendant knew the fact at the time of entering into the charter-party.

Assumpsit on a charter-party dated September 27th, 1830. The defendant undertook that his ship being then at Plymouth should return with all convenient speed to Liverpool; should there load a full and complete cargo of salt; proceed therewith to Terceira; deliver the same there, freight free; and there, or at St. Michael's, load a homeward cargo of fruit, restraint of princes, &c., excepted; and the breach alleged in the declaration was, that the ship did not return with all convenient speed to Liverpool, and there take the cargo on board, and sail on the voyage described in the charter-party.

At the trial before Tindal, C. J., London sittings after *Michaelmas term, it appeared that the defendant's ship on her passage from Plymouth to Liverpool had touched at Fowey; that she had arrived at Liverpool too late to ship the salt, and never proceeded to Terceira. At the time of the contract Terceira was publicly and officially known to be under blockade by the government of Portugal. There was no evidence, however, of any understanding between the contracting parties that the defendant was to violate the blockade; on the contrary, it rather appeared that the blockade had never been thought of till after the charter-party had been executed by the defendant's son on the part of the defendant; and long before that time the blockade had ceased to be real or effective. A verdict having been found for the plaintiff with 100l. damages,

Taddy, Serjt., moved for a new trial. The stipulation to proceed to Liverpool with all convenient speed did not preclude the defendant from touching at Fowey, which is not out of the course from Plymouth to Liverpool, and even if

nt were, the touching there would be no breach of the defendant's contract, supposing him to have touched in the ordinary course of his business, and the voyage in other respects to have been performed with all convenient speed. A carrier who engages to go with all convenient speed does not thereby engage to go in the most direct line from place to place; and it is a sufficient performance of his contract if he use due diligence in his ordinary line. Max v. Roberts, 12 East, 89. But the voyage to Terceira was illegal, and the plaintiff cannot recover for the defendant's omission to proceed thither; Terceira having at the time of the contract been in a state of blockade, the defendant had no right to sail with an intention to violate the blockade. Case *of the Neptunus, 2 Rob. [*233] Adm. R. 110, Adelaide, Ibid. in notis, and Shepherdess, 5 Rob. Adm. R. 263, Naylor v. Taylor, 9 B. & C. 718, Dalgleish v. Hodson, 7 Bingh. 495.

At all events the defendant was not bound to procure simulated papers, or to run the risk of capture. In Tonteng v. Hubberd, 3 B. & P. 291, a British merchant chartered a Swedish ship on a voyage to St. Michael's for a cargo of fruit, and the charter-party contained the usual exception against the restraint of princes; the ship was prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British government; and it was holden, that the Swedish owner could not by proceeding on the voyage after the embargo was taken off entitle himself to recover the freight against the British merchant.

Cur. adv. vult.

TINDAL, C. J. This was an action upon a charter-party, by which the defendant engaged that his ship should return with all convenient speed to Liverpool, and there load a full and complete cargo of salt, and proceed therewith to Terceira, and deliver the same there freight free, and there, or at St. Michael's, load a homeward cargo of fruit; and the breach alleged in the declaration was, that the ship did not return with all convenient speed to Liverpool, and there take the cargo on board, and sail on the voyage described in the charter-party.

After verdict for the plaintiff, and 100l. damages, a motion has been made for setting the same aside, and for a new trial, on two grounds; first, that at the time the charter-party was entered into, Terceira was in a state of blockade by the government of Portugal, which blockade had been notified to the English government, and, consequently, that the voyage described in the *charter-party was an illegal voyage. Secondly, that although the voyage may not be, strictly speaking, illegal, the circumstance of the blockade operated as

an excuse for the non-performance of the contract.

The case of the Neptunus, 2 Rob. Adm. Rep. 110, which was cited in support of the first objection, establishes that it is illegal to attempt to enter a blockaded port, in violation of the blockade, and that after notification of the blockade the act of sailing to a blockaded port with the intention of violating the blockade is in itself illegal. But neither that case, nor any other that can be cited, has laid it down, that the mere act of sailing to a port which is blockaded at the time the voyage is commenced is any offence against the law of nations, where there is no premeditated intention of breaking the blockade, if it shall be found to continue in force when the ship arrives off the port. Any such determination would be destructive in many instances of the fair commercial speculations of neutral merchants, to whom it might be of the first importance to possess the opportunity of introducing their goods into the port which had been blockaded, at the very earliest moment after such blockade had been relaxed. object appears to be legal, both from the opinions of Sir W. Scott in the case of the Shepherdess, 5 Rob. Adm. Rep. 264, and from the judgment of Lord Tenterden, C. J., in Naylor v. Taylor, 9 B. & C. 718. In the present case there was no evidence of any understanding between the contracting parties that the defendant was to break the blockade at Terceira in order to deliver his outward cargo. Indeed the fact of the blockade did not appear to enter into the contemplation of either party, until after the defendant's son, the captain of the vessel, had signed the charter-party for his father; and upon the evidence the blockade had *ceased to be a real and effective blockade long before the regs charter-party was entered into.

We see, therefore, no reason for holding the contract to be void on the ground

of illegality.

As to the second point, it is sufficient to say, that as the blockade had been publicly notified to the government of England, the contracting parties must be taken to have entered into the charter-party with an equal knowledge of its existence; no difficulty, therefore, attending the performance of the contract can be set up as an excuse for its non-performance. In that case the rule of law laid down in Paradine v. Jane, Alleyn's Rep. 27, applies, viz. "That where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

We think, therefore, the rule for a new trial must be refused.

Rule refused.

SMITH v. WALTON and Another. Jan. 31.

Replevin. Defendant avowed that the rent was payable at Martinmas, to wit, Nov. 23: Held, that this must be taken to mean New Martinmas; and plaintiff having shown that the rent was in fact payable at Old Martinmas, the Court refused to set aside a verdict given for him.

Replevin for goods.

Avowry and cognisance, that Smith occupied the house in which, &c., for a year and a half next before and ending at Martinmas 1830, to wit, on the 23d of November, 1830, as tenant thereof to Walton, under and by virtue of a cer*236] tain demise thereof to him made at and under *the yearly rent of 3l. 10s.,
payable half yearly, that is to say, at Whitsuntide and Martinmas in every year; and because 5l. 5s. of the rent aforesaid for the space of one year and a half ending as aforesaid at Martinmas, to wit, on the 23d of November, 1830, and from that time hitherto was and is still due and payable by Smith, therefore the defendants avow and acknowledge the distress.

Plea, non tenuit modo et formâ, and issue joined thereon.

Upon this issue a jury having found that the rent was payable at Old Martinmas, a verdict was entered for the plaintiff, which, by leave of the Judge who tried the cause,

Wilde, Serjt., obtained a rule nisi to set aside, and enter a verdict for the defendants instead.

Jones, Serjt., showed cause in the last term. Although, upon a parol demise with rent payable at Lady-day, evidence of the custom of the country is admissible to show that by Lady-day the parties meant Old Lady-day, Doe d. Hall v. Benson, 4 B. & A. 588, yet it has been holden that a lease of lands by deed since the new style, to hold from the feast of St. Michael, must be taken to mean from New Michaelmas, and cannot be shown by extrinsic evidence to refer to a holding from Old Michaelmas. Doe d. Spicer v. Lea, 11 East, 312. Now a plea must receive the same construction as a deed; and the defendants having pleaded that the rent was payable at Martinmas must be taken to have pleaded that it was payable at New Martinmas, the words, "to wit, on the 23d of November," being mere surplusage. But the plaintiff having proved, and the jury having found, that the rent was really reserved, payable at Old Martinmas, the avowry **2071** **affords no warrant for the distress, and the verdict for the plaintiff must

*237] *affords no warrant for the distress, and the volume.

**Wilde. As there are two Martinmasses, one which falls on the 11th, and one on the 23d of November in every year, the words, "to wit, on the 23d of November," are a material part of the plea, inserted for the express purpose of preventing ambiguity, and therefore cannot be rejected as surplusage. If the defendants had avowed for a rent payable at Old Martinmas, they would have

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been entitled to the verdict. It is the same thing, but expressed with more precision, to say the rent was payable November 23d.(a)

Cur. adv. vult.

TINDAL, C. J. The question in this case arises upon an avowry and cognisance by the defendants, in which they allege, that the plaintiff, for one year and a half next before and ending at Martinmas 1830, to wit, on the 23d day of November, 1830, held and enjoyed the place in which, &c., as tenant thereof to the avowant by virtue of a certain demise thereof to the plaintiff made, at and under the yearly rent of 3l. 10s. payable half yearly, that is to say, at Whitsuntide and Martinmas in every year; and because the sum of 5l. 5s. of the rent aforesaid for the space of one year and a half ending as aforesaid at Martinmas, to wit, on the 23d day of November, 1830, and from thence, &c., was due and payable, therefore the defendants avow and acknowledge the distress made. To this avowry and recognisance there was a plea in bar, that the plaintiff did not hold modo ac forma; and upon the trial of an issue joined on this plea the jury found that the rent was payable at Old Martinmas, and a verdict was entered for the plaintiff.

A motion has been made to set aside this verdict, and *to enter a verdict for the defendants, by leave of the learned Judge who tried this cause; and, after hearing argument against and in support of the rule, the majority of the Judges who heard this argument think the present verdict ought

to stand.

The case of Doe d. Spicer v. Les appears to them to be decisive upon the pre-There it was held, that since the existence of the new style sanctioned by act of parliament, a lease by deed, to hold from the feast of St. Michael, must be taken to mean New Michaelmas; and that extrinsic evidence is not admissible to show that it means a holding from Old Michaelmas. And we think where there is an allegation upon the record that the tenant holds at a rent payable half yearly, that is to say, Whitsuntide and Martinmas in every year, the same rule which governs the construction of a deed, must govern the construction of a plea, and that it can only be understood to mean New Martinmas, there being only one day set down as Martinmas in the calendar which forms part of the statute for the alteration of the style. It is true, that in another part of the avowry, distinct from the allegation of the terms of the tenancy, the defendant state the year's rent for which the distress was taken, to be for a year ending at Martinmas, "to wit, on the 23d November." But we think ourselves bound to take notice that Martinmas falls on the 11th of November in every year, by the enactment of the statute above referred to, and that it cannot fall on any other day; and, consequently, that all which follows under the videlicet, which is inconsistent with and contrary to such enactment, must be rejected.

Evidence, no doubt, is admissible in the case of a parol taking at Martinmas, generally, to show whether the day of taking was intended to be calculated according to the new or old style: indeed, such evidence was admitted in this very case for the purpose of showing *that the rent was payable at Old Martinmas, which the jury found to be so. But no case can be found in which where a party pleads upon the record that the taking was from Martinmas, he has been allowed to show that he meant by that pleading Martinmas accord-

ing to the old style.

My brother GASELEE thinks the words under the videlicet amount, in effect, to a distinct averment, that the word Martinmas in the pleading so explained, means the feast of old Martinmas which falls upon the 23d of November; and that the allegation in the first part of the avowry, that the holding was for a period ending at Martinmas, viz., "the 23d of November;" and again, a similar allegation in the latter part of the pleadings, show that the word Martinmas mentioned in the reservation of rent, must be intended to apply to the same day, that is, Old Martinmas. He agrees with the rest of the Court in the opinion, that no extrinsic evidence ought to be received to explain the record.

Rule discharged.

DOE v. HARVEY. Jan. 31.

Where a party holds land under a written agreement, parol evidence cannot be received of the fact under whom he came into possession.

TRESPASS for mesne profits.

At the trial before Alderson, J., at the last Somerset assizes, the plaintiff, after proving that the defendant had occupied the premises in question from May 1829 to May 1830, offered in evidence a judgment in an ejectment brought for the same premises by the plaintiff in this action against Simon Payne, (a) and called as a witness the son of Simon Payne, who stated that he, *240] *the son, had put the defendant in possession. It appearing, however, that this had been done under a written agreement, which was not produced, it was objected, on behalf of the defendant, that the witness could not, while that instrument existed, by parol evidence, disclose under whom the defendant held, and that without evidence that the defendant held under Payne, the judgment against Payne could not be produced against the defendant. And the learned Judge being of this opinion nonsuited the plaintiff.

Wilde, Serjt., obtained a rule nisi to set aside this nonsuit, against which rule Stephen, Serjt., argued last term that the written agreement was the best evidence to show under whom the defendant held, and that the agreement being in existence and not produced, parol evidence to that point was properly excluded. Then, with respect to the judgment against Payne, he contended, as in Doe v. Whitcombe, and on the authorities there cited, that the defendant not having been shown to be party or privy, the judgment was no evidence against him.

Wilde. Parol evidence of any of the stipulations in the written agreement could not be received; but it was competent to the Judge to admit evidence of facts independent of the agreement; as, who professed to be landlord and received the rent. Those were facts which could not alter or interfere with any stipulation in the agreement, and might, therefore, be proved by other evidence. In R. v. Holy Trinity, Hull, 7 B. & C. 611, it was held that parol evidence of the *241] fact of tenancy was admissible, although the tenant held under a written of a written instrument cannot be proved without producing it. But, although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of tenancy may be proved by parol, without proving the terms of it. It was unnecessary in this case to prove by the written instrument, either the fact of tenancy or the value of the premises." And Park and Gaselee, Js., held the same opinion in Strother v. Barr, 5 Bingh. 136.

Cur. adv. vult. TINDAL, C. J. This was an action of trespass for the mesne profits, upon the trial of which it was proved, that Harvey, the defendant, had occupied the premises in question from May 1829 to May 1830. The plaintiff, in order to prove his right to the possession of the premises during that period, offered in evidence, a judgment in ejectment brought for the same premises by the present plaintiff, against one Payne. It was objected that this record was not admissible in evidence against the present defendant, he not being the defendant in the original cause, nor shown to claim through or under him. The only evidence that was given as to the origin or nature of Harvey's occupation was, that one Henry Payne, the son of the defendant in the ejectment, had put him into possession. But as it appeared from the same witness that he had been put into possession under a written agreement, which agreement was not produced, the parol evidence of Henry Payne, as to the landlord under whom he held, or the terms under which he was let into possession, was deemed insufficient for that purpose. The learned Judge, who tried the cause, held, under these circumstances, the record of the judgment *in ejectment to be inadmissible in evidence in

this cause, and the plaintiff was thereupon nonsuited, with liberty to move to set aside the nonsuit, and enter a verdict for the plaintiff.

After hearing the arguments against and in support of this motion, we are of opinion that the direction of the Judge upon both the points so made at the trial was right. As to the first point, if nothing had been in issue but the single fact, whether Harvey held or occupied the land, such fact might undoubtedly be proved by the payment of rent, declarations of the tenant, or other parol evidence sufficient to establish it, notwithstanding it appeared that he held under an agreement in writing. Authorities to this effect were cited in argument at the bar. But here the question was, not merely whether Harvey held the premises, but whether he held them as tenant to Payne; and of this fact there was no other evidence admissible than the written agreement, which was not produced.

The second point is simply this, whether in an action of trespass for the mesne profits, a recovery in ejectment against a former tenant in possession, is producible in evidence against a person who is afterwards found in possession, without proving that he came in under the defendant in ejectment, so as to make him a privy to the judgment in ejectment. And we are all of opinion that it is not. A recovery in ejectment is conclusive evidence both of the plaintiff's right to the possession, and that the defendant is a trespasser in an action for the meme profits brought against the person who was defendant in the original action of ejectment: Aslin v. Parkin, 2 Burr 668. According to the resolution of the Judges, "the tenant is concluded by the judgment, and cannot controvert the title." But no reason has *been urged, nor any authority cited at the table, to show that this judgment is to be considered as differing from judgments in other personal actions; and the general rule of law is, that judgments bind only parties and privies; but as to strangers are considered as res inter alios acta, and are not producible in evidence against them. In the case of Denn v. White and Wife, 7 T. R. 112, it was held by the Court that in an action of trespass for the mesne profits against husband and wife, a judgment in ejectment against the wife could not be given in evidence against the husband, because he was no party to that suit: and again, in Hunter v. Britts, 3 Campb. 456, it was held by Lord Ellenborough, in an action of trespass for the messe profits brought against the landlord of the premises, who had been in the receipt of the rents and profits from the time of the demise till the writ of possession was executed, that a judgment in ejectment against the casual ejectors was not admissible in evidence against him, without proof that the tenant upon whom the ejectment was served, had given him notice of it. And this appears to have been on the ground, that he was not privy to the judgment.

The only proof in this action, that the defendant is a trespasser, or that the plaintiff has a right to the possession, is by the production of the judgment against Payne. But as the defendant is a stranger to Payne upon the evidence before the Court, no admission made by him, and no judgment obtained against him, ought to affect Harvey until he is shown to be privy in estate with Payne. We therefore think the rule should be discharged.

Rule discharged.

*MILLER v. TRAVERS and Others.(a) Jan. 28. [*244

Devise of all testator's freehold and real estates in the county of L. and city of L. Testator had no estates in the county of L.; a small estate in the city of L., inadequate to meet the charges in the will; and estates in the county of C. not mentioned in the will: Held, that the devisee could not be allowed to show by parol evidence, that the estates in the county of C. were devised to him in the draft of the will; that the draft was sent to a conveyancer to make certain alterations not affecting the estates in county C: that by mistake he erased the words county of C.; and that testator, after keeping the altered will by him for some time, executed it without adverting to the alteration as to the county of C.

⁽a) The Lord Chief Justice of the Court of Common Pleas, and the Chief Baron of the Court of Exchequer, Lord Lyndhurst, having been called on to assist the Lord Chancellor in the case of Miller v. Travers and Others, their joint opinion was delivered as above in the Court of Chancery by the Lord Chief Justice, on the 28th of January. As this opinion is on a sub-

TINDAL, C. J. In this case the plaintiff, John Riggs Miller, filed his bill against the defendants for the purpose of establishing the will of the late Sir John Edward Riggs Miller, Bart., and for carrying into execution the trusts thereof. One of the defendants, Elizabeth Wheatley, was the sister and heiress And upon the hearing of the cause before His Honour at law of the testator. the Vice-Chancellor, after the answers of the several defendants, and amongst others, the answer of the defendant, Elizabeth Wheatley, had been put in, and witnesses examined, His Honour ordered, amongst other things, "That the parties should proceed to a trial at law on the following issue; viz. Whether Sir John Edward Riggs Miller, Bart., did devise his estates in the county of Clare, and in the county of Limerick, and in the city and county of the city of Limerick, or either and which of them, to the trustees mentioned in his will, and their heirs;" in which issue the plaintiff in the cause was to be the plaintiff, and the heiress at law and her husband defendants.

*Against this part of the decree the defendant, Elizabeth Wheatley, has appealed, and prays a rehearing of the cause so far as respects that

part.

Upon the hearing of this petition of appeal, the Lord Chancellor has been pleased to request the assistance of the Lord Chief Baron and myself; probably reseeing, as the case has appeared in the result, that the propriety of directing an issue, at least as to the devise of the estates in the county of Clare, which was the main point in contention between these parties, would depend upon the nature of the evidence to be brought forward by the plaintiff, upon whom the affirmative in such issue would rest.

For if the evidence, and the only evidence which can possibly be brought forward by the plaintiff in support of his proposition, is of such a nature and de-cription as to be inadmissible at the trial of the cause, it would be the duty of this Court to refuse the issue; it being manifestly to the advantage of both parties that such question should be decided in the first instance by the Judge sitting in equity, rather than that the very same question should be decided upon the very same principles of evidence by the Judge at Nisi Prius, after an expense and delay that must be worse than useless to all concerned in the suit.

Now the main question between the parties, and which has formed the principal subject of argument before us, is this, Whether parol evidence is admissible to show the testator's intention that his real estates in the county of Clare should pass by his will? There is a subordinate question as to the due execution of one sheet of the will, to which we shall afterwards advert, and upon which question an issue of a different and more limited form than that which has been at present directed, may perhaps properly be granted, if the plaintiff thinks fit to insist upon it; but the great contention *between the parties is upon the question above proposed, as to the admissibility of parol evidence with

respect to the estates in Clare.

This question arises upon facts, either admitted or proved in the cause, which

are few and simple.

The testator by his will, duly executed, devised "all his freehold and real estates whatsoever, situate in the county of Limerick, and in the city of Limerick," to certain trustees therein named and their heirs. At the time of making his will he had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick, and considerable real estates situate in the county of Clare.

The real estate in the city of Limerick is admitted to have passed under the devise; but the plaintiff contends that he is at liberty to show by parol evidence that the testator intended his estates in Clare also to pass under the same devise.

The general character of the parol evidence which the plaintiff contends he is at liberty to produce, in order to establish such intention in the devisor, is this;

ject strictly relating to proceedings at common law, and the case, which is fully stated above by the Lord Chief Justice, is of the highest importance, it has been thought advisable to give it a place in these reports.

first, that the estate in the city of Limerick is so small, and so disproportioned to the nature of the charges laid upon it, and the trusts which are declared, as to make it manifest there must have been some mistake; and in order to show what that mistake was, the plaintiff proposes to prove that in the copy of the will which had been submitted to the testator for his inspection, and had been approved and returned by him, the devise in question stood thus: "All my freehold and real estate whatsoever situate in the counties of Clare, Limerick, and in the city of Limerick;" that the testator directed some alterations to be made in other parts of his will, and that the same copy of the will, accompanied with a statement of the proposed alterations, was sent by the testator's attorney to his conveyancer, in order that such *alterations might be reduced into proper form; and that upon such occasion the conveyancer, besides making the alterations directed, did by mistake, and without any authority, strike out the words "counties of Clare," and substitute the words "county of" in lieu thereof, so as to leave the devise in question in the same precise form as it now stands in the executed will. The plaintiff further proposes to prove, that a fair copy of the will so altered was sent to the testator, who, after having kept it by him for some time, executed the same in the manner required by law, without adverting to the alteration above pointed out. Indeed, without entering more minutely into the detail of the evidence, it may be taken, for the purpose of the argument, that if parol evidence was admissible by law, the evidence tendered in this case would be sufficient to establish, beyond contradiction, the intention of the testator to have been to include his estates in Clare in the devise to the trustees. Upon the fullest consideration, however, it appears to the Lord Chief Baron and myself, that admitting it may be shown from the description of the property in the city of Limerick, that some mistake may have arisen, yet, still, as the devise in question has a certain operation and effect, namely, the effect of passing the estate in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare cannot be collected from the will itself, nor without ultering or adding to the words used in the will, such intention cannot be supplied by the evidence proposed to be given.

It may be admitted, that in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence, upon the same subject, calculated to explain *what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim "Ambiguitas verborum latens, verifications sup-

pletur."

But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found, that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale: or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively parol evidence is admissible to show which manor was intended to pass, and which son was intended to take. (Bac. Max. 23. Hob. Rep. 32. Edward Altham's case, 8 Rep. 155.) The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part but not true in every particular. As where an estate is devised called A., and is described as in the occupation of B., and it is found, that though there is an estate called A., yet the whole is not in B.'s occupation; or where an estate is devised to a person whose surname or Christian name is

mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient *indication of intention appearing on the face of the will to justify the application of the evidence.

But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed, any description whatever of the estates in Clare. The present case is rather one in which the plaintiff does not endeavour to apply the description contained in the will to the estates in Clare, but in order to make out such intention is compelled to introduce new words and a new description into the

body of the will itself.

The testator devises all his estates in the county of Limerick and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found, upon inquiry, that he has property in the city of Limerick which answers to the description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, no difficulty in the application of the words of his will to the state of the property as it really exists. The natural and necessary construction of the will is, that it passes the estate which he has in the city of Limerick, but passes no estate in the county of Limerick, where the testator had no estate to answer that description.

The plaintiff, however, contends, that he has a right to prove, that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in the place of or in addi-

tion to that of Limerick.

But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not *apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect, as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.

Now, the first objection to the introduction of such evidence is, that it is inconsistent with the rule, which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words

which he has not used cannot be added. Denn v. Page, 3 T. R. 87.

But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator, and, therefore, open for his inspection, which copy was afterwards executed by him with all the formalities required by the statute of frauds, the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subjectmatter of devise, why not also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to introduce new matter of devise, or a new devisee, why *not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would real y be the attorney after his death; that all the guards intended to be introduced by the statute of frauds would be entirely destroyed, and the statute itself virtually

repealed.

And upon examination of the decided cases on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to,—that an uncertainty, which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself.

Thus, in the case of Lowe v. Lord Huntingtower, 4 Russ. Rep. 581, m., in which it was held that evidence of collateral circumstances was admissible, as of the ages of the several devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will; such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of his property and family; the evidence is produced to prove facts, which, according to the language of Lord

Coke in 8 Rep. 155, "stand well with the words of the will."

The case of Standen v. Standen, 2 Ves. jun. 589, decides no more, than that a devise of all the residue of the testator's real *estate, where he has no real estate at all, but has a power of appointment over real estate, shall pass such estate over which he has the power, though the power is not referred to. But, this proceeds upon the principle that the will would be altogether inoperative, unless it is taken that, by the words used in the will, the testator meant to refer to the power of appointment.

The case of Mosley v. Massey and Others, 8 East, 149, does not appear to bear upon the question now under consideration. After the parol evidence had established that the local description of the two estates mentioned in the will had been transposed by mistake, the county of Radnor having been applied to the estate in Monmouth, and vice versa; the Court held that it was sufficiently to be collected, from the words of the will itself, which estate the testator meant to give to the one devisee, and which to the other, independent of their local description: all, therefore, that was done, was to reject the local description as unnecessary, and not to import any new description into the will.

In the case of Selwood v. Mildmay, 3 Ves. jun. 306, the testator devised to his wife part of his stock in the 4 per cent. annuities of the Bank of England; and it was shown by parol evidence, that at the time he made his will, he had no stock in the 4 per cent. annuities, but that he had had some, which he had sold out, and had invested the produce in long annuities. And in this case it was held, that the bequest was in substance a bequest of stock, using the words as a denomination, not as the identical corpus of the stock; and as none could be found to answer the description but the long annuities, it was held that such

stock should pass rather than the will be altogether inoperative.

This case is certainly a very strong one; but the *decision appears to us to range itself under the head, that "falsa demonstratio non nocet," where enough appears upon the will itself to show the intention after the false description is rejected.

The case of Goodtitle v. Southern, 1 M. & S. 299, falls more closely within the principle last referred to. A devise "of all that my farm called Trogues Farm, now in the occupation of A. C." Upon looking out for the farm devised, it is found that part of the lands which constituted Trogues Farm are in the occupation of another person. It was held, that the thing devised was sufficiently ascertained by the devise of "Trogues Farm," and that the inaccurate

part of the devise might be rejected as surplusage.

The case of Day v. Trigg, 1 P. Wms. 286, ranges itself precisely in the same class. A devise of all "the testator's freehold houses in Aldersgate-street,"

when in fact he had no freehold, but had leasehold houses there. The devise was held in substance and effect to be a devise of his houses there; and that as there were no freehold houses there to satisfy the description, the word "free-

hold" should rather be rejected than the will be totally void.

But neither of these cases afford any authority in favour of the plaintiff; they decide only that where there is a sufficient description in the will to ascertain the thing devised, a part of the description which is inaccurate may be rejected, not that anything may be added to the will; thus following the rule laid down by Anderson, C. J., in Godb. Rep. 131:--" An averment to take away surplusage is good, but not to increase that which is defective in the will of the

On the contrary, the cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established, that where *254] a *complete blank is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the

Hunt v. Hort, 3 Bro. C. C. 311, and in many other cases. testator.

Now the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised, which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present

case, where there is a total omission of the estates in Clare.

In the case of Doe d. Oxenden v. Chichester, 4 Dow. P. C. 65, it was held by the House of Lords, in affirmance of the judgment below, that in the case of a devise of "my estate of Ashton," no parol evidence was admissible to show that the testator intended to pass not only his lands in Ashton, but in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate.

The Chief Justice of the Common Pleas, in giving the judgment of all the Judges, says, "If a testator should devise his lands, of or in Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of those counties." Lord Eldon, then Lord Chancellor, in page 90 of the Report, had stated in substance the same The case so put by Lord Eldon and the Chief Justice, is the very case now under discussion.

But the case of Newburgh v. Newburgh, decided in the House of Lords on the 16th of June, 1825, appears to be in point with the present. In that case the appellant contended, that the omission of the word "Gloucester," in the will of the late Lord Newburgh, proceeded upon a mere mistake, and was con*255] trary to the intention *of the testator, at the time of making his will,
and insisted that she mucht to be allowed to prove as well from the conand insisted that she ought to be allowed to prove, as well from the context of the will itself as from other extrinsic evidence, that the testator intended to devise to her an estate for life as well in the estates in Gloucester, which was not inserted in the will, as in the county of Sussex, which was mentioned therein.

The question, "whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word 'Gloucester' had been inserted in the will," was submitted to the Judges, and Lord Chief Justice Abbott declared it to be the unanimous opinion of those who had heard the argument, that it could not.

As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue, and that it would therefore be useless to grant the issue in the terms directed by the Vice-Chancellor.

Upon the second point that has been made, namely, whether the sheet of the will numbered 20 forms any part of the will,—although we cannot but form a strong opinion from the evidence in the cause as to the result of such an issue, still as it is a question merely of fact, and one upon which by possibility further evidence might be produced, we think an issue might properly be allowed,

directed and limited to the precise investigation of that single fact.

Some arguments were offered by the plaintiff's counsel upon the construction of the will from the context of the whole instrument; and it was contended, that without the introduction of any extrinsic evidence, the estates in Clare would pass under the will; but as the state of *the cause at the time of the hearing did not admit of such discussion, and as the counsel for the defendants disclaimed entering upon it at present, we have, in fact, not heard the parties on that point, and we therefore think it right to forbear offering any opinion thereon.

The Lord Chancellor expressed his concurrence in the opinion delivered as above, and after adverting to some of the cases cited, said,—The result will be, that the issue cannot be granted as ordered by his Honour the Vice-Chancellor; but upon the other point, whether the sheet marked No. 20 formed a part of the will at the time of the execution, the parties, if they think it worth their

while, may have an issue.

Whether the whole instrument taken together, and without going out of it, was sufficient to pass the estates in Clare, is a point which has not been argued here, and on which we give no opinion.

Order of the Vice-Chancellor reversed

BAYNON v. BATLEY. Jan. 25.

Adultery of the wife after separation, no plea to a covenant to pay a trustee a separate maintenance for the wife.

A declaration alleging, that by indenture purporting to be made between plaintif and defendant, it was softnessed that defendant covenanted, Held, after plea, sufficiently certain.

THE declaration stated that on the 30th of January, 1826, at London, by a certain indenture then and there purporting to be made between the defendant, of the first part, Awdry Ann Batley, wife of the defendant, of the second part, the plaintiff, of the third part, and one William Batley and Henry Batley of the fourth part, one part of which indenture, sealed with the seal of the defendant, the plaintiff there brought *into Court, the date whereof was a certain day and year therein in that behalf mentioned, to wit, the same day and year aforesaid,—After reciting a disagreement between defendant and his wife, and an agreement by him to make her a separate allowance by an annul payment of 2401. to the plaintiff as her trustee, the plaintiff undertaking w indemnify defendant against half his wife's debts,—it was witnessed that, in pursuance of the said recited agreement, and in order in part to effectuate the same, and make such provision for the said Awdry Ann Batley as thereinafter expressed, and in consideration of the sum of 10s. of lawful money of Great Britain, by the plaintiff to the defendant in hand paid, at or before the execution of the indenture, the receipt whereof was by the said indenture acknowledged, the defendant did, for himself, his heirs, executors, and administrators, amongst other things covenant, promise, and agree, to and with the plaintiff, his executors, administrators, and assigns, in the manner following, that is to say, that he, the defendant, should and would well and truly pay, or cause to be paid to the plaintiff, his executors, administrators, and assigns, the said annuity or clear yearly sum of 240l., for and during the term of the natural life of the defendant, in case the said Awdry Ann Batley should so long live. Averment of the separation of the wife, and that she was still living. Breach, non-pay-Pleas, first, non est factum; secondly, that after the execution of the indenture, and before the sum claimed became payable, the said Awdry Ann Batley, wife of the defendant, had committed adultery with one Alfred Talbois. Demurrer and joinder.

Spankie, Serjt., was to have argued in support of the demurrer. But the

Court called on

*258] *Taddy, Serjt., to support the plea, asking him if he could distinguish the case from Jee v. Thurlow, 2 B. & C. 547. Taddy admitted that he could not, and abandoned the plea, but objected that the declaration was ill, for instead of alleging positively that the defendant by indenture did covenant, it only alleged that by indenture, purporting to be made between the plaintiff, defendant, and others, it was witnessed that the defendant did covenant; leaving the covenant, therefore, a matter of inference rather than of positive allegation.

Spankie. The objection lies only on special demurrer. It is cured by plead-

ing over. Com. Dig. Pleader, C. 65. Dyer, 15 a.

The Court thought there was nothing in the objection, observing that the plaintiff had made profert of the indenture, and the defendant had recognised it by pleading the adultery "after the making of the said indenture."

Judgment for the plaintiff.

GARRARD v. WOOLNER and Another. Jan. 28.

The plaintiff and other creditors of the defendants signed resolutions for entering into a composition deed with the defendants, upon their property being assigned to trustees for the payment of the creditors.

The defendants and their trustees having refused to allow the plaintiff to come in as a creditor

under the deed, Held,
That he might sue defendants notwithstanding the execution of the resolutions.

THE plaintiff sued on two bills of exchange for 500l. each drawn by George Loft, the 24th of October and 27th of November, 1828, on the defendants, *by them accepted, payable four months after date, and by Loft endorsed to the plaintiff.

At the trial before Tindal, C. J., London sittings after Michaelmas term, the grounds of defence were two: 1st, Usury between the plaintiff and Loft, which was not established to the satisfaction of the jury; and, 2dly, That the plaintiff, in conjunction with other creditors of the defendants, had, before the action, been a party to certain resolutions for the assignment of the defendants' estate in trust for the payment of his creditors. As to which, the facts were as follows:—

The defendants stopped payment shortly before their acceptances became due, and at their request the plaintiff, on the 9th of March, 1829, attended a meeting of the defendants' creditors at the office of Mr. Parnther the defendants' attorney, when it was resolved that their property should be assigned to trustees, and be by them disposed of in the same way as if a commission of bankrupt had then issued against them, and that the creditors should execute a composition-deed. The plaintiff was put down as a creditor for 1000l., and some days afterwards signed the resolutions which had been come to as above, and had been executed by many other creditors. They were signed by two more creditors after the plaintiff. But not by the defendants.

On the 19th of May the defendants requested the plaintiff to sign their composition-deed, and stated that, upon doing so, he would receive a dividend of 5s.

in the nound.

The trustees under the deed, however, refused to allow a dividend to the plaintiff on a greater sum than 782*l*., alleging that the plaintiff had received from Loft 218*l*., on account of the bills of exchange, before the 9th of March, the day when the plaintiff proved his debt against the defendants upon the creditors coming to resolutions as above.

*The plaintiff asserting that he had not received the 218l., till after the 9th of March, in which case he was by law entitled to a dividend on the full 1000l., refused to accept a dividend on less, or to sign the composition-deed, unless on those terms.

On the 11th of August, 1829, he wrote to require dividends on the whole, and to threaten an action against the defendants, when their attorney, Mr. Para-

ther, answered him on the 12th as follows:-

"In answer to your letter of yesterday, asking whether you are to be paid dividends on the 1000l., and stating, that if not, you will take out a writ against the Messrs. Woolner without delay, I am compelled to say that you never can be admitted a creditor for a sum not due to you; you must deduct from the 1000l., the 218l. received by you in part payment prior to their failure."

Matters were in this state when Loft became a bankrupt, and upon his examination, made statements which induced the defendants' trustees to believe that the bills accepted by the defendants had been drawn by Loft in pursuance of an

usurious contract between him and the plaintiff.

In consequence of this, their attorney, Mr. Parnther, on the 27th of Febru-

ary, 1830, addressed the following letter to the plaintiff's attorneys:-

"Messrs. Woolner's trustees are of opinion that, after the evidence given by Mr. Loft before the commissioners at their last meeting, they would not be justified in allowing Mr. Garrard to rank as a creditor. If you should be desired by Mr. Garrard to proceed against Messrs. Woolner, I will thank you to send the writ to me."

Upon which the plaintiff commenced this action.

The defendants' composition deed, by which they covenanted to carry on their business for the benefit of their creditors, and which contained a clause rendering it void *if not signed before a given time by all creditors within 300l. of the total amount of the debts due, was never signed by the plaintiff or the defendants.

A verdict was found for the plaintiff, with leave for the defendants to move to set it aside, on the ground that the plaintiff, by having signed the resolutions of March 9, 1829, was estopped to bring this action.

Taddy, Serjt., having obtained a rule nisi accordingly,

Wilde, Serjt., who showed cause, contended, that the plaintiff having been rejected as a creditor by the defendants and their trustees, was released from the operation of the resolutions of March 9, 1829. The defendants could not in the same breath deny him to be a creditor, and yet seek to bind him by resolutions which applied to none but creditors. In all the cases in which a creditor has been held bound by a composition deed or agreement, something has been done under the instrument for the benefit of the creditor; Tatlock v. Smith, 6 Bingh 339. Here it is proposed to bind the plaintiff without any consideration at all the is remitted to his rights by the defendants having departed from the contract. Cranley v. Hillarey, 2 M. & S. 120. Boothbey v. Sowden, 3 Campb. 175. Ex parte Vere, 1 Rose, 281. M'Kenzie v. M'Kenzie, 16 Ves. 372. The Court here interposed, and called on

Taddy. It is not contended that the plaintiff's claim is discharged by his being a party to the resolutions of March 1829; but inasmuch as he has thereby induced other creditors to acquiesce in a composition, and has been the occasion of their losing their immediate and separate remedy against the defendants, his right to sue *is suspended till the trusts of the composition deed have been executed. This was the principle on which Tatlock v. Smith was decided. There, by an agreement between the defendants and their creditors, all the defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and the defendants were to execute to trustees a conveyance of all their estate, in which deed were to be inserted all other usual clauses. The trustees carried on defendants' business, and paid the creditors 10s. in the pound; they then tendered for execution by the defendants a conveyance of all their estate, containing a clause of release, which the defendants objected to as insufficestate, containing a clause of release, which the defendants objected to as insufficestate.

cient, and refused to execute the conveyance. The instrument not having been executed by all the creditors, a meeting, at which the defendants were called on to execute, was adjourned, that the signature of every creditor might be obtained. It was held, that the plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least, till the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants.

There, as in the present case, the deed was to be void if not signed by all the creditors; and yet it was held, that the plaintiff's right of action was suspended, though not extinguished. And Boothbey v. Sowden is an authority that the signature by other creditors is sufficient consideration for such an agreement.

In Cork v. Saunders, 1 B. & A. 46, a trader, being insolvent, by agreement stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the next Michaelmas, and that then the property should be divided amongst them: the insolvent assigned his effects: at the next *Michaelmas several of the creditors who had signed that instrument, agreed that the business should be carried on by the trustees for a further time: and it was held, that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agree-Lord Ellenborough said, "The plaintiff, by the terms of the agreement, consents that the property of the defendant shall be assigned, and be in the management, exclusively, of the defendant, under the directions of the trustees, until Michaelmas. How can the plaintiff, then, replace the other creditors in the same situation? I should have been inclined to remit him to his original rights, if all the other parties could have been placed in their original situation, but that is impossible. This is an anomalous case, in which the plaintiff cannot stand in his former situation; nor can I say at present that the whole shall be Bayley, J., said, "By the terms of the agreement, it is stipulated that the farming concerns shall be carried on until Michaelmas, for the benefit of the creditors who might concur; and it contains a further stipulation, that the debtor shall assign all his estate immediately; the consequence of which would be that he would thereby divest himself of all means of payment. It is true, that the defendant remains in possession; but as servant only, to the trustees; he has not a single article of property which he can appropriate to the payment of his debts. The plaintiff confides in the trustees, that they will perform the duties reposed in them; this they neglect to do, and they postpone the period at which they ought to sell. The non-division, however, of the property cannot, under the circumstances, remit the creditor to his original rights. The parties not having provided for that event by the terms of the agreement, it appears to me that their only *remedy is in equity." And Abbott, J., added, "It is said, as the trustees did not sell at Michaelmas, the plaintiff may now sue; but how can the debtor get back his effects? We think, therefore, that the circumstance of the plaintiff's not having concurred in postponing the sale does not remit him to his original right of action."

Here, the creditors cannot be replaced in their original situation, and the plaintiff, by executing the resolutions, having contributed to place them in their present position, cannot now recede from his contract, though it may turn out that he need not have signed it, and is precluded from resorting to the common fund. He must wait till the engagements contracted by the resolutions have

been discharged.

TINDAL, C. J. The signature of the resolutions, and the circumstances which followed, do not amount to a bar of the plaintiff's claim in this action. The defendants contend, that a party who concurs in resolutions for a distribution of the property of his debtor brings himself within the operation of a subsequent deed by which the debtor's property is assigned for the benefit of the creditors at large, and that his separate right is thereby suspended till the creditors are satisfied, or, at least, placed in the situation in which they originally stood. As a general proposition this is true, but it is not true where the party,

by the act of the debtor, is prevented from taking the benefit of the deed. See how the matter stands in this case. The plaintiff, a creditor of the defendants, enters, with other creditors, into general resolutions as to the disposition of the debtor's property. Some time afterwards the amount of the plaintiff's claim is contested, and ultimately the defendants and the trustees under the deed of assignment determine that the plaintiff shall not stand in the character of a *creditor at all; thereby denying him every right with a view to which he signed the preliminary resolutions. He may, therefore, contend that as far as he is concerned, the resolutions have never been carried into effect at I agree that the other creditors are estopped to raise a similar objection, for they have had the benefit of a dividend under the deed: but how can it operate as an estoppel to the plaintiff, who, by the trustees themselves, has been prevented from deriving any benefit under it? Besides this, the plaintiff has been put out of the resolutions by an original act of the defendants and the trustees; for by a letter written on the 27th of February, he is expressly told that "Messrs. Woolner's trustees are of opinion that, after the evidence given by Mr. Loft before the commissioners at their last meeting, they would not be justified in allowing Mr. Garrard to rank as a creditor." What is that but a consent on their part that he shall be discharged from any participation in the general resolutions? Although it is a fraud on the other creditors, if a party who has concurred in recommending a distribution of the debtor's property refuses to come in on the same terms with the rest, it can be no fraud where he is prevented from deriving any advantage from the general distribution. The in Boothbey v. Sowden, Lord Ellenborough says, "If the plaintiffs could show that the defendant had refused to give them the notes according to the terms of the agreement, they might be remitted to their original remedy; but I think that remedy is suspended by the agreement, unless an infraction of the agreement on the part of the defendant is proved by the plaintiffs." Here there has been as infraction of the terms of the agreement by the refusal to permit the plaintif to proceed under it. The rule, therefore, which has been obtained for a new train must be discharged.

PARK, J. I am of the same opinion. The whole turns on this: have the defendants kept to their own agreement? They refuse to let the plaintiff prove under the deed of assignment, and yet they say his right to sue them is suspended. The letter referred to by the Chief Justice settles the whole, for the plaintiff is there told that "Messrs. Woolner's trustees are of opinion that, after the evidence given by Mr. Loft before the commissioners at their last meeting they would not be justified in allowing Mr. Garrard to rank as a creditor." The cases of Boothbey v. Sowden and Cranley v. Hillarey go the whole length of the present. In Boothbey v. Sowden Lord Ellenborough said, "If the plaintiffe could show that the defendants had refused to give them the notes according to the terms of the agreement, they might be remitted to their original remedy. But I think that remedy is suspended by the agreement, unless an infraction of the agreement on the part of the defendants is proved by the plaintiffs." Here the defendants have neither signed the deed nor allowed the plaintiff to come in under it. Mr. Topping contended, in Cranley v. Hillarey, that "no infraction was proved; on the contrary, it appeared that the notes were ready for the plaintiff, who might have received them upon applying for them; but he never did make application." But Lord Ellenborough said, "The rule is, that the person to be discharged is bound to do the act which is to discharge him, and not the other party. If the defendant had offered the notes at the time of action brought, it might have been a ground for staying the proceedings." And Dampier, J., said, "It is laid down by Littleton (s. 340), that the obligor of a bond conditioned for the payment of money at a particular day, is bound to seek the obligee, if he be in England, and at the set day to tender him the money, otherwise, he shall forfeit the bond. So in this case, the defendant was to give the notes, and, *therefore, to go with them to the plaintiff, and he was not to go to the defendant." In Cork v. Saunders the defendant had signed the deed,

and the plaintiff having concurred in it, the Court would not remit him to his

right

Bosanquet, J. I am of the same opinion. It is admitted that the plaintiff's debt is not extinguished, but it is contended that it has been suspended. How? Supposing any contract to that effect could be implied between the plaintiff and the defendants, the plaintiff has been denied the benefit of the agreement, for by Parnther's letter he is told, that "Messrs. Woolner's trustees are of opinion that, after the evidence given by Mr. Loft before the commissioners at their last meeting, they would not be justified in allowing Mr. Garrard to rank as a creditor." Upon this, it must be taken that his concurrence in the resolutions was repudiated; and having consented to such repudiation, he is entitled to proceed as if no agreement had subsisted between him and the defendants.

ALDERSON, J. If the defendants had in all things conformed to the resolutions, the plaintiff's right to sue might perhaps have been suspended; but they cannot exclude the plaintiff from claiming under the deed, and at the same time

Rule discharged.

suspend his right to sue.

*268] *BARTHROP and Others, Assignees of YATES, a Bankrupt, v. ANDERTON. Jan. 31.

Where in an action by the assignees of a bankrupt the bankruptcy is disputed, but the cause is referred to arbitration, the Judge before whom the cause is opened cannot certify under 6 G. 4, c. 16, s. 90, for the costs of proving the bankruptcy, although upon referring, the defendant agrees to admit the validity of the commission.

In this cause the defendant's attorney had given notice to dispute the trading of Yates, the commission, the petitioning creditor's debt, and the act of bank-

ruptcy.

At the last York assizes, the cause was referred to arbitration by an order of Nisi Prius, containing the following clause: "And it is agreed between the parties that the bankruptcy of W. Yates shall be admitted, and the arbitrator shall state upon his award any point of law that he shall think fit for the con-

sideration of the Court, or that either of the parties shall require."

Parke, J., before whom the cause was to have been tried, having certified for costs for the plaintiff under 6 G. 4, c. 16, s. 90, which enacts, "that in any action by or against any assignee, or in any action against any commissioner, or person acting under the warrant of the commissioners, for anything done as such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the trading, or act or acts of bank-ruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, given notice in writing to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignee, commissioner, or other person shall prove the matter so disputed, or the other party admit the same, the Judge, before whom the cause shall be tried, may, if he thinks fit, grant a certificate of such proof or admission; and *2691 to be taxed by the proper officer, occasioned by such notice;"

Wilde, Serjt., obtained a rule nisi to set aside this certificate, on the ground that as the Judge had not tried the cause, the statute did not authorize him to give the certificate. The attorney for the defendant deposed, that when the plaintiffs' counsel had opened the cause, the defendant's counsel proposed a reference on the usual terms, of all matters in difference, including the validity of the commission of bankrupt, trading, the petitioning creditor's debt, and act of bankruptcy; that the plaintiffs' counsel agreed to this, if the defendant would admit the bankruptcy before the arbitrator; which being assented to, the refer-

ence was proceeded with.

Jones, Serjt., showed cause upon an affidavit which stated, that upon the opening of the cause the defendant's counsel admitted the validity of the commission, upon which the plaintiffs agreed to a reference. He therefore contended, that the admission having been made in the presence of the Judge, the Judge had authority to grant the certificate: it was not necessary that he should try the cause through. The statute was remedial, and it was sufficient for the purpose of the certificate that the Judge should be satisfied by proof or admission that the commission of bankrupt was valid, whatever might be the result of the other points in issue in the cause.

TINDAL, C. J. This question depends on the construction of the ninetieth section of the statute of 6 G. 4, c. 16, by which it is enacted, that where notice has been given to dispute a commission of bankruptcy, if the "assignee, commissioner, or other person shall prove *the matter so disputed, or the think fit, grant a certificate of such proof or admission, and such assignee, commissioner, or other person, shall be entitled to the costs."

Words cannot show more distinctly, that a discretionary power is vested in the Judge. But, unless he tries the whole cause, he cannot exercise that discretion properly. It has been argued, that in respect of the costs incurred for proving the commission, it is sufficient that the commission has been admitted. But many cases may be conceived in which it would not be proper to give those costs, although the commission may have been admitted: as where a defendant may have been deceived as to the act of bankruptcy, and upon discovering his error in court, at once makes the due admission. The discretion, therefore, vested in the Judge, by the words "may if he think fit," cannot safely be exercised unless he try the cause. He has the same discretion with respect to the costs of a special jury, for which it has never been the practice to certify when the cause is referred.

PARK, J. The act says, the certificate may be granted by the Judge before whom the cause shall be tried, if he think fit. The clause is cautiously worded to enable the Judge to decline, if he think fit, even when the cause has actually been tried; but it is impossible to say that this cause was tried before the Judge.

Bosanquet, J. It is clear that this certificate was not given by a judge before whom the cause was tried. The statute intended that he should have a discretion which he cannot properly exercise unless he tries. Nor can it be said that the admission here was made on the *trial of a cause. A party may often admit, with a view to a reference, a fact which it might be expe-

dient to dispute if he proceeded to trial.

ALDERSON, J. The moment it is established that the Judge must exercise a discretion, there is an end of this question; for he cannot exercise his discretion without trying the cause: and as to admissions, they are often made for the purpose of argument. In this case, it might well happen that the defendant admitted the bankruptcy, because he had a good defence on the contract, and therefore abstained from troubling the plaintiff to prove the bankruptcy.

Rule absolute.

LEWIS v. KNIGHT. Jan. 31.

An undertaking for a bail-bond given to the sheriff by the defendant's attorney, being a mere nullity, an application by defendant to set it aside and enter a common appearance, was discharged with costs, though defendant was a feme covert.

MEREWETHER, Serjt., on the part of the defendant, a feme covert, had obtained a rule to cancel an undertaking for a bail-bond given by her attorney to

the sheriff; and to stay all proceedings on the defendant's filing a common

appearance, the plaintiff having been aware of her coverture.

Wilde, Serjt., who showed cause, admitted the plaintiff's knowledge of the coverture, but alleged that the defendant had been divorced à mensa et thorô for adultery, and contended that the undertaking being a nullity,—Fuller v. Prest, 7 T. R. 109, Sedgworth v. Spicer, 4 East, 568,—this application must be discharged with costs.

*Merewether. The object of the application is the stay of proceedings, *272] actual and possible, against the defendant on her entering a common

appearance; a protection to which her coverture fully entitles her.

Sed per Curiam. The defendant is not in custody. The undertaking is a mere nullity, and the application must be Discharged with costs.

HOWELL v. POWLETT. Jan. 31.

When the plaintiff gives notice of trial a term earlier than the rules of court require, if he omits to try pursuant to his notice, the defendant may move for judgment as in case of a nonsuit, the next term.

ISSUE was joined in the above cause last term, but so late in the term that the plaintiff was not obliged, according to the practice of the Court, to give notice of trial.

The plaintiff, however, having given notice of trial, and having omitted to proceed to trial pursuant to notice,

Andrews, Serjt., obtained a rule nisi for judgment as in case of a nonsuit,

which

Wilde, Serjt., opposed, on the ground that, according to the statute (14 G. 2, c. 17, s. 1), judgment as in case of a nonsuit can only be given where, after issue joined, the plaintiff neglects "to bring such issue to trial according to the course and practice of the Court." Here issue was joined in Michaelmas term too late for the plaintiff to give notice of trial according to the practice of the Court; he could not have obtained judgment of that term; and the notice actually given being a mere irregularity, the defendant could not move for judg-*273] ment *as in case of a nonsuit till Easter term. Dacosta v. Ledstone, 2 H. Bl. 558, and 2 Archbd. C. P. 151, shows that judgment as in case of a nonsuit can only be moved for in the term next after issue joined, when there is time for a trial in the term in which issue is joined.

TINDAL, C. J. The general understanding has been, that whenever a party has given notice of trial, he is bound to proceed pursuant to his notice, and that if he fails to do so the defendant is entitled to move for judgment as in case of a If the plaintiff has chosen here to expedite the proceedings a step, he

cannot afterwards recede, and the defendant is entitled to his rule.

PARK, J., concurred.

Bosanquer, J. The plaintiff is allowed till a certain time before he can be called on to give notice of trial; but if he chooses to give notice before that time, and fails to observe that notice, he is guilty of a default, and must take the consequence.

ALDERSON, J. The statute contemplates a default wherever notice of trial has been given and not observed. The "course and practice of the Court" applies to the period at which the plaintiff can go to trial, and he can go to trial after issue joined and notice given, although he might not have been compellable to give notice at the period in question.

Wilde now consented to give a peremptory undertaking, and upon that, the rule was Discharged.

*ABRAHAM v. NEWTON. Jan. 31.

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Queere, Whether pregnancy and imminent delivery be a cause for the examination of a witness by the prothonotary, under 1 W. 4, c. 22.
If so, it must be shown by affidavite of competent persons, that the delivery will probably happen about the time fixed for the trial of the cause.

WILDE, Serjt., had obtained a rule nisi for the examination of a female witness by the prothonotary, under 1 W. 4, c. 22, s. 1,(a) on an affidavit that she was pregnant, expected shortly to be delivered, and would be unable to attend the trial of the cause in the months of February and March. The affidavit, however, not disclosing the precise time at which she expected to be delivered,

Bompas, Serjt., who showed cause, objected to it as insufficient.

*The Court, without laying down any general rule, but expressing some doubt whether this was a case contemplated by the late act, thought that at all events the affidavit was insufficient. It ought to have been deposed by competent persons, that there was a fair ground for believing that the delivery would take place before the time of trial, or so near as to render the attendance of the witness perilous.

Rule discharged.

(a) By which, after reciting the powers given by 13 G. 3, c. 63, for the examination of witnesses in India, it is enacted, "That all and every the powers, authorities, provisions, and matters contained in the said recited act, relating to the examination of witnesses in India, shall be, and the same are hereby extended to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the Judges in the several courts therein, and to all actions depending in any of his Majesty's courts of law at Westminster, in what place or county soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the Judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ of commission issued in pursuance of the authority hereby given, will be necessary or conductive to the administration of justice in the matter wherein such writ shall be applied for." And by the tenth section it is enacted, "That no examination or deposition to be taken by virtue of this act, shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the Judge that the examination or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness, or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the court, or dead, or unable from permanent sickness, or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the court, or dead, or unable from permanent sickness, or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the court, or dead, or unable from permanent sickness, or other permanent infirmity to attend th

The Mayor and Burgesses of TRURO v. REYNALDS. Jan. 23. Same v. BASTIAN.

The corporation of T. having proved a prescriptive right to tolls, Held, that it was not destroyed by a charter of Elizabeth, granting and confirming, among other things, all the ancient rights of the corporation, but exempting the inhabitants from toll in all places except London: Held, that this exemption applied to the tolls of all other places (except London), but not to the tolls of T.

DEBT for tolls due, and of right payable to plaintiff for and in respect of goods landed by defendant from ships upon plaintiffs' quay:—in respect of goods landed by defendant from certain ships:—and in respect of goods of defendant imported into and exported from and out of a certain port or harbour:—for tolls generally; and for cranage and wharfage.

Plea, nil debet.

At the trial before Alderson, J., last Bodmin assizes, the plaintiffs produced

the following charter of the date of Stephen or Henry H.:-

"Reginald Fitzroy, Earl of Cornwall:—To all the barons of Cornwall, and all knights and all free tenants, and all men, as well English as Cornish, greeting.

Know ye, that I have granted to my free burgesses of Triverieu all free

*276] *and municipal customs, and the same in all things which they had in the time of Richard de Lacy, to wit, sac and soc and thol and theam and infangenethef. And I have granted to them that they do not plead in hundred courts nor county courts, nor for any summons go to plead elsewhere without the town of Triverieu; and that they be quit of giving toll throughout all Cornwall in fairs and markets, and wheresoever they buy and sell. And that of their money lent and not restored they take distress in their town of their debtors."

Ancient books of the corporation were then produced, showing various demises of the quay dues by the corporation from 1637 to 1692 (in 1672 they were described as ancient dues), and from 1703 to 1713;—lists of buildings for the same dues;—surveys at various intervals from 1730 to 1800;—payment of poor-rate in respect of the dues in 1702 and 1703;—and receipts given by various collectors for dues at various times anterior to living memory.

Numerous witnesses proved the actual receipt of the dues by the plaintiffs or their lessees from various inhabitants of the borough of Truro as well as strangers, from the year 1790 to the present time, and various acts of ownership on the quay. About four-fifths of the entire dues were received from inhabitants.

The sums sought to be recovered of the defendants were 1d. for every sack

of flour landed at the quay.

The defendants, as inhabitants of the borough of Truro, claimed exemption from these dues under a charter of 31 Eliz., which,—after reciting that the borough of Truro was an ancient borough; that the port of Falmouth was in decay and wanted speedy repair, because from the constant employment of the tinners there a great quantity of rubbish had accumulated in the port, to the great injury of the port; that the borough of Truro was so injured thereby, that whereas formerly *ships of 100 tons used to come laden into the port, now scarcely ships of thirty tons could enter; that the inhabitants of Truro had endeavoured by all means to preserve the port, as well as by constant cleansing and repairs, in order that ships coming thither might pursue their ancient course (ad Clavem, Anglice) to the keye; and that the inhabitants of the said borough enjoyed many franchises, liberties, privileges, customs, usages, and immunities, as well by prescription as by divers charters, grants, and confirmations, as well of Reginald, formerly Earl of Cornwall, as of divers kings of England;—granted to the inhabitants to be incorporated by the name of the "Mayor and Burgesses of the Borough of Truro," and that they by the name of the mayor and burgesses, &c., might and should be for ever capable by law to have, &c., lands, tenements, liberties, privileges, jurisdictions, franchises, &c., to them and their successors in fee; and also goods, &c., and that they and their successors by the mayor and council, &c., should make by-laws, &c. It then granted and confirmed to the said mayor and burgesses, and their successors, all messuages, lands, tenements, customs, privileges, immunities, advantages, &c., within the said borough, which the said mayor and burgesses, or the inhabitants, by whatever names or name corporate or incorporate, by reason or colour of any prescription, &c., for fifty years past had held: and that the burgesses and inhabitants of the said borough, and their successors from thenceforth for ever, should and might be free of tollment, passage, pontage, murage, pannage, penage, anchorage, coynage, wharfage, cranage, keyage, stallage, lastage, feltage, and tollage, stonegeld, and scot of all their own proper things, goods, and merchandises throughout the whole kingdom of England, except the city of London, and the suburbs and limits thereof. And that they might have fairs and markets within the borough, to be held and kept in pontage, *keyage, porterage. weighage, lastage, anchorage, and culage, &c.

There was evidence also by which it appeared that the inhabitants had been excused from paying anchorage for empty vessels, and exempted from serving on juries. But the tariff by which the inhabitants were excused from anchorage recited their liability to quayage, and it appeared that they paid anchorage for ships laden with coals.

In the second cause the defendants relied also on alleged variations in the amount of the tolls collected, particularly in the article of currants and molasses; but these variations consisted chiefly of clerical mistakes in the collector's accounts, and of an attempt made in 1815 by the collector and town steward, without the privity of the corporation, to assimilate the tariff of Truro to that of Falmouth and Penzance; which attempt was abandoned upon a remonstrance by the inhabitants of Truro. In a tariff fifty years old there were only four variations among 150 charges, and none of these variations affected the toll for flour.

It was objected also, on the part of the defendants, that the plaintiffs had not proved their title to sue as a corporate body by the style of the mayor and bur-

gesses of Truro.

The learned Judge overruled this objection, and left it to the jury to find whether the plaintiffs had shown a prescriptive right to the tolls in question, or whether the existence of the charter of Elizabeth, although the charter could not of itself abrogate any former grant or prescription, was incompatible with the presumption of such a prescription.

The jury having found for the plaintiffs,

Merewether, Serjt., in Michaelmas term, moved for a new trial, on the ground that the plaintiffs had given no evidence of their title to sue as the mayor and *burgesses of Truro; that the defendants were exempted from toll by the charter of Elizabeth, the acceptance of which implied a surrender of all former charters and rights, prescriptive or otherwise; and that the variations in the amount of the toll were fatal to the claim by prescription.

The Court thought the plaintiffs had adduced sufficient prima facie evidence of their right to sue in a corporate capacity, and therefore refused a rule on the

first ground, but granted it on the two others.

Wilde, Serjt., showed cause. The variations in the amount of toll have been satisfactorily explained at the trial, and are too recent to affect the validity of this prescription. The clause relied on by the defendants in the charter of Elizabeth, exempts the inhabitants of Truro from dues in other towns except London, but does not exempt them from dues necessary for the support of Truro, and received by the corporation long before the charter. The construction contended for by the defendants would render the grants to the corporation nugatory,—for four-fifths of the tolls are paid by inhabitants,—and leave the town without walls or bridges; for the same clause which exempts the inhabitants from tolls exempts them also from murage and pontage. The meaning of the clause, therefore, is clear; but if we were doubtful, the true exposition has been put upon it by contemporary and continued usage, which in cases of doubt has been holden to be the safest guide. Attorney-General v. Parker, 3 Atk. 577; Blankley v. Winstanley, 3 T. R. 279; Withnell v. Gartham, 6 T. R. 396; Chad v. Tilsed, 2 B. & B. 403; Lowden v. Hierons, 2 B. Moore, 102; Rex v. West Looe, 3 B. & C. 677; Rex v. Grout, 1 B. & Adol. 103; *Norton [*280] v. Hammond, 1 Young & Jar. 94; Corporation of Stamford v. Pawlett, 1 Cromp. & Jar. 57. Besides which, all claims of exemption are to be construed strictly. 2 Roll. Abr. 202, tit. Prerogative le Roy, Z.

Merewether. The construction contended for by the defendants will not render the grants to the corporation nugatory, for they may have other property wherewith to support the quay, walls, and bridges; or they may be entitled to levy these tolls of the inhabitants on fair and market days, to which the grant in the charter is confined, without having a right to levy them at all times. Warrington v. Mosley, 4 Mod. 319. But the charter of Elizabeth having specified London as the only place in which the inhabitants of Truro shall be liable to toll, has by that specification impliedly exempted them in all other places, including Truro itself. The language of the charter is unambiguous; the acceptance of it by the corporation is an implied surrender of all former corporate rights; and the grantees under that charter are estopped to claim upon any

previous right. The usage relied on is ambiguous, and altogether subsequent to the charter of Elizabeth.

TINDAL, C. J. There is no necessity, nor would there be any justice in sub

mitting this case to a second jury.

The question is, Whether the plaintiffs have established a prescriptive right to a toll of 1d. a sack for certain goods landed on the quay at Truro? The plaintiffs rest their claim on prescriptive usage. To see whether they have supported it, let us take, first, the evidence which is independent of the charter of Elizabeth. For the last forty or fifty years it appears that 1d. has been paid for every sack of flour landed on the quay by inhabitants of Truro as well as strangers.

*281] *Then, we have evidence of receipts of various sums by collectors, for quayage, long antecedent to the time of living witnesses. Further back we find various biddings for the ancient quay duties of Truro: and then leases of these duties from 1637 to the early part of the last century. Now if this had been the whole evidence adduced, who could doubt that it would sufficiently

establish a prescriptive usage?

If we were to hold otherwise, we should hold that the security of rights was

impaired instead of being confirmed by long-continued usage.

Then comes the charter of Elizabeth. It may be admitted that if there were an express renunciation on the face of the charter of all antecedent privileges, the parties must take the benefit of the charter with the disadvantage so attached to it: but neither by express renunciation nor by necessary implication can we collect from this charter that there was to be any alteration in the duties of the quay. Even if there were a doubt, the receipt of rent for the dues up to 1637 would remove it, for contemporary usage is of great weight in the exposition of such instruments; and no one can suppose that the lessees of those times would burthen themselves with the payment of a rent for tolls if the charter were adverse to the claim of the corporation. But looking to the charter itself, we see no reason for doubt. The charter begins by calling Truro an ancient borough: that, of itself, may imply a borough by prescription. It then goes on to confirm all advantages which the burgesses had had by reason of any prescription for fifty years last past; and then comes the clause relied on for the defendants,-"The burgesses and inhabitants of the said borough, and their successors from henceforth for ever hereafter, shall and may be free of tollnet, passage, pontage, *282] murage, pannage, penage, anchorage, coynage, wharfage, cranage, *keyage, stallage, lastage, feltage, and tollage, stonegeld, and scot of all their own proper things, goods, and merchandises, throughout our whole kingdom of England, except the city of London." It has been contended that this constitutes an exemption of the inhabitants from all duties within the borough.

The natural impression on first reading the passage is, that the sovereign who grants is about to grant the inhabitants an exemption from some duties to which they were liable antecedently to the charter. But upon looking at the words accurately, it is plain they cannot relate to duties within the borough of Truro. "Shall be free of tollnet, passage,"—that must mean passage over the lands of others, for it is not probable they should have paid toll for passing over their

own lands.

Take "pontage;" that is a duty levied for repairing bridges. It would be reasonable to exempt them from repairs of bridges at Exeter or Bristol; but if

they were not to repair at Truro, who should?

Take "murage;" that, it is well known, was a duty for the repairs of the town walls, and necessarily cast on the inhabitants; so that if they are exempted under this grant, it would follow that the Queen meant them to be without walls. If we find in the sentence, these words, which cannot apply to exemptions in the town of Truro, why are we to hold anchorage, wharfage, and quayage of that town?

Then follows, "and shall have fairs and markets within the borough, to be held and kept in pontage, quayage, weighage, lastage, &c.;" and it is contended

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that this implies a negative of a larger prescriptive right for all periods of the year. But if the general right be once established, the introduction of words merely affirmative will not rescind it. I have never *heard that if an existing right be shown, it can be taken away by mere words of addition. It is true one cannot always explain why such words have been added. It may be pro majori cautelâ; but they have no effect to cut down an antecedent right.

An argument has been raised on the word anchorage, and it is urged that it appears from a tariff of duties that anchorage has not always been taken from the inhabitants. But it appears the inhabitants do pay on all ships laden with coals; and the amount of the exemption is, that in some instances they do not

pay for empty vessels.

The utmost effect of this is, that as the grantees of duties may relinquish the demand where they find it burthensome, by common consent it seems to have

been agreed, that duties for empty vessels shall not be demanded.

This disposes of the first case. It would be of no use to send the cause down again if the second trial would be attended with no different result, particularly when it has been left to the jury to find, and they have found a prescription antecedent to the charter.

The second case is the same, with the exception that a variance was alleged in the toll for a cask of currants and a cask of molasses. But the question on that variance was left to the jury, whether it arose from mistake or accident, or they were satisfied it was such as defeated the prescriptive right. And as it was so left to them, it would be of no use to try the question a second time.

Park, J. I am of the same opinion, and never heard so clear a case. First, as to usage. We have it in a strong and uniform course from 1637 to 1829; and the earlier documents carry in themselves traces of usage long before. But if in modern times we find the usage *uniform for a considerable period, we are bound rather to support such usage than to defeat it upon any immaterial variance. And nothing can be more reasonable than this custom, that the corporation, which is at the expense of keeping up the quay and adjoining streets, should raise toll to defray the necessary expense.

It is said, indeed, that the corporation may possess other funds; but of that there is no evidence whatever. We are called, upon, however, to suppose that the charter of Elizabeth is the beginning of this custom to levy toll, and it is true, that there is no evidence of any payment before 1637. But the evidence is uniform to 1674; a document of 1672 speaks of the dues as "ancient dues;" it can scarcely be believed that the word ancient would be applied to a custom of less than forty years' standing; and the charter itself speaks of the ancient

course to the quay.

The exemption proved in respect of certain dues for anchorage has been sufficiently accounted for by the Chief Justice, and it may have originated in the circumstance, that the harbour at that place required no further repairs.

I agree in the correctness of the construction put by the Chief Justice on the general clause of exemption in the charter. It would be absurd to suppose the inhabitants exempted from duties which must have been granted to the corporation to enable them to keep up the necessary repairs of the town. They are exempted from the murage and pontage of other places, but must be liable to their own. The special exception of London from the general clause of exemption, arose either from the pre-eminence of the capital, or for the sake of greater caution; but it leads to no inference that the inhabitants were to be exempted from the necessary charges of their own town.

*Bosanquet, J. The rule must be discharged. Two matters have been proposed for our consideration; first, the existence of a prescriptive usage; secondly, the effect of the charter of Elizabeth. The first, a matter of fact; the second, a question of law for the Court. Now, upon the first it was left to the jury pointedly to say whether this usage existed before the date of the char-

ter. And on that subject the evidence is exceedingly strong.

It appears that these dues have been received for near 200 years; and in an

early part of that period they are described as ancient dues. The only question on a new trial would be, whether the jury were clearly wrong in their finding on this point. It seems to me they were clearly right.

In the second case, indeed, there appears a trifling variation in some of the payments; but the nature and cause of that variation was left to the jury, and

by them properly disposed of.

It appears that the dues in respect of anchorage were not levied on light vessels; but a consent that they should not be collected in such cases, rather con-

firms than impugns the general right to dues in the other cases.

Secondly, as to the construction of the charter of Elizabeth: If the exemption from quayage were unequivocal, and the corporation had accepted the charter subject to such exemption, they would, no doubt, be bound by it; but one question is, whether the language of the charter is so unequivocal, as to countervail the prescriptive usage found by the jury; for if it be only equivocal, it must be explained by the usage. Now, the construction contended for is most unreasonable, namely, that the corporation of Truro is to levy a duty on all the rest of the kingdom for the support of their quay, and not on the inhabitants of the The exemption, it will be observed, is in the nature of a grant. *The reasonable construction, therefore, is, that it means an exemption from duties elsewhere, which the sovereign might, without inconsistency, remit. It would be most unreasonable to suppose an exemption from the duties granted by a clause in the same charter containing no exception. Stress has been laid on the clause respecting duties in fairs and markets. I shall not repeat the observations of the Chief Justice; but if the right in question, as the jury have found, was vested in the corporation before the charter, the affirmative lauguage of the charter will not deprive them of the antecedent right.

ALDERSON, J. I concur in the decision which has been pronounced. I thought the case clear at the trial, and I have seen no reason to alter my opinion.

It was a question for the jury to say, whether the corporation had any prescriptive right to these dues. The evidence began with modern usage, and in the first cause it was proved that there had been no variations as far as human memory went. Then followed much documentary evidence, to show that the quayage had been let and taken from 1637 to the present time.

I left it to the jury to consider whether it was not reasonable to infer that the duty had been taken as far back as 1637; and whether from that circumstance they would not infer a legal origin of the custom. If such evidence be not sufficient to warrant such an inference, I do not know what title would stand the

test of a legal inquiry.

And the charter of Elizabeth does not in any way break in upon this title.

I shall not add to what has fallen from the Chief Justice on that subject. But as to the argument drawn from the grant of duties during fairs and markets, such a grant in its nature only enables the corporation to levy from the strangers *287] who frequent the fairs and *markets during their temporary sojourn, whereas my brother Merewether, who relied on the argument, contends that strangers are to be liable at all times. I think, therefore, the jury have found a right verdict.

The second case turned on the question whether there had been any variation in the usage in modern times. The evidence of that was, an unsatisfactory witness whose credit was left to the jury; a tariff fifty years old, containing only four variations in 150 charges (not one of which variations applied to the charge now in issue), and papers which at various times had been given by the collectors to inhabitants of the town, in some of which the variation was a mere mistake on the face of the paper.

If no corporation could maintain its tolls without producing a series of bills

exempt from mistake, it is probable that no tolls would long exist.

But in 1815, it appeared there had been an attempt to establish a new tariff, accompanied with some improper conduct by a collector, without the privity of

to bail.

the corporation. That new tariff was presented to the people of Truro; they had a meeting; refused to pay; and in a conference with the corporation, produced the old tariff, when they settled from that the rates which have been demanded ever since. That was of itself strong evidence in favour of the ancient toll, and put an end to the objection on the ground of variance. The whole, however, was left to the jury, and I told them if they were of opinion the corporation had established a right to the ancient amount of toll, a slight variation in modern times would not destroy it. I was satisfied with the verdict, and think this rule should be

Discharged.

*REGULÆ GENERALES.

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Hilary Term, 2 W. 4.

I.

WHEREAS it is expedient that the practice of the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, should, as far as possible, be rendered uniform: IT IS ORDERED, That the practice to be observed in the said Courts, with respect to the matters hereinafter mentioned, shall be as follows; that is to say,—

AUTHORITY TO PROSECUTE OR DEFEND.

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 Warrants of attorney to prosecute or defend, shall not be entered on distinct rolls, but on the top of the issue roll.
 A special admission of prochein amy or guardian, to

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2. A special admission of prochein amy or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

AFFIDAVIT.

3. No affidavit of the service of process shall be deemed sufficient if made before the plaintiff's own attorney, or his clerk.

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4. An affidavit sworn before a Judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the Court to which such Judge belongs, though not entitled of that Court; but not in any other Court, unless entitled of the Court in which it is to be used.

*5. The addition of every person making an affi-

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davit shall be inserted therein.

6. Where an agent in town, or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold

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ARREST.

7. After non pros, nonsuit, or discontinuance, the defendant shall not be arrested a second time without the order of a Judge.

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⁽a) The references to Tidd's Practice have been added for the convenience of the profession, but form no part of the rules promulged by the Judges.

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8. Affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient unless they state the money to have been paid, or the work and labour to have been done, at the request	Tidd's P 8th Edit. page	ractice. 9th Edit. page
of the defendant. 9. No supplemental affidavit shall be allowed to supply	183, 4	184
any deficiency in the affidavit to hold to bail. 10. A variance between the ac etiam and the declaration, or the want of an ac etiam, where the defendant is arrested, shall not be deemed ground for discharging the defendant, or the bail; but the bail bond or recognisance of bail shall be		189 450 }
taken with a penalty or sum of forty pounds only.	293	294 }
WRIT, WHEN AND HOW TO BE FILED.		
11. When the rule to return a writ expires in vacation, *290] the sheriff shall file the writ at the *expiration of the rule, or as soon after as the office shall be open. 12. And the officer with whom it is filed shall endorse the	30 8	307
day and hour when it was filed	309	808
BAIL.		
13. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be duly put		
in in the mean time. 14. In the case of country bail, the bail piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from London, and in that case,	247	247, 8
within fifteen days after the taking thereof. 15. When bail to the sheriff become bail to the action, the plaintiff may except to them, though he has taken an	252	252
assignment of the bail bond. 16. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justifica-	255	255
tion.	259	260
17. If bail, either to the action or in error are excepted to in vacation, and the notice of exception require them to justify before a Judge, the bail shall justify within four days from the time of such notice, otherwise on the first day of		
the ensuing term. 18. Notice of more bail than two shall be deemed irregu-	260	260
lar, unless by order of the court or a Judge. *291] *19. Affidavits of justification shall be deemed *insufficient, unless they state that each person	268	266
the Courts, over and above what will pay his just debts,		
and over and above every other sum for which he is then bail.	268	267
20. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognisance.	277	275
21. Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit; not exceeding in the		-7 • •
whole the amount of their recognisance. 22. Bail shall be at liberty to render the principal at any	{ 282 { 385	280
time during the last day for rendering, so as they make such render before the prison doors are closed for the night. Vol. XXI.—69 2 z 2	286	284

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rule, that the original rule should be shown, unless sight thereof be demanded, except in cases of attachment. 52. Where a term's notice of trial, or inquiry is required, such notice may be given at any time before the first day of	506	500
term.	625	577
53. A rule to reply may be given at any time when the office is open. 54. Service of a rule to reply, or plead any subsequent pleading, shall be deemed a sufficient demand of a replication,	729	676
or such other subsequent pleading.	730	676
PAYMENT OF MONEY INTO COURT.		
55. In all cases in which money may be paid into Court, leave to pay it in may be obtained by a side bar rule. 56. On payment of money into court, the defendant shall undertake by the rule to pay the costs, and in case of non-payment, to suffer the plaintiff either to move for an attach-	672	621
ment, on a proper demand and sorvice of the rule, or to sign final judgment for nominal damages.	677	626
*296] *TRIAL, AND NOTICE THEREOF.		
57. Notice of trial and inquiry, and of continuance of inquiry, shall be given in town, but countermand of notice		
of trial, or inquiry, may be given either in town or country, unless otherwise ordered by the Court or a Judge.	{ 93 { 813	753
58. The expression "short notice of trial" shall, in country causes, be taken to mean four days.	478	472
59. In all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give notice of trial at the time of delivering his replication, or other subsequent pleading, and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept		
notice of executing a writ of inquiry on the back of such demurrer.	626	578
60. Notice of a trial at bar shall be given to the proper		
*297] *61. In country causes, or where the defendant resides more than forty miles from town, a countermand of notice of trial shall be given six days before the	809	750
time mentioned in the notice for trial, unless short notice of trial has been given. 62. In town causes where the defendant lives within forty miles of town, two days' notice of countermand shall be	817	757
deemed sufficient.	817	757

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63. The rule for a view may in all cases be drawn up by the officer of the Court, on the application of the party, without affidavit, or motion for that purpose.	Tidd's I 8th Edit. page 848	
NEW TRIAL, MOTION IN ARREST OF JUDGMENT.		
64. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second. 65. No motion in arrest of judgment, or for judgment non edstante veredicto, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term.	947 960	916 928
JUDGMENT, AND TIME FOR SIGNING.		
66. Judgment for want of a plea after demand may in all cases be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but not before. 67. After the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return, and after a verdict, or nonsuit, on the *day after the appearance-day of the return of the distringas, or habeas corpora, without any rule for judgment.	481 { 630 { 934	477 581 903
JUDGMENT AS IN CASE OF NONSUIT.	•	•
68. A rule nisi for judgment as in case of a nonsuit may be obtained on motion without previous notice, but in that case it shall not operate as a stay of proceedings. 69. No motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default, but such costs may be moved for separately, (i. e.) without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of: or the Court on discharging a rule for judgment as in case of a nonsuit may order the plaintiff to pay the costs of not proceeding to trial, but the payment of such costs shall not be made a con-	495	491
dition of discharging the rule. 70. No entry of the issue shall be deemed necessary to	819	759
entitle a defendant to move for judgment as in case of a non- suit, or to take the cause down to trial by proviso 71. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no	821	761
rule for a trial by proviso shall be necessary.	821	761
WARRANT OF ATTORNEY AND COGNOVIT.		
72. No warrant of attorney to confess judgment, or cognozit actionem, given by any person in custody of a sheriff or other officer upon mesne process, shall be of any force, unless there be present some attorney *on behalf of such person in custody expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or cognovit, before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attor-	(595	549)
ney for the defendant, and state that he subscribes as such attorney.	$\begin{cases} 597 \\ 607 \end{cases}$	607 } 560 }
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73. Leave to enter up judgment on a warrant of attorney, above one and under ten years old, must be obtained by a motion in term, or by order of a Judge in vacation; and if	Tidd's I 8th Edit. page	
ten years old or more, upon a rule to show cause	600	533
COSTS.		
74. No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs.	1011	975
EXECUTION.		
75. It shall not be necessary that any writ of execution		
should be signed; but no such writ shall be sealed till the judgment-paper, postea, or inquisition, has been seen by the	(1037	999)
proper officer	{ 1067	1027
76. A writ of habere facias possessionem may be sued out without lodging a præcipe with the officer of the Court. 77. In actions commenced by bill a ca. sa. to fix bail shall	1080	1244
have eight days between the teste and return, and in actions commenced by original fifteen, and must in London and Middlesex be entered four clear days in the public book at the sheriff's office.	1148	1098
*300] *SCIRE FACIAS.		
78. A plaintiff shall not be allowed a rule to quash his own writ of scire facias, after a defendant has appeared, ex-	•	
cept on payment of costs.	982	947
79. A scire fucias to revive a judgment more than ten years old, shall not be allowed without a motion for that purpose in term, or a Judge's order in vacation, nor if more than fifteen without a rule to show cause. 80. A scire facias upon a recognisance taken in Serjeant's Inn, or before a commissioner in the country, and recorded at Westminster, shall be brought in Middlesex only, and	1157	1105
the form of the recognisance shall not express where it was taken.	1175	1122
81. No judgment shall be signed for non-appearance to a scire facias without leave of the Court or a Judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one	11,0	
scire facias.	1178	1125
82. A notice in writing to the plaintiff, his attorney or agent, shall be a sufficient appearance by the bail, or defend-	1100	1127
ant on a scire facias.	1180	1121
ERROR.		
 83. A writ of error shall be deemed a supersedeas from the time of the allowance. 84. To entitle bail to a stay of proceedings pending a writ 	574	530
of error the application must be made before the time to sur- render is out.	577	. 532
SUPERSEDEAS.		
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*801] against a prisoner within three terms *inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such

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trial or judgment; of which the term in, or after which the	8th Edit.	yth Edit.
trial was had shall be reckoned one.	866	362
86. The marshal of the King's Bench prison, and the war-		
den of the Fleet, shall present to the Judges of the Courts		
of King's Bench, Common Pleas, and Exchequer, in their		
respective chambers at Westminster, within the first four days		
of every term, a list of all such prisoners as are superseda-		
ble; showing as to what actions and on what account they		
are so, and as to what actions (if any) they still remain not	041	000
supersedable.	871	366
87. If by reason of any writ of error, special order of the Court, agreement of parties, or other special matter, any per-		
son detained in the actual custody of the marshal of the		
King's Bench prison or warden of the Fleet, be not entitled		
to a supersedeas or discharge to which such prisoner would,		
according to the general rules and practice of the Court, be		
otherwise entitled, for want of declaring, proceeding to trial		
or judgment, or charging in execution, within the times pre-		
scribed by such general rules and practice, then and in every		
such case the plaintiff or plaintiffs at whose suit such pri-		
soner shall be so detained in custody, shall, with all con-		
venient speed, give notice in writing of such writ of error,		
special order, agreement, or other special matter, to the mar-		
shal or warden, upon pain of losing the right to detain such		
prisoner in custody by reason of such special matter; and the marshal or warden shall forthwith after the receipt of such		
matica cames the *matter thance to be entaned in the		
*302] books of the prison, and shall also present to the		
Judges of the respective Courts from time to time a list of the		
prisoners to whom such special matter shall relate, showing		
such special matter together with the list of the prisoners		
supersedable	372-2	367
88. All prisoners who have been or shall be in the custody		
of the marshal or warden for the space of one calendar month		
after they are supersedable, although not superseded, shall be forthwish discharged out of the King's Bonch on Float		
be forthwith discharged out of the King's Bench or Fleet prison as to all such actions in which they have been or shall		
be supersedable.	372	367
89. The order of a judge for the discharge of a prisoner on	0.2	
the ground of a plaintiff's neglect to declare, or proceed to trial,		
or final judgment, or execution in due time, may be obtained		
at the return of one summons served two days before it is		
returnable, such order in town causes being absolute, and in		
country causes, unless cause shall be shown within four days,	0=0	0.00
or within such further time as the Judge shall direct.	372	369
90. A rule or order for the discharge of a debtor who has		
been detained in execution a year for a debt under twenty pounds, may be made absolute in the first instance, on an affi-		
davit of notice given ten days before the intended applica-		
tion, which notice may be given before the year expires.	398	388
ATTORNEY AND HIS BILL.		
91. An order to deliver or tax an attorney's bill may be		
*303] made at the return of one summons, the *same hav-	836	835-6
ing been served two days before it is returnable. 92. One appointment only shall be deemed necessary for	000	000-0
proceeding in the taxation of costs, or of an attorney's bill.	336-7	336
93. No set-off of damages or costs between parties shall be	•	300

allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted.	Tidd's 8th Edit. page { 340 { 734	Practice. 9th Edit. page 339) 680 }
MISCELLANEOUS.		
94. It shall not be necessary that a <i>pluries capias</i> be stamped by the clerk of the warrants to authorize the exigenter to make out an exigent.	129	132
95. In order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record. 96. Side bar rules may be obtained on the last as well as	$\left\{ \begin{array}{l} 367 \\ 369 \end{array} \right.$	$\left. rac{363}{365} ight\}$
on other days in term 97. A rule may be enlarged, if the Court think fit, without	503	498
notice 98. An application to compel the plaintiff to give security	508	502
for costs must in ordinary cases be made before issue joined. 99. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the crown, unless notice shall have been given to the proper officer, but in	582	537
other cases it may. 100. Where the defendant, after having pleaded, is allowed	604	557
person without the appearance of the attorney or his clerk for that purpose before the officer of the Court. 101. There shall be no rule for the sheriff to return a good	607	560
jury upon a writ of inquiry, but an order shall be made by a Judge upon summons for that purpose. 102. An order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application	623	576
of a copyhold tenant, may be absolute in the first instance upon an affidavit that the copyhold tenant has applied for and been refused inspection. 103. In cases where the application for a rule to change the venue is made upon the usual affidavit only, the rule shall be absolute in the first instance; and the venue shall not be	48	594
brought back except upon an undertaking of the plaintiff, to give material evidence in the county in which the venue was originally laid. 104. Where money is paid into Court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs	658	608
on the others up to the time of paying money into Court 105. After judgment by default, the entry of any sub-	666	616
sequent continuances shall not be required. 106. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent, that if they are not	732	678
paid within four days after taxation, the defendant shall be at liberty to sign a non pros. *107. It shall not be necessary that any pleadings	734	680
which conclude to the country be signed by counsel. 108. In all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter,	738	693
109. It shall not be necessary that imparlances should be	774	718
entered on any distinct roll.	777	720

110. Where a pauper omits to proceed to trial, pursuant to notice, or an undertaking, he may be called upon by a rule to show cause why he should not pay costs though he has not been dispaupered.

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TT.

AND IT IS FURTHER ORDERED, That upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service and attendance to receive debt and costs, and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed: and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation.

The endorsement shall be written or printed in the following form:

"The plaintiff claims — for debt, and — for costs. And if the amount thereof be paid to the plaintiff or his attorney within four *days from the service hereof, further proceedings will be stayed."

III.

AND IT IS FURTHER ORDERED, That in Hilary and Trinity terms, a plaintiff in any country cause may file or deliver a declaration de bene esse, within four days after the end of the term, as of such term.

IV.

AND IT IS FURTHER ORDERED, That the rules heretofore made in the Court of King's Bench and Common Pleas respectively, for avoiding long and unnecessary repetitions of the original writ in certain actions therein mentioned, shall be extended and applied to the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, to all personal and mixed actions; and that in none of such actions shall the original writ be repeated in the declaration, but only the nature of the action stated, in manner following: viz. A. B. was attached to answer C. D. in a plea of trespass, or in a piea of trespass and ejectment, or as the case may be, and any further statement shall not be allowed in costs.

v

And it is further ordered, That upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting bail above, the attachment or bail-bond shall stand as a security if the plaintiff shall have declared de bene esse, and shall have been prevented for want of special bail being perfected in due time from entering his *307] cause for trial, in a town cause in the term next after that in which the writ is *returnable, and in a country cause at the ensuing assizes.

VI.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission.

VII.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a Judge, a reasonable time before the trial (such summons Vol. XXI.—70

stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such handwriting or execution, or unless the Judge, upon attendance before him, shall endorse upon such summons, that he does not think it reasonable to require such admission.

VIII.

AND IT IS FURTHER ORDERED, That in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a *Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

AND IT IS FURTHER ORDERED, That the above rules shall take effect on the

first day of next Easter term.

TENTERDEN.
J. N. C. TINDAL.
LYNDHURST.
J. BAYLEY.
J. A. PARK.
W. GABROW.
J. LITTLEDALE.
S. GASELEE.
J. 1

J. VAUGHAN.
J. PARKE.
W. BOLLAND.
J. B. BOSANQUET.
W. E. TAUNTON.
E. H. ALDERSON.
J. PATTESON

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

ш

Caster Cerm,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV. 1882.

WYATT v. HODSON. April 17.

Under 9 G. 4, c. 14, payment of interest within six years by one of several joint contractors takes a debt out of the statute of limitations as against all.

This was an action on a promissory note for 1000%, which the defendant, as a surety, had made jointly and severally with his brother in November 1824.

The statute of limitations having been pleaded, the plaintiff proved payment of interest by the defendant's brother up to 1828; whereupon a verdict was found for the plaintiff, with leave for the defendant to move to set it aside, and enter a nonsuit, on the ground that payment of interest by a joint contractor would not, as against the co-contractor, revive a debt barred by the statute.

*310] *Jones, Serjt., having obtained a rule nisi accordingly, Wilde, Serjt., who showed cause, referred to 9 G. 4, c. 14, s. 1, which provides that nothing therein contained shall alter, take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever; and to Whitcomb v. Whiting, Dougl. 652, Jackson v. Fairbank, 2 H. B. 340, Perham v. Raynal, 2 Bingh. 306, Burleigh v. Stott, 8 B. & C. 36, Pease v. Hirst, 10 B. & C. 122, and Chippendall v. Martin, 4 Carr. & P. 98, to show that payment of interest by one of several joint contractors is an acknowledgment of debt binding on the others; when the Court called on

Jones. (Andrews, Serjt., was with him.) The decision in Whitcomb v. Whiting, on which the subsequent cases are founded, was disapproved of in Atkins v. Tredgold, 2 B. & C. 23, and is incompatible with Bland v. Haselrig, 2 Ventr. 151. And the 9 G. 4, c. 14, which has enacted that even an actual promise to pay shall not revive a six years' debt, unless such promise be in writing, could never mean to give a greater effect to an implied promise. Now the payment of interest is only an acknowledgment from which a promise to pay may be implied; and though by an exception in the statute it is enacted, that payment of interest by any person whatsoever shall prevent the time of limitation from taking effect, yet that must be confined to the individual paying, or an executor or administrator; the word whatsoever being substituted for executor

(555)

and administrator, which immediately before occur in the clause limiting the effect of a promise by one of many joint contractors. "No joint contractor, or executor or administrator of any contractor, shall lose the benefit of *the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." From the provision, also, respecting judgment, it may be collected that the conclusive effect of payment of interest was to be confined to the individual paying, and to executors or administrators:—"Provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

The natural meaning to be put on the words or otherwise, is the payment of

interest described in the proviso immediately preceding.

TINDAL, C. J. It seems clear to us that the defendant is not protected by the statute. The question turns on the construction of 9 G. 4, c. 14; and in order to consider that rightly, we should see what the law was before that statute passed. Now, in Burleigh v. Stott, which was, like this, an action against the administrator of a surety on a joint and several promissory note, it was held, that a payment on account of the note within six years by the other joint contractor operated as a promise to pay the residue by all who were jointly liable.

The statute then provided for the case of promises by one of many joint contractors. After enacting that *an oral promise shall not suffice to revive a demand barred by the statute of limitations, it proceeds: "And where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." That is a provision in favour of such as are not parties to the written promise. Then, with respect to payment of principal or interest, it provides, "that nothing herein contained shall alter, or take away, or lessen, the effect of any payment of any principal or interest made by any person whatsoever." Not confining the effect of payment to the individual paying. Why? Because the payment of principal or interest stands on a different footing from the making of promises, which are often rash or ill-interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment. The statute then proceeds to enact, "that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

It has been urged, that from the word otherwise we must imply "by payment of interest," and thence infer *that payment of interest, like the written acknowledgment or promise with which it is coupled, is to operate only against the party paying. But there are various acts to which the word otherwise might apply; as payment into court, or endorsement by a party who had received interest. However, on the broad construction of the act, we think payment of money by one of several joint contractors an acknowledgment not within

the mischief or the remedy provided by the legislature against the effect of an oral promise.

557

Park, J. I have always considered Whitcomb v. Whiting a governing case, notwithstanding some observations which have been thrown out against it. But the case has been recognised in Burleigh v. Stott, and confirmed in Perham v. Raynal, where an acknowledgment by one of several joint contractors on a promissory note was held to be binding on the others.

That was, like the present, the case of a surety, and, therefore, expressly in point. Then, the recent statute having distinguished between the effect of a promise by one of many joint contractors and the payment of interest by such a person, the law, in respect of such a payment, remains as it was under the

previous decisions.

GASELEE, J. I am of the same opinion. The words "nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever," coming after the enactment that a party should not be prejudiced by the promise of a joint contractor, is a convincing proof that a distinction was intended between the two cases.

ALDERSON, J. When the act passed, the case of Burleigh v. Stott had decided that payment on account, *by one of many joint contractors, should have the effect of fixing them all; and the act says, that the effect of such an acknowledgment shall not be lessened.

Rule discharged.

ADAMES v. BRIDGER. April 17.

Plaintiff having proved under a commission of bankrupt in 1816, Held, estopped to sue for the same debt after the passing of 6 G. 4, c. 16, though that statute repeals 49 G. 3, c. 121, which makes proof of a debt an election not to sue.

DEBT on bond. A rule nisi had been obtained to stay the proceedings, commenced in 1831, on an affidavit that the defendant had been a bankrupt in 1816, and that the plaintiff had elected to prove under a commission sued out at that time.

Bompas, Serjt., who showed cause, alleged that no dividend had been received; and that by the statute 49 G. 3, c. 121, s. 14, the bankrupt act applicable to this subject in 1816, mere proof of debt, without receipt of dividend, would not discharge the bankrupt from proceedings at law; but that, at all events, he could not now avail himself of that statute, which, having been repealed by 6 G. 4, c. 16, must, according to the language of Tindal, C. J., in Kay v. Goodwin, 6 Bingh. 576, be considered as if it had never existed; and the new statute 6 G. 4, c. 16, could not be applied retrospectively to proceedings under former statutes. Thus, in Surtees v. Ellison, 9 B. & C. 750, it was held, that evidence of a trading which ceased before the 6 G. 4, c. 16, took effect, will not support a commission of bankrupt issued after that time.

TINDAL, C. J. By the 49 G. 3, c. 121, s. 14, it was enacted, "That after the *315] 29th of June, 1809, it shall *not be lawful for any creditor who has or shall have brought any action, or instituted any suit against any bankrupt in respect of any demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission to prove a debt under such commission for any purpose whatever, or to have the claim of a debt entered upon the proceedings under such commission, without relinquishing such action or suit, and all benefit from the same; and that the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor, to take the benefit of such commission with respect to the debt so proved or claimed by him;" and so long as that statute continued an act of the legislature, the mere—roof of a debt under a commission of bankrupt was a complete election by

the creditor not to proceed by suit: although not in form, it was, in substance, a discontinuance of any suit commenced at the time. It is true, that statute is now repealed; but for matters bygone and completed, we must look to the law then in force.

The fallacy is in considering the election to prove as an incomplete act. It was a complete act to effect a discontinuance; and, after such a lapse of time, the rule must be

Discharged, with costs.

WATSON v. WALKER. April 17.

Entitling affidavit in false judgment.

MEREWETHER, Serjt., had obtained, upon affidavit, a rule nisi to set aside a writ of false judgment sued out by Walker, the defendant below, in the above cause: but his affidavit was entitled "In the Common Pleas, Watson v. Walker;" upon which it was objected by

*Jones, Serjt., that the affidavit should have been entitled "Walker v. Walker v. Walker being the plaintiff upon the writ of false judgment.

Merewether answered, that he was compelled to entitle the affidavit in the Common Pleas in order to its being read; and that Watson v. Walker was the only cause in existence, his objection being, that the writ of false judgment was void. But

The Court, thinking that there was no such cause in the Common Pleas as Watson v. Walker, discharged the rule, without costs.

NELSON v. CHERRILL and Another. April 19.

Defendant took goods under a second commission of bankrupt, while a former commission we subsisting: Held, they could not retain them, even against a colourable title, the second commission being void.

In trespass for taking the plaintiff's goods, the defendants, at the trial before Tindal, C. J., justified the taking under a commission of bankruptcy against one Lloyd, alleging that the plaintiff had obtained the goods from Lloyd under a fraudulent bill of sale.

It appearing, however, that a prior commission, issued against Lloyd in 1821, was still in force, Lloyd having obtained no certificate under it, a verdict was found for the plaintiff on the authority of Fowler v. Coster, 10 B. & C. 427, and Till v. Wilson, 7 B. & C. 684, which decide that a second commission is void if issued while a former commission is in force.(a)

Andrews, Serjt., now moved for a new trial, alleging that the plaintiff having no right to the goods, the *defendants were entitled to retain them as against him; but the Court recognised the opprectness of the above decisions; and

TINDAL, C. J., said, the plaintiff was in actual possession, at least under a colour of title. The defendants took the goods and set up a commission of bankrupt, which we are bound to call void. It would lead to great confusion, if they could then be allowed to set up the title of others to goods which were not their own.

Rule refused.

PALMER v. MARSHALL. April 19.

Insurance January 28th, on a vessel affoat, at and from Bristol to London. The vessel sailed on the 17th of May:

Held, that the delay, unaccounted for, was unreasonable, and discharged the underwriter, although the vessel was of a species which does not usually sail in the winter.

Policy of insurance effected January 28th, 1831, on the Ruby yacht of thirty-seven tons, at and from Bristol to London. The yacht, which was lying in the float at Bristol at the date of the policy, did not sail till the 17th of May, and was lost in the channel three or four days after. In an action on the policy, the case having gone down to a new trial, (a) Park, J., at the Dorchester assizes, nonsuited the plaintiff, on the ground of an implied deviation or variance of the risk, by an unreasonable delay in the time of sailing. It having been agreed that the plaintiff should stand in the same position as if the question had gone to the jury with a strong direction on the part of the Judge,

Bompas, Serjt., now moved for a new trial on the ground that the Judge ought not to have nonsuited, or to have directed a jury that there had been a *318] variance of the risk by unreasonable delay. There had, in fact, *been no variance of the risk; unless, indeed, to lessen it. The vessel was described in the policy as a yacht; the underwriter was bound to be conversant with the usage as to different classes of vessels; and if so, with the usage as to yachts, which is, to sail only in the summer. As yachts do not go to sea in the winter, the delay from January to May was not unreasonable. And it is clear the risk was not varied,—which is the real question, Mount v. Larkins, 8 Bingh. 195,—for the defendant would not have required a higher premium, if May had

been named for the time of sailing instead of January.

TINDAL, C. J. This was an insurance on the Ruby yacht, at and from Bris-The policy bore date the 28th of January, 1831, and the vessel tol to London. remained in the float at Bristol from the date of the policy till the 17th of May, when she sailed on her voyage, and was shortly afterwards lost. A policy effected in these terms, and in this shape, implies that the voyage insured shall be very shortly commenced, or is, at all events, in the near contemplation of the parties: and when we see that, in the present instance, the voyage was not commenced till the middle of May, we are bound to say that the delay was unreasonable unless it be accounted for. No doubt, whether there has been unreasonable delay or not, is properly a question for a jury; and I take it up, therefore, as if it had been left to the jury, with a strong direction that the delay here was What I have to consider, therefore, is whether any facts have been stated by the plaintiff to account for this delay. I find none suggested, beyond the circumstance that this vessel was described as a yacht upon the policy, and that yachts are usually laid up in the winter. But if the plaintiff meant to rely on that, he should have taken a policy *adapted to his purpose.

He might have insured his vessel in port for a definite time, and on the voyage to be commenced afterwards; instead of that, he adopts a form of policy, from which the underwriter must have understood that the vessel would sail within a reasonable time. Here the vessel lies by for more than three months, during which, in addition to the risk of the voyage, the underwriter is exposed to the risk of every accident which may happen in port. Where the delay is unexplained, and so great as to fix it with the character of unreasonableness in the mind of every reasonable person, the strongest direction to the jury, and a

verdict for the defendant, would be fully justified.

PARK, J. I am astonished at the argument which has been used to-day. There never was so clear a case. The risk on a policy at and from Bristol attaches at Bristol, and the language of the policy implies, that if the vessel be ready for sea, she shall sail without delay, unless the delay be accounted for. Here the vessel was lying in the float; and the circumstance of her being a yacht

does not constitute any exception to the general rule. If the owner proposed that she should sail only in the summer, he would have insured accordingly, "in port and at sea." After the risk has attached, it lies on the assured to show why he did not sail; and I offered to leave the question of delay to the jury, with a strong direction, when it was agreed that the plaintiff should be nonsuited, standing in the same position with respect to the present motion as if the point had been so left to the jury. However, there is nothing in the case. The risk attached at Bristol; and the plaintiff not having insured "in port and at sea," as he might have done, has given no reason for his delay in proceeding to sea.

*GASELEE, J. I am of the same opinion. The yacht being affoat at [*320]

Bristol ought, according to the policy, to have sailed without delay.

ALDERSON, J. Upon a policy like this, a delay in sailing, in order to be justified, must be a delay incurred for the purpose of the voyage; as in Langhorn v. Allnut, 4 Taunt. 511, where it was necessary to wait for the purpose of procuring simulated papers, without which the voyage could not be performed; or in Raine v. Bell, 9 East, 195, where the vessel waited for the purpose of taking in provisions. But here the vessel was afloat; no reason connected with the voyage is assigned for her remaining in port; and the risk of the underwriter is materially changed. Instead of the risk of a voyage performed within a reasonable time after the 28th of January, the plaintiff has substituted the risk of lying in the port of Bristol more than three months, and a voyage at a different time.

KEY, Assignee of SHERWIN, a Bankrupt, v. SHAW. April 19.

A trader, having been denied to a creditor who called for money, was after a little time seen peeping over his wife's shoulder. Upon another occasion, seeing a creditor coming, he retired behind a partition at the back of his shop, and his wife coming forward, said he was not at home:

Held, that a jury were properly directed to consider whether the trader "had kept his house; had wilfully secluded himself; that is, had withdrawn himself from a part of the house where

he was likely to meet a creditor, to a more retired part."

THE question on the trial of this cause was, whether Sherwin had committed an act of bankruptcy. As to which, Willis, a witness produced by the plaintiff, stated, that he called at Sherwin's house to demand *money due to him from Sherwin, when he was told Sherwin was not at home. Another creditor, who called about the same time for the same purpose, having received a like answer, became exceedingly boisterous, when Mrs. Sherwin appeared, and having endeavoured in vain to appease him, Sherwin was at length seen peeping over his wife's shoulder.

Hicks, another witness, stated, that he also called for money due to him, when Sherwin appeared from behind a partition at the back of the shop; but seeing the witness, immediately retired, and Mrs. Sherwin, who came forward, said her

husband was not at home.

Upon this part of the case, Bosanquet, J., before whom the cause was tried, directed the jury to consider "whether Sherwin had kept his house; had wilfully secluded himself; that is, had withdrawn himself from a part of the house where he was likely to meet with his creditors, to a more retired part."

The credit, however, of other witnesses called by the plaintiff having been materially impaired, and his case being open to infirmatory observations in other

respects, a verdict was found for the defendant; whereupon

Taddy, Serjt., moved for a new trial, on the ground of a misdirection as to the evidence of Willis and Hicks, and of the verdict being against that evidence. The learned Judge, he contended, had laid down the law too narrowly. "Beginning to keep his house," in the language of the statute, was not confined to a trader's secluding himself in a retired part of his dwelling, or locking himself

up; it was equally a beginning to keep house, if the trader shirked from a creditor, by eluding his approach, even if he only retreated behind his wife's back. In like manner, the breach of an appointment was holden to fall within the words, "departing from his dwelling-house, or otherwise absenting himself," *Gillingham v. Laing, 6 Taunt. 532. The direction of the learned Judge would have been proper for a state of facts such as occurred in Dudley v. Vaughan, 1 Campb. 270; but it was likely to mislead the jury, where the keeping house was not so much by retiring to a less frequented part of it as by eluding the eye of the creditor.

TINDAL, C. J. I think the Court ought not to grant a rule in this case. has been objected that the learned Judge did not point the attention of the jury to that class of acts of bankruptcy on which the plaintiff relied, and that he only put it to them to inquire whether the party had wilfully secluded himself from a creditor. Even if he had stopped there he could not easily have been misunderstood; for the jury might well apply the term wilfully secluded to a momentary concealment. But the learned Judge added words explanatory of what he meant by wilfully secluded, namely, whether the party withdrew himself from a part of the house where he was likely to meet with creditors to a more retired part? That exactly meets the testimony of Hicks and Willis; and as evidence was adduced on the part of the defendant, on which the verdict of the jury might fairly proceed, the rule must be refused.

PARK, J. The summing up of the learned Judge was

The summing up of the learned Judge was as favourable for the plaintiff as the case admitted; and the question was correctly put to the jury.

A mere omission to keep an appointment is not, as it has been suggested by my Brother Taddy, an act of bankruptcy. That was expressly determined in Tucker v. Jones, 2 Bingh. 2.

GASELEE, J., concurred.

*Bosanquer, J. My attention had been called to the precise point, by a reference to the case of Fisher v. Boucher, 10 B. & C. 705; and I told the jury, that if the party had wilfully secluded himself from a creditor, he had committed an act of bankruptcy, explaining, at the same time, the sense in which I employed the term secluded. Rule refused.

GALL v. ESDAILE. April 25.

"As to the rest of my estate, my two houses in S. and T. I give to my wife for life; after her decease, that in S. to my daughter, the other between my two sons. The rest of my estate, of what kind soever, one third to my wife, the rest equally among the three children." The testator had no real property but the two houses: Held, that the daughter took a fee in the house in S.

This was an action for recovering back the deposit paid by the plaintiff as purchaser at a public auction of a freehold messuage and premises in St. John's Lane, West Smithfield, in the county of Middlesex, and interest thereon; and also for recovering the costs and damages sustained by the plaintiff by reason of the defendant's inability to establish a good title. At the trial before Alderson, J., London sittings in Trinity term 1831, a verdict was entered for the plaintiff, damages 300l., subject to the opinion of the Court on a case, which stated that the sale took place on or about the 1st of July, 1828, and the defendant delivered his abstract of title to the plaintiff, purporting to be an abstract of the title of the said William Esdaile to a messuage or tenement and premises situate in St. John's Lane, West Smithfield, in the county of Middlesex, therein stating (among other things), according to the fact, that John Mayor, citizen and brimer of London, being seised in fce-simple of two freehold messuages or tene-*324] ments and premises, with their *appurtenances, one of the said messuages being situate in St. John's Lane aforesaid, and the other in Tog-Vol. XXL-71

well Court. Charterhouse Lane, made his will, duly executed and attested dated the 15th of July, 1735, in the words following: that is to say, "I John Mayor, citizen and lorimer of London, being in health of body, and of sound mind, understanding, and memory, do make and declare this my last will as followeth: -Firstly, I give my soul to God, that gave it me, resting for the salvation thereof on the alone merits of Jesus Christ, my Redeemer; my body I commit to the grave, to be decently interred at the discretion of my executors hereinafter named: and as to such worldly estate as it hath pleased God to bless me withal, I give or dispose of as followeth:-First, to my brother, Joseph Mayor, one pound one shilling; and to his wife, Sarah Mayor, the same sume, to by each of them a morning ring. To my dear and loveing mother, the sum of five pounds. As to the rest of my estate, the two houses, one in St. Joneses Lane, the other in Togwell Court, Chatchous Lane, I give to my loveing wif, Mary Mayor, for her life; and after her decease, that in St. Joneses Lane to my daughter, Mary Mayor; the other betweene my two sons, John and Joseph Mayor, to be equally divided. As to the rest of my estate, of what nature soever, one third to my wife, and the rest to be divided equally among the three children. And I do hereby make my dear wife and brother, Joseph Mayor, joynt executors of this my last will, revoking all former wills by me at any time heretofore made, and declare this to be my only last will and testament. In witness hereunto I have set my hand and seale this 15th day of July, 1735." The said John Mayor left no real property beyond that specifically stated in the will.

Mary Mayor, the daughter, survived the testator, *and also her mother; and her interest in the said premises in St. John's Lane, or St. Jones's Lane (which were the premises purchased by the plaintiff), was, at the time

of the sale, vested in the defendant.

On the receipt of the said abstract of title, the plaintiff objected to the title on the ground that Mary Mayor, the daughter, took a life interest only in the house in St. John's Lane under the specific devise in the will of the said John Mayor, her father, and the remainder in fee in one third part of two third shares thereof under the residuary disposition contained in the same will: so that the title to the remainder in fee of the one third share of the testator's widow, and of the two third parts of the two third shares devised to the testator's two sons, remained to be deduced from the widow and the sons.

The defendant insisting that Mary Mayor took a fee in the entirety of the premises after the death of her mother, and the plaintiff refusing to complete his purchase, the defendant, in Michaelmas term 1828, filed a bill in equity against the plaintiff to compel a specific performance of the agreement for the purchase of the said premises; but the bill was, on the hearing, dismissed with costs.

It was agreed between the plaintiff and defendant, that, if the will of John Mayor was insufficient to pass the fee in the entirety of the said premises to the said Mary Mayor after the death of her said mother as aforesaid, the verdict should stand for the plaintiff for the said sum of 300*l*., but if otherwise the

verdict was to be entered for the defendant.

Scriven, Serjt., for the plaintiff. Mary Mayor, the testator's daughter, took only an estate for life. It is true the word estate is sufficient to carry a fee, if, from *the context of the will, such can be collected to have been the [*326 testator's intention. But it is the context which must determine the extent of that expression. Whitelock v. Heddon, 1 B. & P. 247. In Denn d. Moor v. Mellor, 5 T. R. 562, Lord Kenyon said, "In many of the cases that have been litigated, and in which it has been decided that the first devisee was only entitled to a life estate, one cannot but suspect, privately speaking, that it was the intention of the devisor to give the absolute property to the first taker; and Lord Mansfield used to observe that the common class of men imagined that they could devise a fee simple by the same words that are sufficient to give a piece of plate; but the contrary of such a supposition has now been decided by

so many authorities that it would be dangerous to shake them; and in deciding on the construction of wills, we must not indulge in conjectures or wishes, but determine on the words used according to those authorities." And in Pettiward v. Prescott, 7 Ves. jun. 547, it was held that under a devise of "my copyhold estate at P., consisting of three tenements, and now under lease," &c., but not specifically stating for what interest, an estate for life only passed. If the testator had devised the whole of his interest in the house to his wife and daughter, the residuary bequest would have been without meaning, and the devise of a remainder in fee in a portion of the premises is not inconsistent with the devise of an estate for life in the whole of them. Ridout v. Pain, 3 Atk. 486, Doe d. Briscoe v. Clarke, 2 N. R. 343, Dod d. Moreton v. Fossick, 1 B. & Ado! 189. The title offered by the defendant is, at all events, doubtful; and though, if he had shown a strict legal title, the Court would have given judgment in his *327] plaintiff to accept a title which may give rise to a contest at law. Curling

v. Shuttleworth, 6 Bingh. 121.

Bompas, Serjt., contrd. Mary Mayor, the testator's daughter, took a fee in the house in question. In Andrew v. Southouse, 5 T. R. 292, Lord Kenyon says, "For nearly half a century it has been the wish of the Courts to give effect to the intention of the devisor as far as they can. It has frequently been observed that in almost every case where the words of the devise have been so restrained as to give only an estate for life, the decision has been against what may be supposed to have been the private intention of the devisor; and Lord Mansfield often said, it appeared to him that persons in general who made their own wills thought that the same words were sufficient to pass an estate of inheritance that are used to convey a mere chattel interest." Here the intention of the testator to give a fee to his daughter may be inferred from the circumstance of his using the appropriate term when he proposed to limit a life-interest to his And the word estate is sufficient to pass a fee, whether used alone,—per Lord Kenyon in Denn v. Mellor, and Le Blanc, J., in Roe d. Allport v. Bacon, 4 M. & S. 366,—or with words descriptive of locality, as in Holdfast v. Marten, 1 T. R. 411, Roe d. Child v. Wright, 7 Aast, 259, Harding v. Jardner, 1 B. & B. 72, Denn v. Hood, 7 Taunt. 35, and Randall v. Tuchin, 6 Taunt. 410, which latter case is expressly in point for the defendant; so that Pettiward v. Prescott may be considered as overruled. By the word estate, with which the testator has commenced the devise to his wife and daughter, the testator meant to designate the house in question; and if it were *necessary, the Court would transpose the word, and place it in conjunction with the description of the house. Cole v. Rawlinson, 1 Salk. 234.

Scriven. It is not disputed that the word estate will carry a fee, if an intention to that effect can be discovered in the will. But this will discloses no intention either way. The test is, whether the elision of the word will render the will inoperative as to the property in question, as it would have done in Randall v. Tuchin. Here it might be struck out without affecting the devise to Mary

Mayor, or the effect of the residuary clause.

TINDAL, C. J. The only question which we are called on to decide, is what is the intention of the testator to be collected from the language of this will? After commencing with a recital of his intention to dispose of his worldly estate, he bequeaths some pecuniary legacies, and then, by an intermediate clause, proceeds, "The rest of my estate, the two houses, one in St. Joneses Lane, and the other in Togwell Court, Chatchous Lane, I give to my loveing wif, Mary Mayor, for her life, and, after her decease, that in St. Joneses Lane to my daughter, Mary Mayor; the other betweane my two sons, John and Joseph Mayor." And the question is, whether, under this devise, the daughter took a fee, or an estate for life? We are of opinion the testator intended his daughter should take a fee. First, he has used the words, "the rest of my estate," which it is admitted, are sufficient to carry a fee, unless there are other expressions indicating a different intention. And the general rule is clear. There are cases in which the

word estate unaccompanied, has been holden to carry a fee. There are case in which it has been held to have the same effect, *although accompanied with descriptive words, which might seem, at first sight, to restrain it to a description of locality. There is on this will no indication of an intention on the part of the testator to restrain the interest of his daughter to an estate for life; on the contrary, when he leaves the house to his wife for life, and afterwards to his daughter, it may be inferred he meant to leave to her the entirety of that which he had expressly devised to his wife for life. It aids this construction, that the testator had no other real property, and that the residuary clause could only apply to any little personal property which might remain to be divided among his wife and children. It may also be further observed in aid of this construction, that the construction contended for on the part of the plaintiff would confer interests so complicated as are not likely to have occurred to any testator. The judgment of the Court, therefore, must be for the defendant

PARK, J. Looking at the whole will, I think it clear that the testator meant to devise a fee to his daughter Mary. And the argument which may be drawn from the circumstance that the testator manifestly knew the difference between an estate for life and an estate in fee, is sufficient to warrant this construction. When he means to limit the devise to a life interest, he uses the term for life expressly; when he means to devise a larger interest, he omits it.

GASELEE, J. I have no doubt whatever as to the intention of the testator w

devise a fee to his daughter.

ALDERSON, J. I should have had some difficulty if the case had not stated that the testator had no other real property; but when that is stated, and the residuary clause may apply to personal property, the devise *to the testator's wife and daughter, standing unconnected with the residuary clause, is sufficient to give the daughter a fee. There must, therefore, be

Judgment for the defendant

DOE v. CARTER. April 27.

Interlocutory costs may be set off against final costs, where the payment of them at the time they are adjudged is not strictly a condition precedent to ulterior proceedings.

THE trial of this cause having been put off at the instance of the defendant, upon his undertaking to pay the costs of the day, a rule nisi had been obtained to set off the interlocutory costs so due to the lessor of the plaintiff, against the costs on the verdict which was given for the defendant.

Andrews, Serjt., opposed the rule on the ground that the payment of these interlocutory costs was a condition precedent, without which the defendant could not have been allowed to put off the trial. The plaintiff, therefore, was entitled to stand in the same position as if he had received the costs at that time. In Aspinall v. Stamp, 3 B. & C. 108, a defendant was by a Judge's order allowed to go to trial upon certain terms, upon payment to the plaintiff of a certain sum of money, and the costs incurred up to the date of the order; but the plaintiff having consented to the trial proceeding on those terms before the costs had been paid, it was held that the defendant, who obtained the verdict, was bound to pay those costs, and could not set them off against those afterwards taxed for him on the postea. Andrews also relied on the lien of the plaintiff's attorney, who deposed that he should be a loser by the plaintiff if these costs were set off.

*Wilde, Serjt. The payment of the costs in Aspinall v. Stamp was a condition precedent imposed on the defendant, which the plaintiff did not waive by consenting to go to trial; and that was the ground of the decision But here the order for payment might be enforced at any time; and the plain-

tiff could go to trial whether the costs were paid or not.

As to the attorney's lien, his affidavit does not disclose any.

TINDAL, C. J. The order for the payment of the interlocutory costs in this case was not, strictly speaking, a condition precedent; but it was a bargain of which the defendant has had the advantage; and though if the plaintiff's attorney had proceeded strictly he might at once have obtained the costs by attachment, that ought not to be urged too strongly against him, the omission being in effect an indulgence to the defendant. We think, therefore, that upon the plaintiff's attorney satisfying the prothonotary that anything is due to him from the plaintiff in respect of this cause, his lien should be allowed; and that, subject to such lien, the set-off prayed should be allowed.

Rule absolute accordingly.

HUTCHINSON v. BLACKWELL. April 27.

A submission to refer a cause, and the subject-matter thereof, and the issue therein, to the award of a barrister, does not authorize him to order a verdict to be entered up.

WHEN this cause was at issue and the record had been passed, the jury process issued, and the venire had been returned by the sheriff, but before the *332] *cause had been entered for trial, it was, by a submission made in the Court of King's Bench, which recited that this action was pending in the Court of Common Pleas, agreed by the parties "to leave the same, and the subject-matter thereof, and the issue therein, and the costs of such action," to the arbitrament, final end, and determination of a barrister, and to abide by and perform such award, order, and determination as the said arbitrator should make of and concerning the matters, disputes, and differences subsisting between them as thereinbefore mentioned; that the costs of the reference, award, and action should be in his discretion; and that the submission thereby made should be made a rule of the Court of King's Bench.

The arbitrator ordered a verdict to be entered for the plaintiff for 2041. 10s.

and that the defendant should pay the costs of the cause.

The submission was made a rule of the Court of King's Bench.

Taddy, Serjt., obtained a rule nisi to enter up a verdict pursuant to the award, or that the defendant should withdraw his plea of not guilty (the action was in

trover) and enter a cognovit for the sum of 2041. 10s.

Wilde, Serjt., who showed cause, objected, that under this submission the arbitrator had no authority to order a verdict to be entered; that no jury having been sworn, a verdict could not be entered on the postea; and that, the submission having been made a rule of the Court of King's Bench, this Court had no authority to interfere. When the Court called on

Taddy. The arbitrator having authority to decide the cause, the subjectmatter thereof, and the issue therein, had, in effect, authority to enter a verdict, *2221 for *without that he could not determine the issue; and the application is

necessarily made to this Court, as the Court of King's Bench have no authority over the record here. The agreement to abide by the award empowers the Court to carry it into effect, if not by verdict, at least by ordering a cognovit to be entered.

TINDAL, C. J. Probably either of the modes suggested would meet the substantial justice of the case; but we must look to see whether we have authority to do what is required. The terms of the submission are to leave the cause, the subject-matter thereof, the issue therein, and the costs, to the award of an arbitrator.

Now, in ordinary cases, a provision is made that he shall be at liberty to enter a verdict, and that no writ of error shall be brought. That clause being omitted here, we must suppose the parties did not intend to give that authority to the arbitrator, or any power beyond that of proceeding by attachment for non-per-

of costs and damages, Fenton prayed the territorial claim inasmuch as amended to be admitted, and the remainder of the cargo to be restored, with costs and

damages.

"Jackson alleged that he did not object to the admission of said territorial claim as amended, but prayed the Judge to reject Fenton's petition for costs and damages. The Judge having heard the aforesaid claim and evidence, and proofs, read at the petition of Fenton on motion of counsel, and with consent of Jackson, admitted the aforesaid claim; pronounced the goods to belong as claimed; and by interlocutory decree the same to be restored to claimant for the use of the owners and proprietors thereof; and having heard advocates and proctors on both sides, by further interlocutory decree pronounced the demurrage to be due from the day of the capture, viz. the 5th of January, to the 4th of March last, as also interest on the value of the cargo for such period, and special damage, if any could be shown, but gave no costs; and further reserved the consideration of premium of insurance.

"On Wednesday the 14th of March, 1810, before the Worshipful John Sewell, &c., the deputy registrar's report, as to damages, is confirmed if not objected to by this day. The Judge was pleased to confirm the said report.

Present, Allen and Jackson.

"On Saturday, the 10th of October, 1810, before the Worshipful John Sewell, &c., Fenton and Allen alleged, that on the 14th of March last the registrar and merchants' report as to special damages was confirmed, and that their clients had made repeated application to the captor's agent for the payment of the amount of *suid special damages as confirmed, but that he had not been able to obtain the same; and prayed the Judge to decree a monition to issue forth against the said captors and their agent for the payment of such special damages, and which the Judge decreed accordingly.

" Monition.

"George the Third, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith. To John Chapman, Gent., Deputy Marshal of the Vice-Admiralty Court of the island of Malta and the territories thereunto belonging, greeting: Whereas the Worshipful John Sewell, Doctor of Laws, Judge of the Vice-Admiralty Court of the island of Malta, and the territories thereunto belonging, and also to hear and determine all and all manner of causes and complaints as to ships and goods seized and taken as prize, specially constituted and appointed, rightly and duly proceeding in a certain cause or business of prize, moved and prosecuted before him in our said Court on behalf of George Miller Bligh, Esq., commander of our ship of war Glatton, the captor of a certain vessel called La Madonna della Lettera e Gesu Maria Giuseppe, whereof Francisco Micali was master, against the said ship or vessel, her tackle, apparel, and furniture, and all and singular the goods, wares, and merchandises laden therein, and also against Gregory Mattei, the claimant of the said ship and cargo, on the 15th day of April, in the year of our Lord 1809, by his interlocutory decree, decreed certain goods to be restored to the said claimant for the use of the owners and proprietors thereof, and condemned the captors in certain demurrage, costs, and special damages sustained by the claimants: And whereas on the 10th day of October instant, the said Judge rightly and duly proceeding at the petition of the proctors of the said claimants, alleging, that on the 14th day of March last the *registrars' and merchants' report as to the special damages and demurrage was confirmed, and that their clients had made repeated applications to the captor's agent for the payment of the amount of said special damages and demurrage, but that they had not been able to obtain the same, hath decreed monition to issue forth against the said George Miller Bligh, the captor of the said ship and cargo, and William Robertson, the agent of the said captors, to pay to the said claimant the sum of 2991 scudi, 11 taris, and 11 grains of Malta currency, being the amount of said special damages and demurrage as confirmed, besides the charges of this monition, and the exeaution thereof, within fifteen days after service (justice so requiring); we do

therefore charge and strictly enjoin and command you, that you omit not by reason of any liberty or franchise, but that you monish or cause to be monished, peremptorily and personally, the said George Miller Bligh, commander of our said ship of war Glatton, the captor of the above vessel and her cargo, and Wm. Ribertson, the agent of the said captor, to pay, or cause to be paid, to the said claimant, or his proctors, the sum of 2991 scudi, 11 taris, and 11 grains, being the amount of such special damages and demurrage, as confirmed as aforesaid, besides the charges of this monition and the execution thereof, within fifteen days after service, under pain of the law, and the peril which will fall thereon; and that you duly certify to our aforesaid judge or his surrogate, what you shall do in the premises, together with these presents. Given at La Valetta, in our aforesaid Vice-Admiralty Court, under the seal thereof for causes, this 27th day of October, in the year of our Lord 1810, and of our reign the fifty-first.

"'W. STEVENS, Dep. Reg.'
"Monition against captors and agents to pay special damages and demurrage.
"Fenton and Allen, Proctors."

*341] *Endorsed, "I, John Chapman, deputy marshal of the Vice-Admiralty Court of the island of Malta, and the territories thereunto belonging, do hereby certify that the within original monition was personally served on the within-mentioned W. Robertson, by showing to him the within monition under seal, and by leaving with him a true copy thereof. And I do also certify that the aforesaid monition was not served on the within-mentioned George Miller Bligh, by reason of his having left this island some time ago, and that he has not at present returned to Malta. Witness my hand this 8th day of November, 1810, &c.

"Madonna della Lettera, &c. Francisco Michali, Mr. This 14th day of November, 1810, appeared personally John Chapman, of the city of Valetta, gent., deputy marshal of the Vice-Admiralty Court of the Island of Malta and the territories thereunto belonging, and made oath that the contents of the certificate endorsed on the back of the annexed monition, and to which he hath subscribed his name, were and are true.

"Sworn before me, Ro

ROBERT FORBIST.

"On Monday, the 28th November, 1810, before, &c., Fenton returned the monition duly executed, and prayed an attachment. Jackson appeared for Mr. W. Robertson, and alleged him not to be the agent of his Majesty's ship Glatton, and that he was not in possession of any effects belonging to the said ship, and prayed him to be dismissed from all observance of justice in that matter.

"All and singular which premises, as they have been drawn up and passed in our aforesaid Vice-Admiralty Court, so we have thought fit that the same should be exemplified unto you; and we do attest that the same do agree, having been *3101 faithfully compared with their *respective originals, remaining on record

in our court aforesaid. In witness whereof we have caused the seal of our aforesaid Vice-Admiralty Court to be hereunto affixed. Given at La Valetta, Malta, this 8th day of May, in the year of our Lord 1828, and of our reign the ninth.

"J. LOCKER, Registrar."

A witness who had practised for many years in the Vice-Admiralty Court at Malta as a proctor, stated, that the usual course of proceeding in prize causes is, that the ship's papers and affidavits are first brought in before a surrogate, and that the ship's papers disclose who are the owners; after which a monition is directed to be issued, calling upon all persons to appear and make known their claims. This monition is usually stuck up on 'Change. After such monition is returned, the claim is generally made. It is a claim with an affidavit annexed in support of it; and such claim and affidavit show in whose behalf and what right the claim is made. The claim and affidavit in the present cause are not comprised in the document produced. This cause is taken up from the admission of the claim. The witness stated he was not aware there were any other proceedings in the progress of the cause besides those which appeared in the document produced; and that he believed there were no steps taken before the first which

was entered on the document produced, but that it did not contain a transcript of all the acts of court: there were other acts of court, such as assigning a proctor for the captors; returning the monition; and the affidavit and claim. He further stated, that he thought the document contained the whole of the proceedings from the monition, and that there would be no other formal adjudication beyond that which appeared on the document produced; that *the monition set forth in the document produced is the last monition, and is served on the agent, if the party cannot be found, and there be an agent regularly appointed: after service of the last monition, an attachment issues if the money be not paid: but an attachment does not issue without service of the last monition on the party, or an agent regularly appointed by him. Before the claim is put in, the captain, mate, and principal officers are usually examined.

The Glatton was paid off in England in October 1809. Some evidence was given to show that this judgment was still unsatisfied; and that point was left by the Chief Justice to the jury, who found for the plaintiff.

It was agreed that either party was to be at liberty to refer to the proceedings; and the question for the opinion of the Court was, Whether the plaintiff was entitled to recover? If the Court should be of opinion that he was, then the verdict was to stand; if otherwise, judgment of nonsuit was to be entered.

Stephen, Serjt., for the defendant.(a) There are five objections to the plain-

tiff's recovering in this action.

First, it nowhere appears upon this transcript that the defendant had notice of the proceedings in Malta; on the contrary, it may be inferred, as in Buchana v. Rucker, 9 East, 192, and Cavan v. Stewart, 1 Stark. 525, that the defendant was never within the jurisdiction of the Court. Now in Buchanan v. Rucker, which was an action upon a judgment obtained against the defendant in the island of Tobago, the Court held the proceedings invalid, because it did not appear that the defendant had ever been in the colony, had property there, or was subject *to the jurisdiction of the colonial court; and in Cavan v. Stewart, where the defendant was sued on a Jamaica judgment, Lord Ellenborough said that it ought to have been proved that, at least, he was once in the island of Jamaica.

Secondly, the transcript offered by the plaintiff of the proceedings in the Vice-Admiralty Court is a document too imperfect for this Court to proceed on. If the plaintiff was not bound to set forth the whole of the proceedings, at least he should have set forth the parts material to his own case; as, for instance, the appearance of the defendant or the appointment of a proctor to act for him: above all, the judgment of the Court, which is nowhere stated. It lies on the plaintiff to make the proper extracts, or to show the whole of the proceedings, and that they are conclusive against the defendant. Plummer v. Woodburne, 4 B. & C. 625.

Thirdly, it does not appear that these proceedings were final in the Vice-Admiralty Court. According to the definition in Brown's Civil Law, p. 494, a sentence is interlocutory where a further sentence is to be expected. Upon this transcript it appears that many points remain to be adjudicated, and there is no finding that any precise sum is due from the defendant. In Emerson v. Lashley, 2 H. Bl. 248, and Fry v. Malcolm, 4 Taunt. 705, it was expressly holden that actions cannot be maintained on a mere interlocutory order. An action on a judgment only lies where a debt or duty can be implied which a court of law can recognise. And in Carpenter v. Thornton, 3 B. & A. 52, the Court held that a contract could not be implied from a decree of a court of equity (in a suit for specific performance) to pay interest on the purchase-money of an estate. Bayley, J., *said, "The foundation of the suit in equity in this case seems to have been an equitable obligation, on the part of the defendant, to pay the money. This action, if it can be maintained at all, must be founded

⁽a) For the sake of avoiding repetition, the argument for the defendant is stated first, although the plaintiff's counsel commenced as usual.

upon a legal obligation to pay. The decree in equity merely ascertains that the defendant is under an equitable obligation to pay; it does not go further, and show that there is any legal obligation to pay." And Holroyd, J., said, "In the case of judgments of inferior courts, and courts not of record, where the law implies a promise to pay, it is to pay a legal debt. Wherever there is a debt at law, the Court will presume that the party promises to do that which the law When the debt is founded upon equitable considerations alone, it may be enforced by the authority of the Court which ordered it to be paid. The law, in such a case, does not imply a promise. There is no instance of an action brought on a rule of Court for payment of money. The mode of enforcing such an order is by attachment, for contempt in not obeying the order of the Court. Now, although that does not absolutely show that such an action is not maintainable, yet, where no such action has ever been maintained, it lies on the party bringing such action to state a clear principle on which it is maintain-In Henly v. Soper, 2 Mann. & Ry. 153, there was a balance of account and an agreement to refer, from which a promise to pay might be implied, and Lord Tenterden said, that the action would lie for the balance of an account, but not on every order of a court. In Smith v. Whalley, 2 B. & P. 482, there was also an agreement.

Fourthly, it nowhere appears upon the transcript in what right Mattei acted, or that he had any interest in the subject of the suit. It is rather to be collected *346] that he was a mere agent of the government whose rights *had been violated by the capture of the ship in question; such agents being usually parties to suits of this kind; Twee Gebroeders, 3 Rob. 162; but that would give neither to him nor to his administrator any interest in the sum now sought to be recovered. Thus in Pigott v. Thompson, 3 B. & P. 147, where A. agreed in writing to pay the rent of certain tolls which he had hired, "to the treasurer of the commissioners;" it was held, that no action for the rent could be maintained in the name of the treasurer. And this Court may examine and impeach the legality of foreign judgments. Arnot v. Redfern, 3 Bingh. 351; Walker v.

Witter, Dougl. 1.

Fifthly, this is in effect a question of prize or no prize, over which the Court of Admiralty has exclusive jurisdiction. Thus in Le Caux v. Eden, Dougl. 594, it was held that an action would not lie at common law for false imprisonment, where the imprisonment was merely in consequence of taking a ship as prize, although the ship had been acquitted. And Willes, J., said, "I am of opinion that the action is not maintainable. I may perhaps go upon narrower ground than the rest of the Court, but the rule I would lay down is, that, where the injury is the necessary and natural consequence of the capture, the Court of Admiralty has the sole and exclusive jurisdiction." And Buller, J., said, "There is no case in which it has ever been holden that such an action would lie; and, if it could be maintained, there are, in every war, such frequent opportunities for it, that it must have happened in every day's practice, or some instances, at least, must have been in the memory of those who have had long experience in Westminster Hall; but there is not the smallest trace of such a *deter-*347] mination, or even dictum, in any Court in England."

[ALDERSON, J. In Le Caux v. Eden the Court were called on to draw an inference from the foreign judgment, namely, that the party was entitled to damages: here we are only asked to enforce the payment of the sum specified in the monition.] But that involves the original question of prize or no prize. The principle established in Le Caux v. Eden was acted on in Mitchell v. Rodney, 2 Br.

P. C. 423, and Sinclair v. Fraser, there cited.

Wilde, Serjt., contrd. 1. It sufficiently appears on this transcript that the defendant had notice of the proceedings of the Court of Vice-Admiralty, and was properly subjected to its jurisdiction. Indeed in the suit in that Court he must have been the actor, and have required the appearance of the parties interested in the captured vessel. That vessel is alleged to have been taken by the Glatton, of which the defendant was the commander. Now it is the duty of the

captor to proceed to condemnation; 33 G. 3, c. 66; Case of The Williams, 4 Rob. 214, The Huldah, 3 Rob. 235, The Susanna, 6 Rob. 48; he is the only person liable for damages; and his acts bind all persons under him; Diligentia, 1 Dods. 404; and upon the evidence before this Court, the monition appears to have issued in a proceeding in the Court of Vice-Admiralty for the condemnation of the Madonna. Everything incidental to such a proceeding, such as the appointment of proctors, the examination of evidence, and all that precedes the sentence of the Court, must be presumed to have been rightly done. The Court must be accredited for the due observance of its own practice; and as the suit could not have existed except upon the captor or his agent *proceeding 1*348 for condemnation, it sufficiently appears that he had notice of the suit, 1 and was within the jurisdiction of the Court.

2. The Court of Vice-Admiralty receiving credit for the correctness of its intermediate proceedings, the monition, which is equivalent to a writ of execution, refers to the judgment of the Court, and sufficiently establishes the existence and amount of a debt, the payment of which this Court will enforce. It is no doubt necessary that a certain amount should be shown; Hall v. Odber, 11 East, 118; but when that is established, it is for the defendant to impeach, if he can, the regularity of the judgment; Galbraith v. Neville; (a) and the plaintiff is not bound to set out the whole proceedings; Appleton v. Lord Braybrook, 6 M. & S. 34. In Buchanan v. Rucker, and Cavan v. Stewart, it appeared on the proceedings that parties entitled to notice had never been summoned to appear; though that would not invalidate a judgment where by the law of the country the Court had authority to proceed in the absence of the party; Douglass v. Forrest, 4 Bingh. 686; but here the defendant Bligh, being the actor in the Vice-Admiralty Court, was the person to summon, not to be

3. The proceedings, as set out on this record, are not interlocutory in the sense in which that term is used in English law, but final and conclusive. Restoration of the captured vessel is ordered, and a sum to be paid for the damages Nothing further was to be expected from the Court, which is the test that the proceeding is at an end, and the judgment, though termed interlocutory in the civil law, has the effect of a definitive sentence. "Illud dicitur decretum interlocutorium, habens vim sententiæ definitivæ, quando illud decretum est *finale et non speratur alia sententia seu aliud decretum super [*349 illo articulo, re, vel causa, sed per illud imponitur finis illi rei de qua interlocutum est."(b) That is, on the main point of the suit, for the question of costs is incidental to every judgment, and does not affect its conclusiveness on the point to be decided. The 33 G. 3, c. 66, s. 28, expressly enacts, that the decisions of Admiralty Courts shall have the force of a definitive sentence. If so, the amount of damages awarded, which is sufficiently disclosed by the monition, is a legitimate cause of action in the Courts of this country. In Gilbert's treatise on debt (c) it is laid down "that the act of law, that is, the judgments or acts of courts of justice, may reduce men's acts of any sort to a certain value, whether they be acts of benefit, or of injury and injustice. And when a certain value is set upon such action, it creates a debt to the party to whom it is by law appointed, for, though there be no actual contract, yet the debt arises ex quasi contractu; for as it is common justice to repair injuries, so when the law has settled the compensation of the injury, the law supposes a contract engaging the party to make a compensation. Besides, the law being the common rule to settle all disputes, when once the quantum of the damage or injury is adjusted by the decision of one of its courts, that decision or judgment ought in right reason to create a debt, as much as if the parties themselves had chosen arbitrators to determine between them, who had awarded a certain sum of money, which, as has been already observed, might be recovered by an action of debt." So Black-

⁽a) Cited in 4 T. R. 191.

⁽c) Gilbert's Law and Equity, 390.

⁽b) Oughton, ord. Judie, tit. 123.

stone says, 3 Comm. 159, "That if one hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may *350] afterwards bring an action of *debt upon this judgment, and shall not be put upon the proof of the original cause of action; but upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt, and is bound to pay it." The principle, therefore, laid down by Lord Tenterden in Carpenter v. Thornton, that an action on a judgment only lies where the Court can review the grounds of the judgment, appears too narrow, for that would exclude actions on judgments of record. Even in Carpenter v. Thornton, Lord Tenterden takes a distinction between the judgments of courts in this country and those of foreign courts. The decision in Henly v. Soper shows that it was not intended to lay down the principle so broadly as it appears in Carpenter v. Thornton. There it was held that an action would lie upon the decree of a colonial court of equity for the balance of an account between part-In such action the Court would look at the substance, without regarding the form of the proceedings upon which the decree was founded. And Courts here do not exact the proof of strict regularity in the proceedings of foreign In Molony v. Gibbons, 2 Campb. 502, the Court assumed that the attorney in the foreign court was well appointed; and if the judgment in such a court appear to be final, Bernardi v. Motteux, Dougl. 575, it has always been held that an action lies here for the amount. Walker v. Witter, Dougl. 1.

4. Whether Mattei was the person entitled to claim damages was altogether a question for the Court of Vice-Admiralty, Sinclair v. Fraser, 20 Howell's St. Tr. 468, which cannot be presumed to have erred so far as to have admitted impro-

per parties to the suit;

*351] *5. And the less, as that Court has undoubtedly exclusive jurisdiction in the question of prize. So that the Courts here will not interfere by prohibition, even if they take a view of the law on that subject different from the view taken by the Admiralty Court; Lord Camden v. Home, 1 H. Bl. 476, 4 T. R. 382, 6 Br. P. C. 203; and whatever is incidental to such a question, as the amount of damage or the like, can also only be tried there; Faith v. Pearson, 2 Marshall, 133, Smart v. Wolff, 3 T. R. 323, 343, 345; but when the amount to be paid has been once ascertained, a debt is established, the discharge of which the Courts here will enforce by the same remedies as any other debt.

TINDAL, C. J. Shaped as these proceedings are, the Court cannot with sufficient certainty see on the face of them that which is necessary to make the defendant liable in this action; and what weighs most with me is, that the defendant nowhere appears to have been brought within the jurisdiction of the Vice-Admiralty Court, but that the proceedings, as set out, are upon the face of them imperfect. The only mention of the defendant is where the captured vessel is styled "La Madonna della Lettera, taken by his Majesty's ship of war Glatton, George Miller Bligh, Esq., commander, and brought to Malta." that mode of expression does not convey the idea that Bligh was present on the occasion of the proceedings in the court at Malta, for a captured vessel is commonly sent to port for condemnation in charge of a prize master. Neither does it appear that he was present in October 1810, when application was made for a monition; for it is granted upon an allegation that the proctors had made "repeated applications to the captor's agent for the payment of the amount of the special damages as confirmed, but that they had not been able *to obtain the same." On the contrary, it appears from the language of the return to the monition, that he was not present, the deputy marshal certifying that "the monition was not served on the within-named George Miller Bligh, by reason of his having left the island some time ago, and that he has not at present returned to Malta." It is left in uncertainty when he quitted the island, and we may fairly infer that if it had been possible, it would have been stated on the proceedings that he was present. But I do not rely on that alone, for his personal attendance was not strictly necessary, and it was, as has been forcibly urged, his duty to proceed to a port for the due condemnation of the captured vessel. Still there was something to be done in the Admiralty Court on his part and with his authority; the appointment of a proctor ought to have been properly authenticated; and if that took place, I cannot see why the statement of it is omitted on this transcript. A proctor has much more power than an attorney; he is styled dominus litis; he is appointed with solemnity by an instrument under seal, or by the Judge; and his appointment is a matter of record; Clerk's Praxis, 2d part. It appears, on this transcript, that all the proceedings of the Court have not been set out, for it recites, "The Judge having pronounced the goods to belong as claimed, and by interlocutory decree the same to be restored to the claimant for the use of the owners and proprietors;" but this interlocutory decree is nowhere set out. Now it was the business of the plaintiff at least to make the necessary selection for the information of this Court; and the fair inference from the omissions is, that the whole of the proceedings, if set out, would not have shown the appointment of any proctor for Bligh. It further appears that no agent of Bligh's resided in Malta. The monition indeed is served on Robertson, but in the next proceeding it is stated that *Jackson appeared for him, and "alleged him not to be the agent of his Majesty's ship Glatton, and that he was not in possession of any effects belonging to the said ship." This allegation is not contradicted, but thereupon the proceedings terminate; from which we must infer that the applicants were incompetent to deny the allegation of Jackson, and that Robertson must be taken not to have been the agent of the defendant. If so, the proceedings against him have been carried on when neither he was present nor any proctor or agent to attend to his interests. And though the plaintiff has set out the monition, which is in the nature of a writ of execution, he has nowhere stated the judgment on which that monition is grounded. When the plaintiff had the power of producing the proceedings which have been thus withheld, we should proceed in the dark if without more precise information we were to hold the defendant It is of extreme importance that the plaintiff should be held strictly to the proof of his claim, for the consequences would be serious to the defendant if he should be held liable to this demand after a lapse of twenty-two years; when he can neither investigate the claim nor recover over from parties who originally might have been liable to contribute. The ground of my decision, however, is, that I do not see my way on these proceedings, which are manifestly so imperfect, to find the defendant liable. On that ground alone I think there ought to be judgment of nonsuit.

Park, J. It is not necessary for us to proceed on any other ground than the glaring defect of these proceedings. No libel is stated, no responsive allegations. It does not appear for whom Mattei claimed, nor what was the judgment on the subject of damages; the monition is ordered to be served on Bligh or his agent, and it is served on Robertson, who disclaims being *agent, or *agent, and it is served on Robertson, who disclaims being *agent, or *agent, and agent, or *agent, or *a

ance.

GASELEE, J. I think there can be no doubt of the authority of this Court to entertain the plaintiff's suit, if the judgment in the Vice-Admiralty Court had been properly set out; for that judgment appears to have been final. And as to the appearance of the defendant Bligh, there is a great deal in the argument, that he, as captor, was bound to take the cause into the court at Malta: but the ground of my decision is, that this transcript discloses no decree for the payment of any specific sum: for the monition is no part of the judgment; it is either the equivalent of a writ of execution, or a prelude to it by way of attachment; and this Court cannot consider an instrument in such a form as sufficient evidence or a judgment to the same amount. The transcript, there-

fore, being defective in not stating a decree for any specific amount, the plaintiff has failed to establish any cause of action, and a nonsuit must be entered.

ALDERSON, J. I am of the same opinion. The proceedings, as set out, are too imperfect to enable us to give any judgment but that of nonsuit. The plaintiff sues as administrator of Mattei, and should, therefore, show who Mattei was, and in what right he claimed. But many important parts of the proceedings are not set out, such as the appointment of a proctor for the defendant Bligh, and the statement in detail of Mattei's claim. The Court directs the restoration of part of the cargo, and refers it to a body of merchants to ascertain the amount of damage, if any, sustained by the owners of the property. report of the merchants is stated *to have been afterwards confirmed, but what the report was nowhere appears, nor the amount found to be due for damages: for the monition cannot be taken as part of the judgment of the court, or evidence of the sum specified in the decree. If the proceedings stopped there, they would be too imperfect for us to rest any decision upon them, but the monition ordering that a certain sum shall be paid by the agent of the captor, is served upon Robertson, who disclaims the agency, or that he has any effects belonging to the Glatton, and what is done after that does not appear. It is perfectly consistent with all that appears on this record, that another monition may have issued, and that the money may have been paid. The proceedings set out, being therefore so imperfect, the Court has no alternative but to pronounce Judgment of nonsuit.

DUNCAN v. PASSENGER. April 27.

The county in the margin of the declaration held a sufficient venue, on special demurrer.

Upon special demurrer it was objected that the declaration in this cause was destitute of any allegation of venue. In the margin alone, there was "Middlesex to wit;" and a certain day being specified, all the material facts were alleged to have taken place "then and there."

Adams, Serjt., argued, that though this might suffice on general demurrer, Mellor v. Barber, 3 T. R. 387, to allow it on special demurrer, would be to dispense with the necessity of observing any of the formal rules of pleading, more especially of alleging facts with the ancient certainty as to time and place.

*356] *Sed per Curiam. There, in the allegation "then and there" must apply to the county named in the margin, and is, therefore, a sufficient allegation of place.

Judgment for plaintiff.

OAKLEY v. ADAMSON. April 27.

From a covenant in the defendant's lease, to contribute with other occupiers of the lessor's property a rateable proportion of the expense of keeping up paths used in common between them, coupled with the fact that the plaintiff had always used a path between his house and the defendant's from a period anterior to the defendant's lease, and that there was no other path to which the covenant could apply, the Court inferred, that the soil of the path, which was included in the demise to the defendant, was demised subject to a right of way in the plaintiff.

In this action the plaintiff claimed a right of way along a passage between his house and the defendant's, under a lease granted to him in 1819, but the property was in Middlesex, and the lease not being registered, it could not be produced in evidence. The defendant at the trial relied on a registered lease of 1820, from the same lessor, which conveyed to him all ways, &c., and, without exception or qualification, the soil over which the plaintiff claimed the right of way.

The defendant's lease, however, contained a covenant, by which he engaged to contribute with the other occupiers of the lessor's property, a rateable proportion of the expense of keeping up paths, &c., used in common between them; and it was proved by a former occupier of the defendant's house, in partnership with the defendant at the time, that the plaintiff had used the path in question ever since he came to occupy his premises in 1814, and that there was no other path to which the covenant could apply. The jury found for the plaintiff a right of way on foot.

Andrews, Serjt., obtained a rule nisi for a new trial, on the ground that the absolute grant of the soil to the defendant was incompatible with the right of way claimed by the plaintiff under the same lessor.

* Wilde, Serjt., who showed cause, relied on the covenant in the defendant's lease, which, explained by the usage, was sufficient to show that the lessor had granted the premises to the defendant subject to the right of way.

Andrews contended, that the defendant's lease, conveying to him, without ambiguity, an absolute right in the soil, ought not to be qualified by parol evi-

dence.

TINDAL, C. J. The lease containing the grant of the right of way to the plaintiff cannot be read, and we may assume that the lessor meant to convey the soil of the passage in question to the defendant: but he has also inserted in his lease to the defendant a covenant that the defendant shall contribute with the other occupiers a rateable proportion of the expense of repairing paths, &c., enjoyed in common; and there is no path but the path in question to which the covenant can apply. Are we to give any effect to that covenant or not? If we are to do so, the lease to the defendant is not incompatible with the grant of a prior right of way to the plaintiff. On the face of the lease there is a stipulation consistent with the existence of a right in some other person: we may, therefore, look at the facts to explain the nature of this stipulation, and they show that the plaintiff used the way from a period anterior to the date of the defendant's lease, and while the defendant's partner occupied the adjoining We are, therefore, satisfied that the defendant had notice that he took this property subject to a servitude or right of way, and that the verdict ought not to be disturbed.

PARK, J. Assuming that the defendant took the soil of the passage under his lease, where is the inconsistency that another should have a right of way over it? Coupling the testimony in the cause with the *covenant in the defendant's lease, I think it clear that the lessor did not mean to dero-

gate from the plaintiff's right of way.

GASELEE, J. As there was no other path to which the covenant could apply,

the parol evidence puts an end to the case.

ALDERSON, J. I am of the same opinion. The question is merely on the construction of the defendant's lease. Rule discharged.(a)

(a) Morris v. Edgington, 3 Taunt. 24. Kooystra v. Lucas and Others, 5 B. & A. 830.

HANCOCK and Another, Assignees of NICHOLLES, a Bankrupt, v. CAFFYN. April 30.

Defendant, a leaseholder, underlet to N. and put him in possession under an agreement to grant a lease when N. should have paid 1200l., which he was to do by instalments in three years, in the mean time paying rent at certain days to defendant, subject to distress for non-payment. Defendant received rent from N. but omitted to pay the superior landlord, who distrained on N. for arrears due from defendant. N. having become bankrupt, Held, that the damage incurred by this distress was a cause of action on which his assignees might suc.

FFYN, being possessed of a house which he held on a long lease from Har-

rison the owner, put Nicholles in possession of it by an agreement under seal bearing date September 10, 1828, in which he covenanted to grant Nicholles a lease of the premises by indenture, when Nicholles should have paid, for furniture and other considerations, 1200l., which he was to do by instalments in three years: Nicholles covenanted, in the mean time, to pay 250l. a year to Caffyn for the rent; and that if the rent were in arrear Caffyn should be at liberty to enter and distrain.

Nicholles duly paid his rent to Caffyn, but Caffyn omitted to pay what was *359] due from himself to Harrison; *whereupon, on the 21st of October, 1829, when only a quarter's rent was due from Nicholles to Caffyn, Harrison, the superior landlord, distrained on Nicholles for 1251., being half a year's rent due from Caffyn to Harrison on the 24th of July preceding. Nicholles's goods were sold to a disadvantage, and he had also to defray the expense of the distress. Shortly afterwards Caffyn himself distrained for a quarter's rent. Nicholles then became bankrupt, and his assignees brought this action against Caffyn for the damage incurred by Nicholles in having been so as aforesaid sub-

jected to Harrison's distress.

The first count of the declaration stated, that before and at the time of committing the grievance by defendant, as thereinafter next mentioned, the defendant held and enjoyed a certain messuage, cottage, and premises, situate in the parish of St. George, Hanover Square, in the county of Middlesex, as tenant thereof to one John Harrison, at and under a certain yearly rent, to wit, the yearly rent of 2501. payable by defendant to said John Harrison, to wit, at London: that whilst defendant was such tenant to J. Harrison, and before and at the time of committing the grievance thereinafter next mentioned, and before John Nicholles became a bankrupt, to wit, on the 21st October, 1829, to wit, at, &c., John Nicholles, at the special instance and request of defendant, had become and was tenant to defendant of said messuage, cottage, and premises, with the appurtenances, at and under a certain yearly rent, to wit, the yearly rent of 250l., payable to defendant quarterly on the 10th December, 10th March, 10th June, and 10th September in every year, to wit, at, &c.; and thereupon it then and there became and was the duty of defendant, so long as defendant continued such tenant to J. Harrison, and so long as J. Nicholles continued such tenant to defendant, to pay said first-mentioned rent to J. Harrison, and to indemnify and *360] save harmless *J. Nicholles from and against the payment of any of said rent so payable to J. Harrison over and beyond the amount of said rent so payable to defendant as aforesaid, which might be due and in arrear from J. Nicholles to defendant, and from and against any distress, or costs, charges, damages, or expenses which should or might be made, arise, or happen to J. Nicholles for or by reason of the non-payment thereof; and although said tenancy of defendant to J. Harrison, and said tenancy of J. Nicholles to defendant, was and continued for a long time until and after the committing of the grievances thereafter next mentioned, and although a small sum of money only, to wit, the sum of 84l. 17s. 10d. of rent was due and in arrear from J. Nicholles to defendant at the time of committing the grievances thereinafter mentioned, yet defendant, not regarding his duty aforesaid, but contriving and fraudulently intending to injure and defraud J. Nicholles in that behalf, before he became a bankrupt, and said plaintiffs, as assignces, as aforesaid, after he became a bankrupt, did not nor would, during the continuance of said tenancies, pay said firstmentioned rent to J. Harrison, or save harmless or indemnify J. Nicholles according to his duty, but wholly neglected so to do; and by reason thereof, during the continuance of said tenancies, and before J. Nicholles became a bankrupt, to wit, on, &c., at, &c., a certain distress was made by and on the behalf of J. Harrison on divers goods and chattels of J. Nicholles, to wit, &c., of great value, to wit, of the value or 4001, then in and upon said messuage, cottage, and premises, for a certain sum of money, being in amount much over and beyond the amount of said rent so due and in arrear from J. Nicholles to defendant, to wit, the sum of 1251. then due and in arrear from defendant to J. Harrison for and in respect of said rent so payable to him as aforesaid: and said J. Harrison afterwards, to wit, on, &c., at, &c., sold *said goods and chattels as such distress as aforesaid, for and towards payment and satisfaction of said rent so due and owing to him from defendant, and of the costs and charges of said distress, and incidental thereto; and J. Nicholles before his bankruptcy, and said plaintiffs, as assignees as aforesaid, since his bankruptcy, had been and were much prejudiced, injured, and damnified by means of the premises, to wit, at, &c.

There were several other counts, varying the statement of the same injury, and claiming damages for the distress by Caffyn at a time when, in consequence of the payment to Harrison, nothing was due. Ry the agreement of 10th of September, 1828, in consideration of 400l. paid down, and 1200l., with interest, to be paid by instalments in three years, Caffyn agreed to sell Nicholles the furniture on the premises, and covenanted that he would, immediately after the full payment of the sum of 1200l. and interest, pursuant to the covenant in that behalf thereinafter contained, well and effectually, by indenture, demise and lease unto the said J. Nicholles, his executors, administrators, and assigns, all that messuage or tenement situate and being No. 21 in Lower Grosvenor Street, in the parish of St. George, Hanover Square, in the county of Middlesex, with the cottage built behind the same, and all the appurtenances thereunto belonging, as the same had been for some time prior to the execution of that agreement, in the occupation of the said J. Caffyn, and of which possession had been or was intended to be given that day to the said J. Nicholles; to hold the same unto him the said J. Nicholles, his executors, administrators, and assigns, from the day of the date of that agreement, for the term of twenty-five years, at the yearly rent of 250%, payable quarterly; that, in such indenture of lease there should be contained the like covenants and agreements on the part of the said J. Nicholles, his *executors, administrators, and assigns, as were contained on [*362] the part of the lessee in the indenture of lease whereby the said J. Caffyn held the said premises, with others, and also all other usual and reasonable covenants, provisions, clauses, and agreements whatsoever. Nicholles then covenanted that he would, "in the mean time, and until such lease should be granted, well and truly pay or cause to be paid unto the said J. Caffyn, his executors, administrators, and assigns, the said yearly rent or sum of 250l. on the respective days and in the manner thereinbefore appointed for payment of the same; and also well and truly observe, perform, and keep all and singular the covenants and agreements which would be to be performed and kept by him the said J. Nicholles, his executors, administrators, or assigns, in case the said lease was actually granted: Provided always, that the said J. Nicholles did thereby for himself, his heirs, executors, administrators, and assigns, covenant, grant, and agree to and with the said John Caffyn, his executors, administrators, and assigns, that if at any time thereafter, before the said lease should be granted, the said yearly rent or sum of 250l., or any part thereof, should be unpaid for the space of fourteen days next after any or either of the quarterly days of payment thereinbefore appointed for payment of the same, then it should be lawful for the said John Caffyn, his executors, administrators, or assigns, to enter upon the said premises thereinbefore agreed to be demised, or any part thereof, and to distrain for so much of the said quarterly rent as should be in arrear."

Damage to a considerable amount having been proved at the trial, a verdict was found for the plaintiff, with leave for the defendant to move to set it aside

and enter a nonsuit on objections taken at the trial.

Jones, Serjt., moved accordingly on three objections, First, that the defendant had no such duty to *perform towards Nicholles as that required at his hands, unless the relation of landlord and tenant existed between him and Nicholles; that such relation could not exist without an actual demise and that the agreement of September 10, 1828, contained no such demise.

Secondly, that if a tenancy could be assumed, and such a duty be implied, the remedy was by action on the written agreement, and not by an action on

the case for a supposed breach of duty.

Thirdly, that the right of action, if any, was one which did not pass to the assignees of the bankrupt.

He also objected to the amount of damages.

A rule nisi having been granted,

Wilde and Spankie, Serjts., showed cause. The agreement of the 10th of September, 1828, establishes the relation of landlord and tenant, by giving Nicholles immediate possession, stipulating for the payment of rent, and, above

all, containing a power of distress.

If the relation of landlord and tenant be assumed, it is a consequence of the contract which creates it that the landlord should impliedly be responsible for the quiet enjoyment of the tenant; and for the disregard of this duty the tenant may sue in assumpsit or in case, although the details of the contract are contained in an instrument under seal. In Burnet v. Lynch, 8 D. & R. 368, it was held that case (not covenant) lay by the assignor against the assignee of a lease assigned by deed poll, upon his implied duty to perform the covenants in the original lease, although the assignor had, by the assignment, parted with all his interest; and although assumpsit might lie, that case was the better form of action for the injury sustained by the assignor in consequence of the assignce's breaches of covenant.

*And this right of action passes to the bankrupt's assignees; for though they cannot sue for an injury to the person of the bankrupt, injury to his property, which diminishes the fund available for creditors, gives the bankrupt's assignees that right of compensation of which the creditors are to have the benefit. In Smith v. Coffin, 2 H. Bl. 463, Buller, J., said, "The Court is bound to construe the bankrupt laws in the most liberal and beneficial manner for the creditors. I therefore hold, that every species of right, of which by any possibility profit can be made, passes to the assignees." In like manner, ever since the statute 4 Ed. 3, c. 7, executors have been entitled to recover in respect of any damage to the property of their testator, although an action for injuries

to the testator's person does not accrue to them.

Jones. The stipulation for a lease to be granted after the payment of a certain sum of money is conclusive to show that the agreement between Nicholles and Caffyn did not operate as an actual demise, but merely as an agreement for a demise: Dunk v. Hunter, 5 B. & Ald. 322. But even if it operated as a demise, the plaintiff ought to have sued on the written contract. He cannot resort to an implied contract, where there is a writing to settle the rights of the parties. His remedy, therefore, was by covenant; for though assumpsit or case may lie indifferently where the defendant fills a certain known character, as carrier or banker, yet in ordinary cases, if there be a written contract, the party aggrieved is confined to such remedy as that contract affords him. At all events, this right of action does not pass to the assignees: they could not have sued in trover, for the goods were rightfully taken; Wallace v. King, 1 H. Bl. 13; and if they could not recover the goods, neither can they recover for an injury occasioned *365] *by taking away the goods. There are no words in the bankrupt act, 6 G. 4, c. 16, large enough to pass a right of this description.

TINDAL, C. J. I think this rule ought to be discharged. The first objection which has been made to the verdict for the plaintiff is, that an allegation on the record of a demise by the defendant Caffyn to Nicholles, has not been made out in evidence, and that the relation of landlord and tenant between them has not been established. The evidence adduced to establish that point was the agreement of the 10th of September, 1828; and undoubtedly, in its main object and purport that agreement appears to be executory; for if we look at the whole situation of the parties, much remained to be done before the contract would be complete. Part of the agreement was, that upon payment of a stipulated sum, a lease by indenture should be granted; and if that had been the whole, it would have been difficult to say that the relation of landlord and tenant subsisted: but Nicholles was to be put into immediate possession; he was to pay rent on certain specified days; and it is difficult to say that the mere stipulation for a future

lease shall defeat the relation which arises upon such a stipulation for payment of rent. However, it is not necessary to say in this case that there was a letting by actual demise; it is sufficient to say that the relation of landlord and tenant existed, although the lease by indenture had not been executed; and if any doubt on that point could arise from the terms of the agreement, Caffyn has ended such doubt by his own voluntary act, for in October following, before any lease by indenture had been executed, he puts in a distress for rent, which he could not legally do unless the relation of landlord and tenant existed. He cannot be allowed to distrain on the supposition that a tenancy *existed, and afterwards to deny the existence of such tenancy.

The second objection is, that, admitting the existence of the tenancy, there is no such implied duty on the part of the landlord as this action supposes. duty alleged is, that Caffyn, by paying over to the superior landlord the rent received from the under-tenant, should protect the under-tenant from the superior landlord's distress. And that is no more than one of the necessary consequences of the implied agreement on the part of every landlord for his tenant's Even if there be no actual agreement by the mesne landlord quiet enjoyment. to pay over to the superior landlord the rent received from the under-tenant in order to secure his quiet enjoyment, still, in the case of Burnet v. Lynch, it was held to be an implied duty on the part of the assignee of a lease to perform the covenants contained in it, in order to keep the assignor harmless: if that be a duty in the assignee, it is not easy to see why it should not be correlatively the duty of the assignor to protect the assignee by paying over to the lessor the rent received from the assignee. And Burnet v. Lynch is also an authority that case is the more proper form of action, although assumpsit may also lie. And there are many other instances where, upon a duty which the law implies, the remedy

is either by assumpsit or case.

The third objection is, that, at all events, no such right of action as this passes to an assignee under the bankrupt law. Undoubtedly, there is a large class of actions, in which, though an action lies for the bankrupt, the right does not pass to his assignees; as for injuries to person or reputation: but we should not give due effect to the statute, if we were to hold that a right did not pass arising out of an injury which has lessened the amount of the fund belonging to the creditors. The words of the statute 6 G. 4, c. 16, are very *comprehensive; in s. 12, it is enacted, "That the commissioners shall take such order and direction, with the body of such bankrupt, as hereinafter mentioned, as also with all his lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary hold as freehold, which he shall have in his own right before he became bankrupt, as also with all such interest in any such lands, tenements, and hereditaments, as such bankrupt may lawfully depart withal, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandise, and debts, wheresoever they may be found or known, and make sale thereof in manner hereinafter mentioned, or otherwise order the same, for satisfaction and payment of the creditors of the said bankrupt." And by the sixty-third section it is enacted, "That the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him, before he shall have obtained his certificate; and the commissioners shall also assign as aforesaid all debts due or to be due to the bankrupt, wheresoever the same may be found or known; and such assignment shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees." When the statute directs an assignment of all the bankrupt's present personal estate, how can we except a right in respect of which the fund accruing to the creditors would receive compensation to the extent to which the property of the bankrupt has been diminished? The case of executors affords a close analogy: they cannot sue for any injury to the person of the testator; but in respect of an

*368] injury to the property which would *have formed part of the assets, they are entitled to recover.

As to the amount of the damages, we see no grounds for interfering.

PARK, J. I am of the same opinion. The defendant himself has put a construction on this contract by distraining on the plaintiff, and showing thereby that he considered himself to stand in the relation of landlord. Burnet v. Lynch is in point as to the form of action; and the right sought to be enforced is one which undoubtedly passes from the bankrupt to his assignees. The fallacy lies in the generality of the term "personal action." It is true, that a right of action for an injury to the person does not pass to the assignee; but for an injury to the bankrupt's personal property he is entitled to sue.

GASELEE, J. If the agreement between Nicholles and Caffyn does not constitute a demise, I do not know what does. Nicholles is to enter into immediate possession; is to occupy for many months before an indenture of lease is executed; is to pay rent, and to be subject to distress. The objection as to the form of action is answered by the decision in Burnet v. Lynch; and as to the right of action not passing to the assignees, rights of the same kind have been holden to pass under the old statute, the language of which is not so comprehen-

sive as that of 6 G. 4, c. 16.

ALDERSON, J., concurring, the rule was

Discharged.

*369] *PERRYMAN v. STEGGALL and STRAIGHT. May 1.

A general release by a creditor to a bankrupt is not sufficient to render the bankrupt a competent witness for the creditor, where the result of his testimony would give the creditor a right to prove under the commission. The creditor ought also to give a release to the assignee of all claim on the bankrupt's estate, and the bankrupt ought to release his claim to a surplus.

This was an action on a promissory note for 108*l*. given by the defendants as sureties for one Tucker to Sylvester and Walker, and by Sylvester and Walker

endorsed to the plaintiff.

At the trial before Gaselee, J., London sittings in last Hilary term, the defence set up was, that the note was given as a security for money which Tucker had borrowed of Sylvester at a usurious rate of interest; and Tucker, against whom a commission of bankruptcy was still in force, and who, after his bankruptcy, had been discharged under the insolvent debtors' act, was called to prove the usury. The bankruptcy took place after the transaction with Sylvester. Whereupon it was objected, that Tucker was incompetent to give evidence, as the defendants, his sureties, would be entitled to prove under his commission whatever they might be adjudged to pay in this action, the verdict in which would be evidence against him of the amount of damage sustained by the defendants.

Upon this the defendants executed the usual general release to Tucker, when it was further objected, that all Tucker's estate being vested in his assignees, the release which had been executed operated only as a release of his person, and left his estate, which was vested in assignees, still liable to the defendants' proof. The witness, however, was admitted, and a verdict was found for the defendants; which

Wilde, Serjt., obtained a rule nisi to set aside, on the ground that Tucker was

incompetent to give evidence, notwithstanding the above release.

*370] *Andrews, Serjt., who showed cause, after attempting, without success, to show that Tucker was not connected with the defendants, relied on the release as having restored his competency.

Wilde. The defendants, in case of a verdict against them, would, notwithstanding their release to Tucker, be entitled to prove the amount under Tucker's commission without disturbing the previous dividends, if any, 6 G. 4, c. 16, a. 52. The witness, therefore, was interested to defeat the verdict. The defendants should have given to the assignees a separate release of all claim on the bankrupt's estate, and the bankrupt should have released his claim to a surplus.

Carter v. Abbott, 1 B. & C. 444.

TINDAL, C. J. It seems to me, that under all the circumstances of the case, Tucker was not an admissible witness. He had been a bankrupt, and afterwards insolvent; and the proceedings under the commission of bankruptcy are not yet wound up. If the defendants could prove under that commission for the amount of this verdict, the surplus and allowance to the bankrupt would be diminished in the same proportion. Now, the fifty-second section of 6 G. 4, c. 16, enables them to prove for such a claim, without disturbing dividends already paid. If Tucker had released his right to the surplus, perhaps he might have been a competent witness as far as the bankruptcy is concerned. It is not necessary now to touch upon the insolvency; for, considering the witness incompetent in respect of the bankruptcy, we think the rule should be made

Absolute.

*HARRISON v. WOOD. May 1.

[*371

A particular of demand is not to be construed so rigidly as to nonsuit a plaintiff for inaccuracies which could not mislead. Disbursements held recoverable under an item for "cash advanced."

THE plaintiff declared in assumpsit for salary due to him as the defendant's travelling clerk, and for the amount of disbursements he had made for the defendant.

At the trial before Tindal, C. J., he proved that he had been introduced to the defendant towards the end of March 1830; that the defendant had then engaged him as travelling clerk at 100*l*. a year, the expense of his journeys to be defrayed by the defendant; and that he, the plaintiff, had disbursed 51*l*. 9s. 6*d*., the expense of journeys performed between the 29th of March and 26th of September, 1830.

The plaintiff's particular of demand was as follows:-

John Wood to B. Harrison.	Dr.		
1830.	£	8.	d
March. Cash advanced between March 20th and April 1st	51	9	6
March 29th to September 26th. Salary at 100%. per annum	58	0	0
	109	9	6
By cash at sundry times, and payments made by you for me	50	7	7
Balance	59	1	11

On the part of the defendant, it was objected that these disbursements could not be recovered under a particular claiming for cash advanced; and that the *501. 7s. 7d. for which the defendant had credit, covered the real amount of salary due, which, at 1001. a year, was less than 501. from March 29th to September 26th.

Whereupon the plaintiff was nonsuited.

A rule nuss having been obtained for a new trial, on the ground that "cash

advanced" ought to be deemed to include disbursements,

Jones, Serjt., who showed cause, relied on the objection taken at the trial, and also on the circumstance that the dates of the disbursements did not agree with those of the advances specified in the particular.

TINDAL, C. J. If this had struck me at the trial as it does now, I should have reversed the situation of the parties. In both points, I think this particu-

lar ought to have the operation for which the plaintiff contends. In the first place, we ought not to narrow the term "advances" so as to exclude disbursements; which, though not strictly, were in effect advances made to the defendant, since he was under an engagement to defray the expense of the plaintiff's journeys. Secondly, as to the mistake in point of dates, if it had been such as to occasion any doubt, we might have thought it right to hold the plaintiff to the strict language of the particular; but, according to the evidence adduced at the trial, the defendant must have been well aware that this was a mistake, and that April was written for September. The plaintiff and defendant were strangers to each other till the end of March, when the plaintiff was introduced for the first time, and the agreement between the parties was entered into. Now, could it be supposed that any money had been advanced except under that agreement? We should pervert the intent of a bill of particulars, if we were to allow it thus to be *the means of entrapping a plaintiff. The case falls within *373] It thus to be the means of entrapping a part of the decision in Millwood v. Walter, 2 Taunt. 224, where it was holden that an erroneous date to a bill of particulars would not preclude the plaintiff's demand if the date could not mislead

The sum for which the plaintiff gives credit is only a conditional admission, of

which the defendant is not to take an unfair advantage.

PARK, J., referred to Day v. Bower, 1 Campb. 68, 69, n., where it was held that the plaintiff's particular is sufficient, however inaccurately drawn up, if it convey the requisite information to the plaintiff; and to Davies v. Edwards, 3 M. & S. 380. In Wade v. Beasley, 4 Rep. 7, the particular mentioned only a promissory note; and that being unstamped, the plaintiff was not allowed to prove the consideration, because such proof would interfere with the revenue laws.

GASELEE, J., with respect to the defendant's taking advantage of the sum for which the plaintiff gave credit in his particular, referred to Harrington v. Macmorris, 5 Taunt. 228, where it was held that a plaintiff could not use a notice and particular of set-off for evidence of the debt on the issue of non assumpsit.

ALDERSON, J., concurring, the rule was made

Absolute.(a)

(a) See Lambirth v. Roff, post, 411.

*3747

*WILSON v. COLLINS. May 2.

The payment of costs for not proceeding to trial is not a condition precedent to ulterior preceedings, unless so specified in the rule.

Andrews, Serjt., on the part of the defendant, had obtained a rule nisi to defer the trial of this cause, till certain interlocutory costs, awarded for not pro-

ceeding to trial on a former occasion, should have been paid.

Wille, Serjt., who showed cause, contended, that though under extraordinary circumstances the Court might make the payment of such costs a condition precedent to ulterior proceedings, yet that such was not the ordinary practice, and that no circumstances had been disclosed to justify the application which had been made. The party might issue his attachment.

Andrews suggested, that the plaintiff was out of the way, and could not be

served. But

The Court thought it would occasion great inconvenience to make the payment of such costs a condition precedent in ordinary cases, and the rule was

Discharged.

*ARIEL v. BARROW. Moy 7.

[*375

The defendant being in a condition to enter judgment of non proc for want of a declaration, the plaintiff, with a view to prevent the non proc, obtained a rule to discontinue on payment of costs; however, instead of paying costs or discontinuing, as soon as the rule had expired, he served the defendant with a declaration: Held a fraud on the proceedings of the Court; and the defendant having entered up judgment of non proc, the Court refused to set it aside.

THE plaintiff's attorney, in order to prevent the defendant from entering up judgment of non pros for want of a declaration, which he was in a condition to do, obtained a rule to discontinue upon payment of costs, and gave notice of an appointment to tax the costs. This rule expired on the 6th of February, 1832. But the plaintiff, instead of paying the costs or entering a discontinuance, on the 7th served the defendant with a declaration. The defendant upon this entered up judgment of non pros, which

Jones, Serjt., obtained a rule nisi to set aside as irregular.

Wilde, Serjt., who showed cause, relied upon the appointment to tax costs, as

being in itself a discontinuance, when

Jones, in support of his rule, referred to Edington v. Bowdenham, 1 Dowl. Pr. Rep. 154, and urged that the rule to discontinue having been obtained subject to the condition precedent of paying costs, the plaintiff was at liberty to

renounce it if he rejected the condition. But

The Court, without deciding the question of law, held the conduct of the plaintiff's attorney to be in the nature of a fraud upon the proceedings of the Court. Instead of making a direct application for time, he had taken out a rule which he had no intention to act upon, thereby *lulling the defendant into security, and obtaining an advantage which might perhaps have been refused upon a direct application. They, therefore, ordered the rule to be discharged, giving the plaintiff, however, an option to proceed upon payment of all costs incurred by the defendant.

Rule discharged accordingly.

WILLIS v. BERNARD. May 7.

In an action for criminal conversation, the letters of the wife to her husband and others are admissible in evidence to show the state of the wife's feelings, although they may also state a fact which would not strictly be evidence.

This was an action for criminal conversation. At the trial before Tindal, C. J., it appeared that the plaintiff and his wife were residing in Upper Canada when the plaintiff, being called by business to England, left his wife in the colony, but took his mother with him. By a cross-examination of the witness who proved the above facts, the defendant's counsel sought to insinuate that the plaintiff and his wife were not on good terms with each other, and that she felt offended at being left in Canada alone. To counteract the possible effect of this insinuation, and to show the state of the wife's feelings towards her husband, the plaintiff's counsel offered in evidence the following letter written by the wife to her husband's brother shortly after the husband sailed for England, and before her acquaintance with the defendant had commenced.

York, U. C., July 25, 1828.

"My dear Mr. Willis,

 though I fear John will not do so, as he was quite averse to my writing at all. Now, my dear Mr. Willis, it is absolutely necessary John should immediately settle all concerns with the Messrs. Salt, therefore I am exceedingly anxious that my trustees will transfer all or any part of the property now in the funds in my name, to the name of John Walpole Willis, to be applied to his use for the payment of any debts he may have incurred, so far as it will go. I need not say to you that John's desire is to add to any property his wife and child may have, instead of taking any part away; but the only way to increase his property is to be perfectly unembarrassed in pecuniary affairs. Should, however, the trustees be averse to transfer the stock to John's name, there is a plan which, as it more immediately concerns myself, I am determined to adopt, the more so as I should imagine the trustees could not offer any objection to it. As you are aware my husband settled on me, for my sole use, and during my life, any property I may or might have, I propose to do this, which cannot injure any one, but, on the contrary, will benefit us all. It is to sell my life interest in the sum of 5000l., for which, as I am young (twenty-six in August, and I may say strong and healthy), I should get at least 1500l. or 2000l. more than the sum. I earnestly entreat you to forward this plan as much as you can, and thus procure me one of the greatest pleasures the money could ever afford me, of being able to forward in any degree, however trifling, the happiness or benefit of my husband, and I am sure none of us can be contented until we are quite out of *debt. Should this plan, which is entirely my own, and which I am determined to pursue, succeed to my wishes, the money is to be immediately paid to John to pay off all debts, so far as it is sufficient to do so. I have considered this very frequently, and still it appears to me the best means to adopt, as, at my death, should John survive me, it will still be for him and my child, and it will afford me more real gratification than I can express. John's mind, as well as my own, will be relieved of a great annoyance, and then he will be better able to exercise his talents for the benefit of himself and family. It is little I can do, and he has sacrificed much for me; but what little I can, I ought and will do, as far as I can. I have to request another favour of you, not to mention this to John until you have well considered it yourself, and consulted those you think understand the subject, and who will give unbiassed advice. My husband would, I am aware, object to it; and indeed he ought not to be subjected to my trustees' denial; and I am anxious for you to explain to them that my husband is quite ignorant of my having written this letter, and therefore I am perfectly unbiassed by his opinion or advice on this subject. trustees object to this plan, I shall consider of some other means of deriving benefit from money which is now almost thrown by, as the interest is surely far too little for 5000l. Excuse this troublesome office. Accept the united loves of all here, and give the same to all dear friends; and believe me to be, my dear Mr. Willis. "Yours, &c.,

"MARY ISABELLA WILLIS."

The defendant's counsel objected to the reception of the letter on two grounds: 1st, that it was addressed, not to the husband, but to a third person, and the *379] decided cases had not gone further than to admit letters *from the wife to her husband; 2dly, that the wife's letter contained evidence of a particular fact; namely, the wife's offer to transfer her property to her husband, whereas, if admissible at all, it could only be received as evidence of the general state of her feelings. Trelawny v. Coleman, 1 B. & Ald. 90, Edwards v. Crock, 4 Esp. 39. The Chief Justice received the letter, subject to a motion to this Court; but cautioned the jury to read it only as evidence of the state of the wife's feelings; and a verdict having been found for the plaintiff with damages,

Spankie, Serjt., obtained a rule nist for a new trial, on the ground that the above letter ought not to have been received in evidence.

Wilde, Serjt., showed cause. The admissibility of the evidence must be considered with reference to the point to be proved by the plaintiff. The course of the cross-examination rendered it necessary for the plaintiff to establish as a fact Vol. XXI.—74

that his wife's feelings towards him were unaltered at the time her intimacy with the defendant commenced. Now her declarations to that effect would clearly have been admissible evidence. If the declarations of the wife would be admissible, by the stronger reason are her letters, as being less open to misrepresenta-In Trelawny v. Coleman, letters written by the wife to the husband while living apart from each other, proved to have been written at the time they bore date, and when there was no reason to suspect collusion, were held to be admissible evidence. And in Edwards v. Crock, where the husband and wife necessarily, from their situations in life, lived separate, and the wife committed adultery, letters written by her to her husband during their separation, but before any suspicion of *misconduct in the wife, were held admissible evidence to show that the husband and wife lived in a state of connubial affection previous to the adultery. It is immaterial whether the letters are written to the husband or to a third person. And as to their containing a state ment of fact, a witness, on cross-examination at least, would be allowed to state a fact on which he formed his opinion as to the feelings of the wife. But the jury were cautioned not to receive the letter as evidence of the fact; and it is no objection to a writing put in to prove a particular fact that incidentally it also proves another. In Manning v. Clement, 7 Bingh. 362, where the plaintiff alleged that he carried on in an honest and lawful manner the trade of a manufacturer of bitters, and that the defendant libelled him in his trade, by publishing that the bitters were made to adulterate porter, per quod the plaintiff was ruined, it was held, that under the general issue, the defendant might give in evidence that the plaintiff's trade was illegal, although, in doing this, it also appeared that his bitters had been condemned in the Court of Exchequer, and that the libel was true.

Spankie and Storks, Serjts., contrd. In Trelawny v. Coleman and Edwards v. Crock the evidence was admitted on the ground of necessity, because the wife lived apart, and there were no other means of showing what were her feelings towards the husband. In the present case, that proof might have been furnished by persons in whose society they had lived. Besides, this is not a letter to the husband, and a letter to a third person may be written for a purpose. At all events, the letter, as containing the statement of a fact, the surrender of property, which the jury ought not to have taken into consideration, should have been withheld from their perusal. [Alderson, J. That fact was of itself *indicative of the wife's feelings. Suppose the case of Madame Lavalette; would her conduct in rescuing her husband from prison, have been inclusible and inclusible and inclusible and inclusion in the second s inadmissible as evidence of her feelings towards him?] That is a strong case; but, on principle, the evidence of the particular fact ought to be rejected; for her conduct may have been occasioned by motives other than those of regard for her husband. Voltaire, no mean authority for the springs of human action, describes a lady as earnestly and successfully importuning a minister for the promotion of her husband, although her attentions were by no means confined to him alone.(a)

TINDAL, C. J. It seems to me that this letter was admissible for the purpose, and to the extent to which it has been admitted. It appearing on the trial, that the plaintiff being called to England on business, had sailed accompanied by his mother, and leaving his wife in Canada, the defendant's counsel entered on a course of cross-examination, intimating that the parties had not lived on good terms, and that the wife was offended at not being allowed to accompany her husband to England. Under these circumstances, the purpose for which the letter was offered, was to show that the wife retained her affection for her husband, and that she was not dissatisfied at being left in Canada. Two objections were made to the reception of the letter: one, that the Court was called on to extend the decisions in favour of the admissibility of such evidence, by reading a letter from the wife to a third person; the other, that the letter contained, in addition to expressions of affection, a statement of facts which could not properly be sub-

⁽a) Le Monde comme il va. Vision de Babouc, circa finem.

mitted to the jury. As to the first objection, the question on which the letter was submitted to the jury, was, what *were the feelings of the wife towards her husband at the time it was written, and whether her affections had been alienated by her husband's departure. If a person had been present when the letter was written, and had heard her make declarations that she remained freely and voluntarily in Canada, and without offence conceived against her husband, such declarations would have been evidence of that fact. If such declarations made by the wife in conversation, ore tenus, would be evidence, a letter written by her to the same effect seems less open to objection, as being less liable to misrepresentation: and I can see no material difference between a letter addressed to the husband, and a letter addressed to a third person; of the two, it may be thought the more unexceptionable evidence, exempt from any imputation of collusion; we cannot, therefore, be considered to carry the principle farther, by admitting the wife's letter to a third person. The second objection is, that the letter contains statements of fact which could not with propriety be submitted as evidence to a jury, and might improperly influence their judgment. I admit that the letter does contain statements of fact, and if it had been used as evidence of those facts, there ought to be a new trial. But it was produced for the purpose of showing the state of the wife's feelings; the jury were cautioned that it was not to be taken as evidence of the facts, and it contains passages abundantly sufficient to show the general good feeling of the wife. "I wrote yesterday to John in a packet that was sent over by the steamboat, in order to leave New York, if possible, by the Pacific the 1st of August, but I had not time to write to you by the same parcel." And in the body of the letter she says, "I earnestly entreat you to forward this plan as much as you can, and thus procure me one of the greatest pleasures the money could ever afford me, of being able to forward in any degree, however trifling, *the happiness or benefit of my husband." Surely as a declaration of the wife's feelings, this was not to be excluded. No doubt it renders the administration of justice more difficult when evidence, which is offered for one purpose or person, may incidentally apply to another; but that is an infirmity to which all evidence is subject, and exclusion on such a ground would manifestly occasion greater mischief than the reception of the evidence. The rule for a new trial, therefore, must be discharged.

PARK, J. I do not agree with the counsel for the defendant that nothing in this cause called for the introduction of the letter. When it had been insinuated in cross-examination that the plaintiff had left his wife in Canada against her will, and that they were an unhappy couple, sufficient grounds existed to call for the introduction of such evidence; and it was most important to produce this letter, written before the wife's acquaintance with the defendant commenced, and therefore clear of any imputation of collusion. The case falls exactly within the principle laid down in Trelawny v. Coleman, where letters from a wife to her husband were received in evidence; and letters from a wife to a third person are less open to exception. In Edwards v. Crock also Lord Kenyon was clearly of opinion that the wife's letters were admissible in evidence. It has been argued that in those cases the letters were received on the principles of necessity, because no other evidence could be adduced of the feeling between the parties. But the letter was equally necessary here; for the husband being beyond the sea, the wife's demeanour could not otherwise be shown at the period immediately before her acquaintance with the defendant. The letter, independently of the facts as to the settlement, contains a most delicate and feeling expression *384] of conjugal affection,—"I *earnestly entreat you to forward this plan as much as you can, and thus procure me one of the greatest pleasures the money could ever afford me, of being able to forward in any degree, however trifling, the happiness or benefit of my husband." If she had come to England, and had said this to Mr. Willis, would not such expressions have been evidence to show the state of her affections? I agree that it is more desirable that such part of the evidence as does not apply to the point to be proved should be withdrawn altogether from the consideration of the jury. But in many cases that is impossible; as in Manning v. Clement, where the plaintiff alleged that he carried on in an honest and lawful manner the trade of a manufacturer of bitters, and that the defendant libelled him in his trade by publishing that the bitters were made to adulterate porter, per quod the plaintiff was ruined; it was held, that under the general issue, the defendant might give in evidence that the plaintiff's trade was illegal, although in doing this it also appeared that his bitters had been condemned in the Court of Exchequer, and that the libel was true. So in the case of prisoners; where confessions are given in evidence which unavoidably involve the mention of others besides the party confessing. But the jury are always cautioned to exclude the statement as against any but the party confessing. They also received a proper caution in this case, and, subject to that, the letter was properly admitted.

GASELEE, J. I am of the same opinion. I can make no distinction between a letter to a third person, and an oral declaration of the wife, which is clearly evidence according to the decision in Trelawny v. Coleman. The date of this letter shows that it was written after the departure of the husband, and before the wife became acquainted with the defendant; it is, therefore, most *important as showing the state of the wife's feelings at a very critical period.

[*385]
I think that both the objections have been answered, and that the rule must be

discharged.

Alderson, J. This case cannot be distinguished in principle from Trelawny v. Coleman. An objection which was made in that case, that no evidence was given to show why the husband was absent from his wife, has been answered in this, by showing that the husband was called to England on business; but it was admitted in Trelawny v. Coleman, that the declarations of the wife were admissible as forming the ground of a witness's opinion as to the state of her affections. If so, why should not letters from the wife to a third person be received, especially when letters from her to her husband have been received on the same principle as conversations between them? If what the wife says is admissible to show the way of life between her and her husband, what she writes must be equally admissible. Undoubtedly the letter in question contains the statement of a fact which might have weight with the jury, and was not, strictly speaking, evidence. But the jury were properly cautioned on the subject, and as reasonable men, they must, after such caution, be supposed capable of rejecting what was not applicable to the question in issue. That circumstance, therefore, is no objection to the reception of the letter, and the rule which has been obtained for a new trial must be Discharged.

*DOE dem. REW and Others v. LUCRAFT. May 3. [*386

"My house in A. to such son of mine as shall first attain twenty-one years, when he shall attain such age, and his heirs; but in case I depart this life without leaving a son, or leaving such, none shall attain twenty-one, to my daughter Jane, if she shall attain twenty-one, and her heirs; but should I depart this life without leaving issue, to L and his heirs."

Testator left one child, his daughter Jane, who died without issue under the age of twenty-one: Held, that L. took nothing by the devise to him.

THE lessors of the plaintiff sued, as the acting devisees in fee, in trust for sale under the will of James Newton of London, wine-merchant, deceased, heir of John Newton of Broadclyst, in the county of Devon, gent., deceased, to recover possession of one undivided moiety of a freehold messuage, with the appurtenances, situate in Aldgate High Street, which the defendant Nicholas Lucraft claimed to hold to him and his heirs under the will of John Newton.

Upon the trial at the London sittings last Michaelmas term, a verdict was found, by consent for the plaintiff, subject to the opinion of the Court on the following case:—

Henry Newton of Aldgate High Street, London, wine-merchant, being seised in fee-simple of the entirety of the freehold property in question, by his will, dated 4th of August, 1803, devised the same to his brother James Newton and his assigns for life, with remainder to trustees to preserve contingent remainders; with remainder to the testator's nephew Henry Newton, son of the testator's eldest brother, John Newton, for his life; with remainder to trustees to preserve contingent remainders; with remainders in strict settlement to the issue of said Henry Newton, the nephew; with remainder to the testator, Henry Newton's, own right heirs for ever.

The testator Henry Newton died on the 27th of November, 1819, without issue, leaving said John Newton, his eldest brother and heir at law, and said James Newton, his only other brother, him surviving. His will was proved in *19871 the prerogative court of Canterbury 11th *of January, 1820. Henry Newton, son of John Newton, died without issue in the lifetime of the The said John Newton, by his will dated 29th of October, 1822, duly executed and attested to pass freehold estates, devised as follows:--" I give and devise all that my reversion in fee expectant upon the life estate of my brother James, of and in all that messuage or tenement and premises, formerly two messuages or tenements, situate in Aldgate High Street, now in the occupation of my said brother, unto Arthur Clarke and Mark Ashford and their heirs; in trust nevertheless as to one undivided moiety or half part thereof for Nicholas Lucraft, his heirs and assigns for ever : and as to the other undivided moiety or half part thereof, in trust for such son of mine by my present wife issuing as shall first attain the age of twenty-one years, as and when such son shall attain such age, and for his heirs and assigns for ever. But in case I shall depart this life without leaving a son, or, leaving such, none shall live to attain the age of twenty-one years, then as to the said last-mentioned moiety or half part, in trust for my daughter Jane Newton, if she shall live to attain the age of twenty-one years, and for her heirs and assigns for ever. But in case my said daughter Jane Newton shall depart this life under that age, then I give and devise the said last-mentioned moiety or half part unto the said Arthur Clarke and Mark Ashford and their heirs, in trust for such other my daughter by my present wife as shall first live to attain the age of twenty-one years, and for her heirs and assigns for ever. But should I depart this life without leaving issue, then I give and devise the entirety of the said messuage or tenements and hereditaments, situate in Aldgate aforesaid, unto the said Arthur Clarke and Mark Ashford and their heirs, in trust for the said Nicholas Lucraft, his heirs and assigns for ever.

*388] *The said Nicholas Lucraft was John Newton's wife's brother; and at the time of the making the will of John Newton, James Newton was not nor had ever been married, and was of the age of sixty-five years and upwards.

John Newton died in or about the month of March, 1824, in the lifetime of James Newton, leaving Jane Newton, his only child, and without having re-

voked or altered his will; and the same afterwards was duly proved.

The said Jane Newton died in October, 1826, an infant, at the age of four years or thereabout, leaving James Newton, her uncle, her heir at law, her sur-

viving.

James Newton, by his will dated 22d of April, 1823, duly executed and attested to pass freehold estates, after bequeathing certain pecuniary legacies, as to all the rest, residue, and remainder of his estate and effects, of what nature or kind soever and wheresoever, that he should be possessed of, interested in, or entitled to at the time of his decease, and not thereinbefore disposed of, gave, devised, and bequeathed the same and every part thereof to his trustees and executors, the lessors of the plaintiff, to hold to them, their heirs, executors, and administrators, upon the trusts therein mentioned, and appointed them executors of his said will. The testator republished his will on the 21st of July, 1827; died in October, 1830; and the lessors of the plaintiff proved the will.

It was agreed that either party should be at liberty, upon the argument of the

case, to refer to any part of the said will of John Newton.

The question for the opinion of the Court was, whether the defendant Nicholas Lucraft took any and what estate in the mojety of the freehold premises in question under the ultimate devise contained in the said will of John Newton.

*Scriven, Serjt., for the lessor of the plaintiff.

The event upon which the entirety of the premises in Aldgate was to [*389 go over to Lucraft under the will of John Newton never took place; for he died, leaving issue; and if the fact had been otherwise, the devise of the entirety to Lucraft would have been void as too remote after a general failure of issue. Forth v. Chapman, 1 P. Wms. 663, Beauclerc v. Dormer, 2 Atk. 808, Barlow v. Salter, 17 Ves. 482, Franklin v. Lay, 6 Madd. 258.

Stephen, Serjt., for the defendant. The devise over, upon the testator's dying without leaving issue, means such issue as were the objects of the preceding devise, that is such issue as should live to attain twenty-one years; and the will must, therefore, be read as if it had been written, "without leaving such issue as aforesaid." There is abundant authority for putting that construction on the words "dying without leaving issue," when employed after previous devises to children. Blackborn v. Edgley, 1 P. Wms. 600, Morse v. Marchioness of Ormond, 5 Madd. 99, Ginger v. White, Willes, 348, Target v. Gaunt, 1 P. Wms. 432, Farthing v. Allen, 2 Madd. 310, Gulliver v. Wickett, 1 Wils. 105, Fonnereau v. Fonnereau, 3 Atk. 315. No doubt the devise over, in case of dying without leaving issue, would be void, if the Court could not imply an estate tail in the first takers; but that, according to Tenny v. Ager, 12 East,

253, and numerous other cases, may properly be implied.

TINDAL, C. J. It seems to me that, on the proper construction of this will, our judgment ought to be for the plaintiff. The question arises on the *words of a will, by which the testator, John Newton, devised to Nicholas Lucraft certain messuages, with the appurtenances, in Aldgate High Street; and the words are "should I depart this life without leaving issue, then I give and devise the entirety of the said messuage or tenements and hereditaments situate in Aldgate aforesaid unto Arthur Clarke and Mark Ashford, and their heirs, in trust for the said Nicholas Lucraft, his heirs and assigns for ever." Now these words may be taken according to their natural meaning, and then they imply a devise over after a general failure of issue, which would be void, as too remote: or they may be taken to mean a dying without leaving a child or children; in which case the event on which the devise over is to depend will not have happened; for the testator died, leaving a daughter. But, on the part of the defendant, a third construction has been contended for, namely, that we should take the will as if it had been written "Should I depart this life without leaving such issue as aforesaid;" and that this is to mean, not only such issue as had been before described, namely, as son and daughter, but such issue, with the restrictions which accompanied the mention of them in the preceding devise But, though cases have been cited to show that the word issue may be applied to such issue as have been described before, there is no case to show that when used in such sense it is also to include the restrictions which may have accompanied the mention of such issue in preceding parts of the will. Supposing the testator here to have meant, by dying without leaving issue, dying without leaving a son or daughter, what is there to show he meant to restrict that to a dying without leaving a son or daughter who shall have attained the age of twenty-one years? If we were to import such a restriction into this part of the will, we should manifestly do violence to the intention of the testator expressed in another part. *Where the testator disposes of the same property to a daughter in [*391 remainder after a son, he uses those words of restriction: when we see, therefore, that he has omitted them when he devises the same property to the defendant, we must infer that the omission was intentional, and that we should improperly interfere if we interpolated words from another portion of the will. As to our implying an estate tail, to prevent the devise over from being too remote, in case we adopt the construction contended for on the part of the defendant, there is an end of that argument, if by such issue we are to understand

son or daughter. And it is not easy to see to whom the estate is to go over. The proposition, therefore, for which the defendant contends, not being satisfactorily established, I can only give the words their natural effect, that the estate is only to go over if the testator should die without leaving issue; and as that has not happened, our judgment must be for the plaintiff.

PARK, J. I am of the same opinion. When we see words of restriction applied in the devise to the daughter, and omitted in the devise to the defendant, we must suppose this was done advisedly, and the rather, as the testator

appears by the will to have had professional assistance.

GASELEE, J., concurred.

ALDERSON, J. I am of the same opinion. The word issue may sometimes be restrained to a particular class; but it is required here to add the further restriction, that that class should not have attained the age of twenty-one. No case will be found to have gone that length.

Judgment for the plaintiff.

*3927

*TEMPERLEY v. SCOTT. May 9.

Costs. A captain of a ship, witness in a cause, is allowed for his subsistence according to his station, for the whole time during which he is detained to give evidence.

In March 1831, the plaintiff's agent proposed that a witness in this cause, Grewcock, the captain of a ship, should be examined on interrogatories, apprising the defendant that the witness could not be detained except at a considerable expense; the defendant's agent, however, said he would rather incur the risk of expense than forego the advantage of cross-examining the witness in open court.

The trial of the cause, which was twice postponed at the instance of the defendant, took place in February last, when a verdict having been found for the plaintiff, the prothonotary allowed the witness, Grewcock, &!. a month for his subsistence and loss of time during eleven months, upon affidavits that he had been detained during that time, had lost an opportunity of profitable employment, and had been paid 10l. a month by the plaintiff.

Wilde, Serjt., having obtained a rule nisi for the prothonotary to review his

taxation on the ground that the allowance for loss of time was improper,

Taddy, Serjt., who showed cause, relied on Berry v. Pratt, 1 B. & C. 276, where costs were allowed for the subsistence of a seafaring man during the period of his detention in order to give evidence; and on Lonergan v. Royal Exchange Assurance, 7 Bingh. 725, 729, where the captain of a ship was paid for his loss of time.

Wilde. The allowance in Lonergan v. Royal Exchange Assurance was for *393] subsistence. No English *witness is entitled to any allowance for loss of time; a promise to pay him is void; Collins v. Godefroy, 1 B. & Adol. 950; and it is doubtful, whether the allowance of subsistence to an English witness can be supported on principle. Every man is bound to give his attendance in a court of justice; it may have a dangerous effect on his testimony to allow him to be supported at the expense of the party who calls him, and will enable that

party to entail overwhelming expense on his opponent.

TINDAL, C. J. It is unnecessary in this case to agitate the general principle as to the allowance of costs for loss of time; for, in the first place, the sum which has been allowed in this case for subsistence is not extravagant;—very little, if at all, more than was necessary for the board and lodging of a witness in Grewcock's station;—and then an offer was made to the adverse party to examine the witness on interrogatories, and warning was given of the expense that would attend his refusal. Perhaps he made a prudent election; but it reduces the case to a bargain between the two parties, which precludes the necessity of any interference on the part of the Court.

Rule discharged.

*CRISP v. Sir HENRY EDWARD BUNBURY, Baronet, and Others. [*394

Since 9 G. 4, c. 92, an action does not lie against the trustee of a savings bank. In case of disputes, the only mode of proceeding is by arbitration.

THIS was an action of assumpsit against the defendants, as trustees of the Mildenhall bank for savings, for money had and received by them to the use of the plaintiff. At the trial before Tindal, C. J., Middlesex sittings 1830, a verdict was found for the plaintiff for 44l., subject to the opinion of the Court on

the following case:—

In April 1818 a savings bank was established at Mildenhall, in the county of Suffolk, under the provisions of 57 G. 3, c. 130. Rules were drawn up which, in the same year, were duly enrolled with the clerk of the peace, and afterwards acted upon. The defendants, with others since dead, were duly appointed trustees, and acted as such; but William Newton, who is still living, though not made a defendant, was also a trustee, and acted. Sir Henry Edward Bunbury, one of the defendants, who resided at Mildenhall, was also duly appointed, and acted as treasurer, and W. Bassett, another of the defendants, as manager. One William Gill was duly appointed clerk in the year 1818, and continued to act in that capacity until 1825, when it was discovered that he had embezzled a considerable sum of money, the amount of deposits which had been received by He absconded, and was prosecuted by the trustees to conviction, and transported. Bassett from time to time received deposits of the plaintiff, and duly signed his book in which such deposits were regularly entered, but he never saw Crisp's account in the possession of the clerk, or attended at the clerk's office after March 1819; the clerk having told him that he *would give him notice when it was necessary for him to attend. On Gill's absconding, Bassett went to his house, and there found two cash account books, one a false and the other a true one; in each of which the plaintiff's account with the bank was entered, from which it appeared, that on the balance in the hands of the clerk, the plaintiff's claim in June 1824 was 351. 8s. 31d. The entry of the account in both books was precisely similar, except that in the false book the word "paid" was added at the end of the account, importing that the whole balance had been paid to the depositor. It was admitted that the receipts and payments on account of deposits were as appeared by the account; and that the plaintiff had not received the balance of the account. A letter was, on the 27th of June, 1829, sent by the plaintiff's attorney to the defendants, to W. Newton, and various others, which, after alluding to the embezzlement and conviction of the clerk, and expressing a hope that an amicable adjustment of the claims of the several depositors might be effected, gave notice to the defendants and others, that the plaintiff had appointed Mr. O. Austin of the Temple, barrister, to be his referce, and called on the defendants, within a month to appoint a referee on their behalf, both in the matter of Crisp, and the other depositors. Sir H. Bunbury was then abroad, and did not return to England till after the action was No arbitrator had ever been appointed by the managers or trustees, they altogether denying their liability, and it being admitted that they had no funds in hand to satisfy the plaintiff's claim. It was admitted that general meetings to receive the reports, and to examine and audit all the accounts of the establishment, were not held pursuant to the first rule of the institution. plaintiff went, about the time Gill absconded, to his house, for the purpose of making a formal demand, but *he found the premises shut up, and that [*396 Gill had absconded.

Among the rules of the society were the following: First, "The affairs of the bank shall be conducted by not less than six trustees, twenty managers, and a treasurer; none of whom shall derive any benefit from the deposits, or receive any remuneration for services. Every trustee will be considered as an honorary manager. General meetings shall be held on the first Friday in October, January, April, and July, to receive the reports, and to examine and audit all accounts of the establishment. The managers shall also have the power of fil-

ing up vacancies, and of adding to the numbers of trustees, and of their own body. Upon the requisition of three managers, a special meeting may be called. upon giving fourteen days' previous notice. At every general meeting, one trustee and four managers shall be competent to act." Seventeenth; "Any matter in dispute between this institution and any person acting under the same, and any depositor therein, or any executor, administrator, or next of kin of any deceased depositor, or any person claiming to be such executor, administrator, or next of kin, shall be referred to the arbitration of two persons; one to be named by the managers, and the other by the claimant: and in case the two persons so named shall not agree, they shall forthwith nominate an umpire, and the decision and award of such referees and umpire shall be final and binding upon both parties." And by 9 G. 4, c. 92, s. 45, it is enacted, "That in case any dispute shall arise between any such institution or any person or persons acting under them, or any individual depositor therein, the matter so in dispute shall be referred to the arbitration of two indifferent persons to be chosen and appointed in the manner therein pointed out; *397] and, in case of their not agreeing, then to the *barrister at law to be appointed by the commissioners, as directed by the act; and whatever award shall be made by the said arbitrators, or the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal."

The case was argued in Hilary term by

Storks, Serjt., for the plaintiff, and Taddy, Serjt., for the defendants, who took several objections to the plaintiff's recovery; in particular, that the defendants, as honorary trustees, were not responsible for embezzlement by the clerk of the society; and that, at all events, the plaintiff's remedy was not by action, but by arbitration. The decision of the Court turns on the latter ground alone; as to which, it was contended on the part of the plaintiff, that the statute 9 G. 4, c. 92, s. 45, is directory only with respect to arbitration, not imperative; that parties cannot, by agreement, oust the courts of law of their jurisdiction; nor can a statute effect this, except by express words or necessary implication; Cates v. Knight, 3 T. R. 442; and that, at all events, the defendants having refused to proceed to arbitration, could not now object that the plaintiff had proceeded at law.

On the part of the defendants it was argued, that though parties cannot, by agreement, oust the jurisdiction of the courts of law, it may be ousted by statute; and that the statute 9 G. 4, c. 92, s. 45, is imperative in this respect, the object of the legislature being to protect the funds of poor contributors from more expensive litigation.

Cur. adv. vult.

TINDAL, C. J. This is an action of assumpsit against the defendants, as *398] trustees of the Mildenhall bank for *savings, and is brought for money had and received by them to the use of the plaintiff. This bank was established in the year 1818, under the rules and regulations set out in the case; and from that time, until the passing of the statute 9 G. 4, c. 92, was governed by the various provisions contained in the statute 57 G. 3, c. 130. But that statute, with certain other acts which had been passed for amending it, were repealed by the 9 G. 4, c. 92, with an exception, that nothing in that act contained should invalidate or annul any payments, agreements, or appointments made, or proceedings had, or any instruments executed under the authority of any of the repealed acts; and by the last section of the 9 G. 4 that statute is declared to extend "to all savings banks established, and hereafter to be established, in England and Ireland." It appears, therefore, to us, that the only law which governed and regulated the rights of the parties to this action at the time the action was brought, is to be derived from the only statute then in existence in relation to the subject-matter of the action, namely, the 9 G. 4.

Amongst the objections that have been urged by the defendants against the right to maintain this action, one is, that by the forty-fifth section of the last statute, the legislature has provided, "That in case any dispute shall arise between

any such institution, or any person or persons acting under them, and any individual depositor therein, the matter so in dispute shall be referred to the arbitration of two indifferent persons, to be chosen and appointed in the manner therein pointed out: and, in case of their not agreeing, then to the barrister at law to be appointed by the commissioners, as directed by the act; and whatever award shall be made by the said arbitrators, or the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes without any appeal;" and it is *contended on the part of the defendants that this enactment is imperative upon the plaintiff, taking away the jurisdiction of the courts of common law, and leaving the party who complains no other mode of determining his claim than that which is pointed out and provided by the act. It is not denied, on the part of the plaintiff, that the present case falls within the description of those contained in the forty-fifth section; indeed, it would be impossible to argue that the present is not a dispute between persons acting under the institution and an individual depositor: but it is contended by the plaintiff, that the jurisdiction of the courts of common law is not ousted by any words to be found in this section; and that the utmost which the section contemplates is, to create a concurrent, and not an exclusive jurisdiction in the arbitrators or But we are of opinion, that both with reference to the words of the statute, and the object which it had in view, the plaintiff is barred from maintaining the present action in a court of law, and must pursue the remedy provided by the statute. It is undoubtedly true, that the jurisdiction of the superior courts of Westminster is not to be ousted, except by express words, or by necessary implication: Cates v. Knight: yet, where the object and intent of the statute manifestly requires it, words that appear to be permissive only, shall be construed as obligatory, and shall have the effect of ousting the courts of their jurisdiction, as in the case last referred to, where a clause enacted that it "shall and may be lawful for a justice of peace to hear and determine offences against the act that subject the offender to penalties, not amounting to 501," with a power to the justices to mitigate the penalties; whilst the same act directed that all penalties which amount to 50l. or more, shall be sued for in his Majesty's courts at Westminster; it was held, that by necessary implication the courts above were ousted of *their jurisdiction in the case of penalties not amounting to 50l. Now, in this case the legislature has enacted that disputes of the description of the present "shall be referred," -words which, in their natural force, denote an obligation, not a permission only; and unless these words are construed to be compulsory on the plaintiff, they mean nothing If they are not compulsory on the plaintiff, neither can they be so, upon any principle of fair construction, upon the defendant. And if recourse to arbitration is not intended except both parties choose to adopt it, then indeed the act is made a dead letter; for it would be competent for both parties to refer the dispute to arbitration, if they both agreed upon it, without the intervention of the statute. In order, therefore, to give these words of the statute any force or operation, the word shall must be construed as obligatory, that is, that the matter in dispute shall of necessity be referred to arbitration, and not be determined in any of the courts of Westminster Hall. But looking at the object and intention of the legislature, we think it clear that the remedy by action is taken away, and that by arbitration substituted in its place. These institutions were intended to comprehend a very large number of depositors, chiefly from the lower walks of life; many of them contributing very small sums, and claiming very small profits by the addition of interest. On the other hand, the trustees and managers are uncertain in point of number. To allow, therefore, actions at law to be maintainable by each depositor against the trustees, upon the occasion of every dispute with the institution, either as to the amount of the balance due, or the interest claimed by him, would be, in effect, to cause the ruin both of the depositors and the institution, by casting the costs of an action in the superior courts at Westminster upon the losing party. No person would fill the gratuitous office

*401] of a trustee or a manager, if he *was exposed to the hazard of suits at law at once so expensive and so numerous; no depositor would be able to enforce his just rights, if he must sue in the superior courts, at the hazard of being defeated with heavy costs if he sued more of the trustees than he might be able to prove liable; or subject to have his suit abated if he sued too few. It is evident, therefore, that the legislature contemplated the cheap, simple, speedy, and equitable adjustment of all disputes by a reference in the mode pointed out in the act, instead of a more expensive, dilatory, and uncertain remedy by action at law; and we think we should defeat that very serviceable object,—serviceable alike to the depositors and to the institution,—unless we construe the words used, as words which import an obligation to refer, and which take away the right to sue in the superior courts.

In this view of the case, it would be improper to give an opinion on the other points which were made in argument, as we have no jurisdiction: and we can only express our surprise and regret that the defendants, who set up this as a ground of defence, did not act upon it when the plaintiff appointed an arbitrator on his part. At present, however, there must be judgment for the defendants.

*402] *IN THE COURT OF CHANCERY.

Ex parte TINDAL. May 10.

By marriage settlement, S. covenanted to cause 4000L to be paid to his wife's trustees within twelve months after his own decease, in trust to pay her the interest for her life in case she survived him, and afterwards the principal to their children; but if they had no children, to the survivor of them, S. and his wife, his or her executors or administrators.

Held, that this was a debt on a contingency, provable under a commission of bankrupt against S.

EDWARD GRAY, upon the marriage of his daughter with William Smith, covenanted in her marriage settlement to pay Smith 2300*l*. immediately, for his absolute benefit, and 4000*l*. more within twelve months after Gray's decease. The 2300*l*. was accordingly paid on the marriage, and the 4000*l*. shortly after Gray's decease.

Smith, on his part, covenanted to secure his wife 80l. a year for her separate use, and, within twelve months after his decease, to cause to be paid 4000l. to her trustees, with interest from the time of his death, in trust to pay the interest and annual produce to his wife for her life in case she survived him; and after her death, in trust to pay and assign the money and the interest, and annual produce thereof to, between, and amongst the child and children of Smith and his wife, in manner thereinafter mentioned; and if they had no child or children, to the survivor of them the said Smith and his wife, his or her executors, administrators, or assigns. The provision made for the wife was to be in lieu of dower.

Smith having become bankrupt, and his wife being still alive, Tindal, the trustee under her marriage settlement, applied to prove the value of the 4000l. covenanted to be paid by the executors of Smith within twelve months after his death, under 6 G. 4, c. 16, s. 56, which enacts, that "If any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the *issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt; and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not have been so ascertained before the contingency shall have happened, then such person may, after such contingency shall

have happened, prove in respect of such debt, and receive a dividend with the

other creditors, not disturbing any former dividends."

The proof was rejected by the commissioners, but their decision was reversed by his Honour the Vice-Chancellor.(a) The decision of his Honour was afterwards reversed by Lord Lyndhurst.(b)

This was a petition to Lord Brougham, C., to rehear the order made by Lord Lyndhurst, and was argued before the Lord Chancellor, assisted by TINDAL, C.

J., and LITTLEDALE, J., on the 27th of August, 1831.(c)

TINDAL, C. J., now delivered his opinion as follows, in which LITTLEDALE,

J., and Lord Brougham, C., concurred:—
There are two questions in this case: First, whether the bankrupt has contracted a debt payable on a contingency within the meaning of the fifty-sixth section of 6 G. 4, c. 16; and, secondly, supposing that he has done so, whether the commissioners can set a value upon the debt so as to make it the subject of proof under the commission.

On the first question it is contended, on the behalf of *the assignees, [*404] that the contract entered into by the bankrupt is not a debt, but merely a covenant that the executors of the bankrupt shall pay a sum of money on a collateral event; that the only effect of that contract is, to create a charge on his assets; and that such was all that the parties themselves contemplated by the settlement, as the bankrupt himself could never have been liable to pay the money: that the parties themselves took the chance of what the assets might produce,—a chance which, in some cases, might be more beneficial to the wife and children; because, if the husband should become bankrupt, and afterwards acquire property, they would have the benefit of the provision in full, instead of a dividend, very much diminished as it must be by the calculation of the contingency.—But we are of opinion that the contract contained in the settlement is a debt which the bankrupt has contracted within the meaning of the fifty-sixth section of the bankrupt act. A covenant to pay a sum of money constitutes a debt; and an action of debt, technically so called, may be maintained upon it: 1 Leonard, 208, Com. Dig. tit. Debt (A 4), Ingledew v. Cripps, 2 Ld. Raym. 814: for though in the case last cited there was a penalty, yet the language of the Court is, that debt will lie on a covenant to pay a sum of money; and it is a common practice to draw declarations in debt on a covenant to pay a sum of And if a man covenants that his executors shall pay a sum of money after his death, that also appears to us to create a debt, and we think it just as much so as if he himself had covenanted to pay it. Plumer v. Marchant, 3 Burr. 1380. In that case the testator covenanted that he would leave by his will, or that his executors or administrators should, within six months after his death, pay a sum of money *to trustees for the benefit of his wife and children; and an action being brought against the administrator on a [*405] bond of the testator, he pleaded plene administravit: the question was, whether he could retain the money so covenanted to be paid; and all the Court held that this was a debt which might be retained. It is true, there was a penalty on which debt would lie, but the Court only noticed that incidentally, and it is plain that their judgment would have been the same if there had been no penalty.

There may be a doubt whether an action of debt, technically so called, would lie against executors upon such a covenant, because debt would not have lain against the testator himself: Wentworth's Office of Executors, 232, and Perratt v. Austin, Cro. Eliz. 232: though Lord Mansfield, in Plumer v. Marchant, above cited, speaks very lightly of the latter case of Perratt v. Austin, and even in the case itself, there is a note at the end making a quære to one of the reasons. But those authorities are merely to the form of action, whether it should be debt or covenant, and do not affect the substance of the case, which is, whether a sum of money is payable by the contract; and in the case referred to in Leonard's

⁽a) See 1 Mont. & Mac. 415.

⁽b) Ib. 422.

⁽c) For the argument see 1 Mont. & B. 375.

reports, it is said that the word covenant sometimes sounds in covenant, sometimes in contract, according to the subject-matter. The case of Lee v. Cox and D'Aranda, 1 Ves. 1, and 3 Atk. 419, was cited, to show that a covenant that a man's executors should pay, was the same as a covenant to leave a sum of money, and that the latter did not create a debt; but without considering whether, at law at least, a covenant that a man's executors shall pay, be for all purposes the same thing as a covenant that he will leave, the case of Lee v. Cox and D'Aranda was upon a question, whether a widow should have the benefit of such a covenant, *406] and *also of the distributive share, pro tanto, of her husband's estate; a question on the point of double satisfaction. Many similar cases have occurred, all of which were considered in Goldsmid v. Goldsmid, 1 Swans. 211. But we do not form our opinion upon the technical ground that an action of debt will lie in point of form, but upon the substance and effect of an absolute covenant, that a man's executors shall pay a sum of money to certain persons

upon certain trusts, which, in our opinion, constitutes a debt.

Then, if it be a debt contracted, there is no doubt but it is payable on a contingency. There is one contingency as to the distance of time at which it is payable, depending upon the life of the bankrupt; and another, whether the wife or any of the children be alive at the death of the bankrupt, so as to be entitled to the benefit of it. It is possible, that the contingency as to who shall have the benefit of it, may never happen at all, which would be the case if the wife should be dead, and there should be no children at the death of the bankrupt. But it has been urged, that this is not a contingent debt within the meaning of the act of parliament, because it is uncertain whether the debt will ever be payable or not. We think, however, that uncertainty affords no reason why it should not: neither the words nor the spirit of the act require such a restriction upon contingent debts. It surely would put too narrow a construction upon the words of this act, to hold that they are to be confined to cases where the event upon which the contingency rests must happen some time or other; and that because such event may never happen, the debt is not to be taken as payable on a contingency; for though the debt may never be paid, it is nevertheless payable if the contingency does happen, and as such it *is, strictly and properly *4077 speaking, payable on a contingency.

One of the classes of contingent remainders is, where the contingency may never happen at all; and it is to be presumed that the legislature in using the word contingency, meant that it should apply to such cases as upon other occasions are held to fall within the meaning of that term. Before the late act of parliament, a very extensive set of creditors claiming under marriage articles had, on various occasions, applied to prove debts under commissions of bankrupt, as appears by the cases of Tully v. Sparkes, 2 Ld. Raymd. 1546, Ex parte Caswell, 2 P. Wms. 497, Ex parte Greenaway, 1 Atk. 113, Ex parte Groome and Ex parte Winchester, 1 Atk. 115, Ex parte Mitchell, 1 Atk. 120, Ex parte Barker, 9 Ves. 110, Ex parte Alcock, 1 Ves. & B. 176, Ex parte Taaffe, 1 Gly. & J. 110, and that class of cases. In many of these cases expressions are used of the hardship of trustees under marriage settlements not being able to prove under commissions of bankrupt. And there can be little doubt but that the legislature had in view this numerous class of cases of trustees under marriage settlements: and we think the words of the present act of parliament are suffi-

cient to reach these cases.

But the principal difficulty which has been urged in argument is, that no valuation can be made by the commissioners within the meaning of the act. If the contingency depends upon the lives of persons in existence, and the order of time in which the various individuals may die, such contingencies are clearly reducible to a matter of calculation, and a valuation may be made of the present worth of the debt; but if the valuation depends upon particular events, which *408] *may or may not take place, and upon the lives of persons uot now in existence, and where it is uncertain whether any such persons will ever come into existence, and if any do, it is still uncertain how many there may be,

and the valuation is to be made upon a contingency depending on such a complication of events, then, indeed, it may be admitted that no valuation could be set upon it, as there would be no possibility of bringing such a case within any rules And in this particular case, if the calculation must necessarily of calculation. depend on how many persons there should be connected with there being any children of this marriage, or upon the number of such children, if any, or on the time of the death of these uncertain children, then we should have thought that no valuation could be made of the debt in question, so as to admit it to proof. But we think the valuation is not to depend upon the fact of there being any future children of the marriage, or upon the time of their death. It appears to us such calculation ought to be made merely with reference to the time of the bankrupt's death; and that the valuation is to be simply this,—the present worth of 4000l., payable twelve months after the death of the bankrupt. The settlement contains a positive covenant that the debt is to be paid to the trustees at the end of twelve months after the death of the bankrupt. The trustees are, therefore, entitled to receive the whole at that time, as an absolute debt to themselves. They are directed, after receiving it, to lay out the money in securities mentioned in the settlement, and apply the interest and principal in the way therein directed, and in the first instance, the wife is to have the That would be the state of things if Smith had not become whole for her life. Then how is it altered by the bankruptcy? Suppose the debt to the trustees had not been contingent and had been payable immediately, the *trustees would have proved for the whole debt, without reference to the fact whether there were children or not. Suppose the debt had been payable at a future day certain, then they would have proved for the whole debt, deducting a rebate of interest, and that, also, without reference to the fact whether there were children or not. But this debt being payable at a future day, which is uncertain, there can be no rebate of interest, and, therefore, a value is to be set upon it, and that value, it seems to us, should be governed upon the principle, that the value should be put upon the whole debt, without reference to there being children. There being children or not ought not to affect the right of the wife to the interest for life in the first instance, and she cannot have the benefit of the whole debt unless the value should be taken in the way we have mentioned. If there are children, the trustees will divide the money amongst them, according to the terms of the settlement. And, as to these also, they are entitled to have the benefit of the whole debt, subject to the deduction as to the valuation. And if there are no children, the wife will take the debt by survivorship; reduced, as it will be, by the deductions before alluded to, and by the receipt of dividends under the commission only instead of the debt. In the event of the wife dying before the husband and there being no children, there will be nobody to take, and then it will revert back to the husband's estate.

One argument adduced against admitting the present proof is, that this may, in certain events, be a proof for the benefit of the husband, and that, therefore, it cannot be received. If a proof was made for the immediate benefit of the husband, it would be nugatory to allow it to be made, because the benefit of it must go back to the estate. But if, in the multiplied limitations of a marriage settlement, some benefit may eventually arise to the husband, there can be no reason why the whole *proof should on that account be rejected. Here [*410 there are two ways by which the husband might be benefited; one, if the husband should survive the wife and there should be no children. In that case, the money received as the dividends, would go back to the husband's estate; but then the proof would not be considered as having been made for the benefit of the husband, but the whole proof would fall to the ground, and be as if it had never taken place; because the trusts of the settlement, as far as relate to the sum of 4000*l*., would not come into operation till after the death of the husband. Again, if the wife should die in the lifetime of the husband, and there should be children who survived the husband, but they should die before they acquired

vested interests, then, the husband having survived the wife, his executors would be entitled; but that collateral contingent interest to his executors could not be considered as rendering the proof a proof for the benefit of the husband so as altogether to exclude it; on the contrary, such beneficial interest, vesting in the husband's executor, would form part of the estate of the bankrupt. The case Ex parte Grundy, 1 Mont. & M'Arthur, 293, was nearly similar to the present; and in that case the trustees were allowed to prove. But as the objection now under consideration was not made there, and the case was determined on the retrospective operation of 6 G. 4, c. 16, that case cannot be adduced as an authority. Upon the whole, we think the demand of the trustees is provable, upon the grounds and principles which we have above stated.

*411] *LAMBIRTH and PORTER v. ROFF. May 8.

Plaintiffs, spirit merchants, inadvertently delivered a bill of particulars for goods sold to defendant in their trade of brevers. A verdict having been given for plaintiffs on proof of delivery of spirits, defendant obtained a rule wisi for a nonsuit, on the ground that he had been surprised by the variance between the particular and the proof: it appearing, however, that he had been neither surprised nor misled, the Court discharged the rule.

THE plaintiffs, wine and spirit merchants, having supplied the defendant with spirits, sued him for the amount in an action for goods sold and delivered; and by their particular, delivered November 22, 1831, claimed 63l. 1s. 4d., "being the balance of a debt due from the defendant to the plaintiffs for goods sold and delivered by the plaintiffs to the defendant in their trade or business of brewers."

Lambirth, besides his wine business in partnership with Porter, carried on the business of a brewer in partnership with one English. The defendant dealt with Lambirth and English for beer, and occupied a public-house under a lease from Lambirth, English, H. W. Lambirth, and Porter.

At the trial, the delivery of the spirts by Lambirth and Porter having been proved, a verdict was taken for them, subject to a motion for a nonsuit on the ground that such evidence ought not to have been admitted under the above

particular.

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Lawes, Serjt., accordingly obtained a rule nist for setting aside the verdict and entering a nonsuit, on the ground that the plaintiffs' particular did not disclose any charge for spirits; and on affidavits, that as the defendant had dealings with Lambirth and English for beer, and held his house under a lease from the Lambirths, English and Porter, he was taken by surprise by the proof offered at the trial, having come prepared to disprove any debt due to Lambirth and English as brewers.

Stephen, Serjt., showed cause on affidavits which satisfied the Court that the *412] defendant had not been *surprised. The plaintiffs, by a letter signed "Lambirth and Porter," had, in April 1831, demanded 65l. for spirits supplied by them to the defendant; they arrested him for that sum on the 1st of June; declared only in the names of Lambirth and Porter; and their attorney, in September, wrote a letter to the defendant's attorney, stating, in answer to a letter from him, that there was no such firm as Lambirth, English, and Co., but that 60l. and upwards was due from the defendant to Lambirth and Porter for spirits, and near 20l. to Lambirth and English for beer. Stephen contended, that the only object of a particular being to limit a plaintiff's demand, it was sufficient if the defendant were not misled; Day v. Bower, 1 Campb. 69, n., Davies v. Edwards, 3 M. & S. 380.

Lawes and Bompas, Serjts. in support of the rule, urged that great laxity and confusion would be introduced into practice if this particular were held sufficient, and they relied on Macarthy v. Smith, 8 Bingh. 145, where it was held, that the plaintiff could not recover for money had and received under a bill of

particulars for goods sold and delivered, though it appeared the goods had been delivered to defendant as agent, for sale or return, and that he had sold them,

and received the value.

TINDAL, C. J. The plaintiffs' attorney has been guilty of great negligence; but the question is, whether the defendant has been taken by surprise. Looking at the evidence adduced on the trial, the affidavits now read, and the defendant's mode of shaping his case, we cannot see that he has been deprived of any just ground of defence. The letters of the plaintiffs and their attorney excluded the possibility of his acting under any mistake. We should be carrying the principle of rigour *with respect to particulars too far, and convert them into a trap for plaintiffs, if we were to hold that every slight variance, whether it misled the defendant or not, is to defeat the plaintiffs' action.

PARK, J. I yield to the opinion of the Court with reluctance, being

apprehensive of the carelessness to which it may give rise.

GASELEE, J. I concur in the decision of the Court, though I am not sure that we are right. It is clear, however, that the letters of the plaintiffs and their attorney would have sufficiently apprised the defendant of the subject-matter of the action.

ALDERSON, J. The material question in all these cases is, whether there is anything in the bill of particulars calculated to mislead the defendant; if not, it is the duty of the Court to see that a party is not entrapped and defeated by a slight variance, which could not mislead the defendant. In Davies v. Edwards, the particular of demand was rent of land at Chepstow; the defendant objected that the land was in another parish; and Lord Ellenborough said, "If the defendant could have shown not only that he might have been but that he was actually surprised, there would have been some foundation for the argument But here no deception whatever was practised, nor the defendant misled. If he had gone to a Judge's chambers, as it was competent to him to do, for further particulars, and had stated that he held no other but these premises, would it not have been useless to have granted him a further particular?" Can I say that the defendant has been deceived, when he was told that the plaintiffs were about to proceed for 651. due for spirits; when this is followed up by an arrest for that amount; by a letter explaining *the two accounts, one for beer with Lambirth and English; one for spirits with Lambirth and Porter; by an action brought by Lambirth and Porter, and by a bill of particulars delivered in their names? Rule discharged.(a)

(a) See Harrison v. Wood, anti, 371.

WALKER v. WATSON. May 12.

A balance of less than 5l due on a bill of exchange for 17l drawn payable in London, and reduced by previous payment, Held, a debt under 5l arising within the jurisdiction of the Halifax Baron Court, the parties residing at Halifax.

This was a writ of false judgment, which Merewether, Serjt., had obtained a rule nisi to set aside, on the ground that the action had been brought in the Halifax baron court for a debt of less than 5l., both parties residing within the jurisdiction of that court. By the 17 G. 3, c. 15, s. 30, the Halifax court act, it is enacted, that "no plaint, suit, or action to be entered or commenced in this court for any debt or damages under 5l. arising within the said honour, or any judgment or other proceedings to be had thereupon, shall be removed or removable by any writ of recordari facias loquelam, certiorari, false judgment, or otherwise howsoever, but such judgments in this court shall be final and conclusive to all intents and purposes whatsoever."

Jones, Serjt., showed cause upon an affidavit which disclosed that the action was brought for a balance, of less than 5l. indeed, but due on a bill of exchange

for 17l., drawn payable at Masterman's in London, and reduced by previous payments. He contended that the suit was not for a debt or damage of 5l. or under, *415] arising within the jurisdiction of the Halifax *court. The demand arose from a debt of 17l., and due in London, not Halifax. In M'Collam v. Carr, 1 B. & P. 223, it was held that the jurisdiction of the Middlesex court of conscience, under an act of parliament, the language of which is nearly the same as the above, did not extend to contracts made on the high seas; nor would the Court allow a suggestion for double costs under 23 G. 2, c. 33, where the original debt being above 40s., had, by a balance of accounts, been reduced below that sum.

TINDAL, C. J. The whole question turns on the thirtieth section of 17 G. 3, c. 15, which enacts, that "no plaint, suit, or action to be entered or commenced in this court for any debt or damages under 5l. arising within the said honour, or any judgment or other proceedings to be had thereupon, shall be removed or removable by any writ of recordari fucias loquelam, certiorari, false judgment, or otherwise howsoever, but such judgments in this court shall be final and conclusive to all intents and purposes whatsoever." And this suit was entertained for a debt, under 5l. at the time of entertaining it. I cannot agree in the position, that because the debt was originally more, the party ought not to sue in such a court, when by payment it has been reduced below 5l. All the old cases are the other way. Upon this affidavit, it is clear that before the present suit was commenced, the original demand had been reduced by payment below 5l. It is impossible to contend that it is not a case within the act.

PARK, J. When we see the anxiety of the legislature to save expenses to poor suitors, we cannot defeat the intention of the act by allowing such a proceeding as this.

*416] *GASELEE and ALDERSON, Js., concurring, the rule was made
Absolute.

DIGBY v. ALEXANDER. May 2.

A plea in abatement by an Earl, of misnomer in his title of dignity, must allege positively, and not merely by inference, that he was Earl at the time of suing out the writ.

To an action on a bill of exchange set out in the declaration as addressed to the defendant by the title, addition, and description of the Right Honourable the Earl of Stirling, and accepted by him by the name or title of Stirling, the defendant pleaded in abatement as follows:—

And the Right Honourable Alexander Earl of Stirling, of that part of the United Kingdom of Great Britain and Ireland called Scotland, against whom the plaintiff has issued his said writ, and declared thereon by the name of Alexander Humphreys Alexander, in his own person comes, and saving to himself all advantages and exceptious, as well to the writ as to the declaration as aforesaid, prays leave to imparle thereon and to have until Wednesday the 11th day of January, in Hilary term, in the second year of the reign of our lord the now King; and he hath it. At which day come here, as well the plaintiff by his said attorney, as the said Right Honourable Alexander Earl of Stirling in his own person. And the said Earl of Stirling says that long before the issuing the said writ of the plaintiff in this suit, to wit, on the 20th day of April, in the sixth year of the reign of the lord George IV. late King of the United Kingdom of Great Britain and Ireland, defender, &c., the said lord the late King, by his royal proclamation, bearing teste at Carlton House the day and year last aforesaid, after reciting that Alexander Earl of Balcarras had been duly elected and returned to be one of sixteen peers of *Scotland, to sit in the House of Peers in the then present parliament of the United Kingdom of Great Britain and Ireland, and was then since deceased, in order to the electing another peer of Scotland to sit in his room by

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and with the advice of his privy council, issued forth that proclamation, strictly charging and commanding all the peers of Scotland to assemble and meet at Holyrood House, in Edinburgh, on Thursday the 2d day of June then next, between the hours of twelve and two in the afternoon, to nominate and choose another peer of Scotland to sit and vote in the House of Peers of that then present parliament of the United Kingdom of Great Britain and Ireland, in the room of the said Alexander Earl of Balcarras, deceased, by open election and plurality of voices of the peers that should then be present, and of the proxies of such as should be absent (such proxies being peers, and producing a mandate in writing duly signed before witnesses, and both constituent and proxy being qualified according to law); and the lord clerk register, or such two of the principal clerks of session as should be appointed by him to officiate in his name, were thereby respectively required to attend such meeting, and to administer the oath required by law to be taken there by the said peers, and to take their votes; and immediately after such election made and duly examined, to certify the name of the peer so elected, and to sign and attest the same in the presence of the said peers, the electors, and return such certificate into the High Court of Chancery of Great Britain. And the said lord the said late King thereby strictly charged and commanded that that proclamation should be duly published at the Market Cross at Edinburgh, and in all the county towns in Scotland, twenty-five days at least before the time thereby appointed for the meeting of the said peers to proceed in such election. And the said Earl of Stirling further says that the said *proclamation was afterwards, and more than twenty-five days before the time thereby appointed for the meeting of the said peers to proceed on such election, to wit, on the 6th day of May, in the year 1825, duly published at the Market Cross at Edinburgh aforesaid, and in all the county towns of Scotland. That afterwards, and long before the issuing of the said writ of the plaintiff in this suit, and before the assembly and meeting hereinafter next mentioned, to wit, on, &c., at, &c., the said lord clerk register duly appointed Sir Walter Scott, Bart., and Colin Mackenzie, Esq., to be clerks to the meeting so to be held as aforesaid for such election as last aforesaid, and two of the principal clerks of session to officiate in his name That afterwards, and before the issuing of the writ of the plaintiff in this suit, to wit, on the 2d of June, 1825, divers of the peers of Scotland, in obedience to the said proclamation, did assemble and meet at the palace of Holyrood House in Edinburgh, between the hours of twelve and two in the afternoon of that day, to nominate and choose a peer of Scotland to sit and vote in the House of Peers of that then present parliament of the United Kingdom of Great Britain and Ireland in room of the said Alexander Earl of Balcarras deceased; and that the said Sir Walter Scott and Colin Mackenzie, the said two clerks of session so nominated and appointed as aforesaid, attended the said meeting or assembly, and officiated thereat for the purpose aforesaid. That at the said assembly or meeting so held as aforesaid for the purpose of such election as aforesaid, the long or great roll of the peers of Scotland was called over, except those who stood attainted of high treason. That the said defendant then being Earl of Stirling of that part of the United Kingdom of Great Britain and Ireland called Scotland, attended and was present at the said meeting or assembly for the purpose of giving his vote as a peer of Scotland *at and upon [*419 the said election; and that upon the title of Earl Stirling being called, he, the defendant in this suit, claimed to vote, as Earl of Stirling, and entitled to the honours and dignity of Earl of Stirling; and he, the Earl of Stirling, the defendant in this suit, then and there answered to his title of Earl of Stirling, and his vote was then and there taken and received by the said Sir Walter Scott and Colin Mackenzie, the two clerks of session so nominated and appointed by the lord clerk register as aforesaid, for the purpose aforesaid, and officiating as aforesaid. And he further says, that the said Sir Walter Scott and Colin Mackenzie, the said two clerks of session so nominated and appointed as aforesaid, and officiating as aforesaid, then and there at

the said meeting or assembly so held as aforesaid, for the purpose in that behalf aforesaid, to wit, on the said 2d day of June, 1825, in the palace of Holyrood House aforesaid, administered to him, the said Earl of Stirling, the oath required by law to be taken by him as a peer of Scotland, and took and received his vote at the said election; and that he did as Earl of Stirling as aforesaid vote at the said election for James Viscount of Strathallan, to sit and vote in the House of Peers of the then parliament of the United Kingdom of Great Britain and Ireland in the room of the said Alexander Earl of Balcarras deceased, as by the record of the proceedings at the said election remaining in the general register house of our lord the now King at Edinburgh aforesaid more fully appears. And the said Earl of Stirling, defendant in this suit, further says that the said Sir Walter Scott and Colin Mackenzie, the said two clerks of session so nominated and appointed, and officiating as aforesaid, immediately after such election made and duly examined, certified the name of the peer so elected, and signed and attested the same in the presence of the peers, the electors, and returned the said certificate *into the High Court of Chancery of Great Britain, as by the record thereof remaining in the said High Court of Chancery at Westminster, in the county of Middlesex, more fully appears. That by virtue of the said election, the said Viscount of Strathallan afterwards, and before the issuing the writ of the plaintiff in this suit, to wit, on the 6th of June, 1825, took his seat and voted in the House of Peers in the then parliament of the United Kingdom of Great Britain and Ireland. That afterwards, to wit, on the 24th day of July, in first year of the reign of our lord the now King, our said lord the now King, by his royal proclamation, bearing date at Westminster, the day and year last aforesaid, after reciting that he, our said lord the now King, had in his council thought fit to declare his pleasure for summoning and holding a parliament of his United Kingdom of Great Britain and Ireland, on Tuesday the 14th day of September, next ensuing the date of his said royal proclamation, in order, therefore, to the electing and summoning the sixteen peers of Scotland, who were to sit in the House of Peers, by the advice of his privy council, issued forth that his royal proclamation, strictly charging and commanding all the peers of Scotland to assemble and meet at Holyrood House, Edinburgh, on Thursday the 2d day of September then next ensuing, between the hours of twelve and two in the afternoon, to nominate and choose the sixteen peers to sit and vote in the House of Peers in the said ensuing parliament, by open election and plurality of voices of the peers that should be then present, and of the proxies of such as should be absent, such proxies being peers, and producing a mandate in writing duly signed before witnesses, and both constituent and proxy being qualified according to law: and the lord clerk register, or such two of the principal clerks of session as should be appointed by him to officiate in his name, were thereby respectively *required to attend such meeting, and to administer the oath required by law to be taken there by the said peers, and to take their votes, and immediately after such election made and duly examined to certify the names of the sixteen peers so elected, and sign and attest the same in the presence of the said peers the electors, and return such certificate into our said lord the now king's High Court of Chancery of Great Britain. And our said lord the now king did, by the said last mentioned proclamation, strictly command and require the provost of Edinburgh, and all other the magistrates of the said city, to take special care to preserve the peace thereof during the time of the said election, and to prevent all manner of riots, tumults, disorders, and violence whatsoever. And our said lord the now king did, by the said last-mentioned proclamation, strictly charge and command that his royal proclamation should be duly published at the market-cross at Edinburgh, and in all the county towns in Scotland, twenty-five days at least before the time thereby appointed for the meeting of the said peers to proceed to such election. The defendant then averred, that the said lastmentioned proclamation was afterwards, and more than twenty-five days before the time thereby appointed for the meeting of the said peers to proceed on such election as last aforesaid, to wit, on the 29th day of July, 1830, duly published

at the market-cross in Edinburgh aforesaid, and in all the county towns in Scotland. That afterwards, and long before the issuing of the said writ of the plaintiff in this suit, and before the assembly and meeting hereinafter next mentioned, to wit, on the 19th day of August in the year last aforesaid, at, &c., the lord clerk register of Scotland duly nominated and appointed Thomas Thomson and Adam Rollard, Esqrs., two of the principal clerks of session, to be clerks of the meeting *to be held as last aforesaid, for the purpose of such election as [*422] last aforesaid, and to officiate in his name at the said meeting. That last aforesaid, and to officiate in his name at the said meeting. afterwards, and before the issuing of the said writ of the plaintiff in this suit, to wit, on, &c., divers of the peers of Scotland, in obedience to the said last-mentioned proclamation, did assemble and meet at the palace of Holyrood House in Edinburgh aforesaid, between the hours of twelve and two in the afternoon of that day, to nominate and choose the sixteen peers of Scotland, to sit and vote in the House of Peers in the then ensuing parliament of the United Kingdom of Great Britain and Ireland; and that the said Thomas Thomson and Adam Rollard, the said two clerks so nominated and appointed as aforesaid, attended the said last-mentioned meeting, and officiated thereat for the purpose aforesaid. That at the said assembly or meeting so held as last aforesaid, for the purpose of such election as last aforesaid, the long or great roll of the peers of Scotland was called over, except the names of those who stood attainted of high treason, and that the name of him, the defendant in this suit, as Earl of Stirling, was then and there called as a peer of Scotland. That he did not attend the said last-mentioned meeting, but sent a list signed by him, together with the documents and instruments as by law directed, containing the names of sixteen peers of Scotland, for whom he intended to vote at the said last-mentioned election, to be nominated and chosen to sit and vote in the House of Peers in the said then ensuing parliament of the United Kingdom of Great Britain and Ireland, to wit, the Marquess of Queensberry, &c., &c. And he further says, that the vote of him, the said Earl of Stirling, by such signed list was then and there taken and received by the said Thomas Thomson and Adam Rollard, the said two clerks so nominated and appointed as last aforesaid, and officiating as last *aforesaid, for the said several peers named in the said signed list, to sit and vote in the House of Peers in the said then ensuing parliament of the United Kingdom of Great Britain and Ireland; and that all the peers named in the said list were, at the said assembly or meeting so held as last aforesaid, elected, nominated, and chosen to sit and vote in the House of Peers in the said then ensuing parliament of the United Kingdom of Great Britain and Ireland; as by the record of the proceedings at the said last-mentioned election remaining in the general register office of our said lord the now king at Edinburgh aforesaid more fully appears. That the said Thomas Thomson and Adam Rollard, the said two clerks so nominated and appointed, and officiating as last aforesaid, immediately after such election made and duly examined, certified the names of the sixteen peers so elected, and signed and attested the same in the presence of the said peers, the electors, and returned the said certificate into our said lord the now king's High Court of Chancery of Great Britain, as by the record remaining in the said High Court of Chancery at Westminster aforesaid more fully appears. "And so the said earl, the defendant in this suit, says that he, before and at the time of the issuing of the said writ of the plaintiff in this suit, was, and ever since has been, and still is, Earl of Stirling of that part of the United Kingdom of Great Britain and Ireland, called Scotland, and by that name and title ever since his vote was so received at the said first-mentioned election, has been named and called, without this that he the said Alexander Earl of Stirling now is, or at the time of issuing the said writ of the plaintiff in this suit was, named or called by the name of Alexander Humphreys Alexander, as by the said writ and declaration thereon founded is above supposed: and this he is ready to verify, wherefore, inasmuch as he is not sued and named, and called in by the said writ, and the *declaration thereon founded in and by the said name and

dignity of Alexander Earl of Stirling, he prays judgment of the said writ and declaration thereon founded, and that the same may be quashed, &c."

Demurrer and joinder.

Stephen, Serjt., in support of the demurrer. The former decision in this case(a) applies to setting aside the bail bond only, and does not warrant a plea like this. The plea only states that the defendant voted twice at the election of Scotch peers; but not that his vote was effectual. Defendant nowhere states he is Earl of Stirling, or how. This is in effect a plea of misnomer, to be tried by a jury; and should not allege mere circumstances, but the fact proposed to be proved by those circumstances; for the consequence assumed does not necessarily follow from the facts stated. If a party, instead of pleading soil and freehold, were to plead that he voted in respect of the land at two elections for knights of the shire, it would not follow that the land was his. It is compatible with this plea that the defendant may have tendered his vote and have been rejected upon subsequent occasions. The plea is double; and it does not state that the defendant pursued the forms required by statute on tendering his vote; as by taking the oaths; or that he was Earl at the time this writ was sued out. In Lett v. Mills, 6 Mod. 105, the defendant pleaded in abatement, that suscepit ordinem militarem, et jam miles existit; but it not being said that he was a knight tempore exhibitionis billæ, or after the last continuance, the Court ordered a respondent

Taddy, Serjt., contrd. The plea sufficiently shows that the defendant is Earl of Stirling, and how. The *instrument on which the plaintiff sues treats the defendant as Earl of Stirling; the defendant accepts by that name; he shows the facts which prove him to be Earl of Stirling; and says, that he being Earl of Stirling, voted; which is the same as an allegation that he was Earl. 2 Wms. Saund. 352, n. 3. And, after discharging the defendant from his bail bond, as a privileged person, (a) the Court will not now reject his claim. For the defendant has no remedy except by plea. In Lord Banbury's case, 2 Ld. Raym. 1247, upon a motion for a supersedeas to a writ of latitat sued out against Lord Banbury as Charles Knolls, the Court said, "If my lord had ever been summoned to parliament, and had a writ to show that there was no dispute about the identity of the person, it would have been reasonable to have granted a supersedeas; but in this case, of a lord who has never sat there, they could not do it, for they could not try peerage upon a motion; but his lordship might plead it." And it is true that an English peer must show his title by summons or patent; but that rule cannot apply to a Scotch peer, who is never summoned; and as for a patent, the most ancient of the nobility in Scotland, and other parts of Europe, are territorial, and possess no records of the creation of their titles. The Lords of Session were ordered, June 12th, 1739, to lay before the House a roll or list of the peers of Scotland, and the particular limitation of each peerage; upon which they made their report; and, after stating various circumstances, concluded by saying, "That the Lords of Session are not able to give your Lordships any reasonable satisfaction touching the limitations of the peerages that are still continuing." In Co. Litt. 16 a, it is said, "A man may *have an inheritance in title of nobilitie and dignitie three manner of wayes, that is to say, by creation, by descent, and by prescription. By creation, two manner of ordinary wayes (for I will not speake of a creation by parliament), by writ, and by letters patent." "And this writ hath no operation or effect until he sit in parliament, and thereby his blood is ennobled to him and his heires lineall, and thereupon a baron is called a peer of parliament. And if issue be joined in any action, whether he be a baron, &c., or no, it shall not be tryed by jury, but by the record of parliament which could not appeare unlesse he were of the parliament. Therefore a duke, earl, &c., of another kingdome, are not to be sued by those names here, for that they are not peeres of our parliament." This plea, therefore, does not proceed on the ground of defendant's being a peer by writ or patent. Before the union with Scotland, there was no writ or summons to peers. Magna Charta prescribed a summons to prevent the inconvenience of proclamations here. But that was never adopted in Scotland. Lord Kaimes's Brit. Antiq. 55. Spottiswood's Pract. 33, gives a proclamation for calling parliament together. The statute 6 Ann. c. 23, takes up that state of facts; and the peers of Scotland do not receive any summons. A list of peers was made and considered in committee, February 12th, 1708 (18 Journal of Lords, 399), on the first assembling of the united parliament; and in 25 Journal, 466, a return, as used in the Scotch parliament of 1706, containing an Earl of Stirling. And that roll is still referred to as authority. Wight on Elections, c. 2, p. 125. The defendant, therefore, could not plead more conclusively, for the voting at the election of a representative peer being the only act by which a Scotch peer can assert his title, that act is equivalent to summons or patent with an English peer. [Per Curiam. All this is good evidence, but no plea that defendant is Earl.] *It alleges that in substance. In the Countess of [*497] Rutland's case, 6 Rep. 52 b, it was held that Duke or no Duke should be tried by the record; Duchess or no Duchess by the country, for her dignity accrues by matter of fact; and for the same reason, matter of record forms no

part of the title of a Scotch peer.

TINDAL, C. J. It appears to me that this plea being pleaded in abatement, is insufficient, and that our judgment must be, that the defendant do answer The plea is strictly a plea in abatement on the ground of misnomer; for although it is otherwise in the case of a baron, in the case of an earl the title is the substance of the name; and as this is a dilatory plea, which is always to be taken strictly, the question is, whether the defendant has so pleaded that an issue can be taken on the point which he proposes to make the ground of his plea. Now there is no distinct and positive allegation that on the day the writ in this cause was sued out the defendant had the name suggested and no other. The plea begins by stating that in 1825 the King issued his proclamation commanding all peers of Scotland to assemble at Holyrood House to choose a peer of Scotland to sit in parliament in the room of the Earl of Balcarras deceased; that at the meeting held in pursuance of such proclamation, the defendant, then being Earl of Stirling, attended for the purpose of giving his vote as a peer of Scotland at the said election; that upon the title of Earl of Stirling being called, he claimed to be Earl of Stirling, and answered to his title, and his vote was then taken by Sir Walter Scott and Colin Mackenzie; that they administered to him the oath required to be taken by a peer of Scotland, and took his vote; and that he did as Earl of Stirling vote. That in September 1830, *upon the occasion of another election, he sent in his vote, which was received by the clerks. It amounts to no more, therefore, than that the defendant acted as Earl of Stirling; not that he was de jure Earl. He says, indeed, that, "being Earl of Stirling, he voted;" but no allegation so distinctly predicates the fict that he was Earl, as that issue can be taken on it. The precedents are few, but all the forms of the common plea of misnomer go to the day of suing out the writ inclusive; they state "that C. D., against whom the plaintiff hath exhibited his bill by the name of E. F., is named and called by the name of C. D., and by that name hath always hitherto been named and called; without this, that he is, or at the time of exhibiting the plaintiff's bill was, named or called by the name of E. F.;"(a) excluding, therefore, the possibility of there being any other name in which at that time the writ could be sued out: and in two ancient precedents of pleas of abatement for misnomer in title of dignity, there is a distinct allegatron of the existence of the dignity. Thus, in the Year-book 39 Ed. 3, p. 35, B. Brief de Ravishmet de Gard' fuit port vs Gilbert Umfravil Chivaller. Kirton demanda jugmet de br, p o q Gilbert Umfravil est Conte d'Angos, nient nome Conte. Jugement de br. Fene. Le Conte d'Angos n'est p 3 deins le royalme d'Angletre, et ptant c ne point estre trie, le quel il soit Conte, on nient :

⁽a) See 3 Chitty on Pleading, "Pleas in Abatement."

issint n'ë my cel' nom de dignity, forsq surnom. Jugemet, si në bë ne soit assez bon. Kirton. Le nom de Conte est nom de dignity, et p cel' nom doit il estre nom: et il est somone a chesë parliamet per nom de Conte; et le Roy mandeë a luy le grand' seal' come a Per del tëe. Et pu3 le bë abata, &c. And in Fitz. Abr. Brief, pl. 40, Labb. de fountey, port bëe de faux Inpsonmet vers un *429]

*Wm. Fraunc. Fulth. Le bre est si abbas fecerit te securum niët nosmant son propre nosme: par que Marten; Labb. est nosme de dignitie

* * * et abb. est suffic, nosme et sil ad suffic nosme il suffis etc * * * Mes si Counte soit a porter bre il eovient q' ambideux nosmes soient nosmes coe J. Erle de, &c. Briefe, pl. 40. So in the case of the Earl of Banbury, Carth. 297, indicted for murder by the name of Charles Knolls, Esq., in which there was a plea of misnomer in abatement to the indictment, the defendant alleged in his plea, "quod ipse ad indictamentum illud respondere compelli non debet quia dicit quod Dominus Carolus primus nuper Rex Angliss, &c., per literas suas patentes" now produced, &c., created his grandfather an Earl of this kingdom, &c., and thereby the honour was entailed upon the male line; and then shows his own descent, and that he is heir male, and Earl of Banbury, and concludes with hoc paratus est verificare, &c. And this plea was afterwards amended by adding an averment "that his uncle, who was of the elder branch, was dead without issue, and that he himself was a peer at the time of the plea pleaded."

The present plea, therefore, not specifying any circumstance from which it can be predicated that the defendant was Earl of Stirling at the time the writ

issued, must be held insufficient.

PARK, J. The plaintiff was obliged to set out the bill of exchange as it was drawn, but he nowhere, in his own language, calls the defendant Earl of Stirling. Nor if he had done so, would that be an answer to the present objection; for in Haworth v. Spraggs, 8 T. R. 515, it was held that the defendant in a plea in abatement of misnomer must give his surname, as well as his true Christian *430] name, although his true surname be used in the *declaration. That case was confirmed in Docker v. King, 5 Taunt. 652.

GASELEE, J. I am of the same opinion. Four-fifths of this plea are matters of evidence: the conclusion is merely argumentative; and there is nowhere a positive allegation that the defendant is a peer. A plea in abatement ought to be correct in every point; and it does not follow that the defendant has con-

tinued to be Earl of Stirling even if he were so at the time of voting.

ALDERSON, J. I am of the same opinion. Every fact alleged in this plea may be true, and yet the defendant may not now be Earl of Stirling. That is sufficient to render the plea bad. It contains nothing but evidence for a jury, and not a distinct allegation of the thing to be proved, that the defendant was Earl of Stirling at the time of the writ. There must be judgment of

Respondeat ouster.(a)

(a) See the precedent in Blackmore v. The Earl of Wigtown, sued as the Right Hon. Hamilton Fleming, 3 Wentworth's Pleading, 295.

As to the question whether peerage is available as an objection to a proceeding by bill in K. B., unless pleaded in abatement, see Lord Lonsdale v. Littledale, 2 H. Bl. 267, 299, and the note (a), p. 272. See also Hosier and Another v. Lord Arundell, 3 Bos. & Pul. 9, and the note (b).

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*ANDREWS v. THORNTON. May 12.

In an action of slander, although there be no justification, and no special damage alleged, the plaintiff, if he recovers, is entitled to the expense of witnesses necessary to prove an inducement explanatory of the slander, and his professional reputation.

SLANDER. The declaration, after the usual averment of the plaintiff's good name, his innocence of such misconduct as that imputed to him by the defendant, and the good opinion of his neighbours, stated, that before the committing

of the grievances by defendant, as thereinafter mentioned, plaintiff had been, and then was, a mariner, and the employment of a mariner had used and exercised with great credit and profit to himself, to wit, at, &c.; that plaintiff, in certain parts beyond the seas, to wit, at Sincapore, had shipped himself in and on board of a certain ship or vessel called the Vittoria, as a mariner and chief mate for a certain voyage, to wit, from Sincapore aforesaid to London, of which said ship or vessel defendant had been, and then was, a freighter, to wit, at, &c.; that before, &c., and before the arrival of the said ship or vessel at London, to wit, on the high seas, a mutiny of divers of the crew of said ship or vessel had broken out in and on board of said ship or vessel, and the master or commander and divers mariners belonging to the crew of said ship or vessel had been killed, and divers large quantities of the cargo of said ship or vessel had been thrown overboard by the mutineers, to wit, at, &c.; that said plaintiff, being employed as a mariner in and on board of said ship or vessel as aforesaid, having, with the assistance of certain of the crew of said ship or vessel, recovered the same from the power and control of said mutineers, and having taken upon himself the command and navigation of said ship or vessel, had proceeded with the same to a certain port in parts beyond the seas, to *wit, the Mauritius, the same being the most eligible port to proceed to after such mutiny as aforesaid, to wit, at, &c.; that plaintiff, at the Mauritius aforesaid, had necessarily been obliged to discharge and unload the cargo of said ship or vessel, and to reload the same in and on board said ship or vessel, at a very considerable expense, and in so doing, had employed one William Aiken as agent for said ship or vessel for that purpose, and having done so, said plaintiff had safely and securely navigated and brought said ship or vessel, together with her cargo, so reloaded as aforesaid, to her port of delivery, to wit, at, &c. Nevertheless said defendant, well knowing the premises, but greatly envying the happy state and condition of said plaintiff, and contriving, and wickedly and maliciously intending to injure said plaintiff in his good name, &c., on, &c., at, &c., in a certain discourse which said defendant then and there had of and concerning said plaintiff, and of and concerning his said employment as a mariner in and on board of said ship or vessel, and of and concerning said cargo of said ship or vessel, in the presence and hearing of divers good and worthy subjects of this realm, then and there, in the presence and hearing of said last-mentioned subjects, falsely and maliciously spoke and published of and concerning said plaintiff, and of and concerning his said employment as a mariner in and on board of said ship or vessel, and of and concerning said cargo of said ship or vessel, these false, scandalous, malicious, and defamatory words following, that is to say, - "There was no reason for discharging the cargo. I do not believe more than 100l., or at most 200l. worth of the cargo was thrown overboard by the mutineers; and I believe that Andrews has connived with Mr. Aiken, the agent at the Mauritius, in creating expense for the purpose of putting money in his pockets; he ought to be tried at the *bar of the Old Bailey, and no respectable merchant will ever employ him."

There were several other counts; and in the tenth, the only words alleged to have been uttered were, "He ought to be tried at the bar of the Old Bailey."

To the damage, &c.

The defendant pleaded the general issue; and at the trial in London, a verdict having been found for the plaintiff, the prothonotary, on the taxation of costs, had allowed, among other charges, 23l. for the expense of a witness from Liverpool, to prove the plaintiff's skill and character as a mariner; and 12l. for the expense of a witness called to prove the circumstances of a mutiny on board the Vittoria.

Spankie, Serjt., obtained a rule nisi to review the taxation as to these charges, on the ground that the defendant not having pleaded a justification, and there being no allegation of special damage, no question could properly arise as to the plaintiff's character or the circumstances of the mutiny, the only point in issue

being, whether or not the defendant had spoken the words with which he was

charged.

Wilde, Serjt., showed cause. Without proof of the introductory allegations the sting of the slander could not have been understood; and without proof of the estimation in which the plaintiff was held, the jury would have been at a loss as to the proper measure of damages.

Spankie. The assertion, "That the plaintiff ought to be tried at the bar of the Old Bailey," is sufficiently explicit, and needs no explanation in the way of introductory allegations. The witnesses objected to can only have been called

for the purpose of harassing the defendant with costs.

*TINDAL, C. J. I agree in one observation which has been made on *434] the part of the defendant, that when there is no justification in an action of slander, in general the expense of witnesses ought not to be allowed who might have become necessary if a justification had been pleaded. But it would be looking too narrowly at this record to take that proposition without qualification; for the words complained of in the tenth count are not actionable of themselves, but only become so on the proof of the circumstance to which they were intended to apply,—"He ought to be tried at the bar of the Old Bailey." There could not be a more vague imputation of misconduct; and it was necessary, therefore, for the plaintiff to state and prove the inducement which gives it a meaning. The question is, then, whether he has abused his privilege by calling more witnesses than were necessary. Surely, to explain the extent to which he might be injured, and the meaning of the words, it was competent to him to show that he gained his livelihood as a captain of a ship; that a mutiny broke out; that goods were thrown overboard; and the residue carried to the Mauritius: the more so, as it was insinuated that this was not the fact, and that the goods had been improperly disposed of. We ought not to be too nice in cutting down the plaintiff's proof to the exact amount, at which, under bare poles, he may conduct his vessel into port. Rule discharged.

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*SMITH v. HARDY. May 12.

To debt on a judgment, the defendant pleaded a release of December 1831, destroyed by accident. Upon affidavit that the plea was false, the Court allowed the plaintiff to sign judgment as for want of a plea.

To debt on judgment, the defendant pleaded a release, bearing date December 1831, but destroyed by accident.

Wilde, Serjt., upon an affidavit that the plea was false, obtained a rule nisi to

sign judgment as for want of a plea.

Adams, Serjt., who showed cause, relied upon Smith v. Backwell, 4 Bingh. 512, where the Court reviewed all the preceding cases, and refused to set aside upon affidavit of its falsehood, a plea of acceptance by the plaintiff of twenty pipes of port wine in satisfaction of his demand; intimating, that in future,

similar applications should be discharged with costs.

Wilde. That case only decides that the Court will not interfere where the plea, though false, is in the usual form, and does not create perplexity, or raise more than a single issue; but where, as in the present instance, the plea occasions perplexity by raising several issues, the Court will interfere. The result of all the cases was stated by Gaselee, J., who said, "Where the plea has raised different issues, has been exceedingly intricate, or has been a mockery of the proceedings of the Court, a discretionary power has sometimes been exercised by the Judges; but that cannot be done with respect to a single plea, which has nothing improper on the face of it."

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*TINDAL, C. J. If this had been a plea on which only one issue could have been taken, and there had been a profert in curiam of the alleged release, I am not prepared to say that we should not have discharged this rule. But this plea is so ingeniously prepared, that it is likely to occasion perplexity and expense, and the plaintiff might be at a loss whether to take issue on the existence of the release or its destruction by accident. The case, therefore, falls within the principle of Shadwell v. Berthoud, 5 B. & A. 750, and Body v. Johnson, Ibid. 751, where, upon an affidavit of its falsehood, the Court allowed the plaintiff to sign judgment upon a plea so framed as that it might reasonably induce the plaintiff to consult counsel to know how to deal with it.

PARK, J. The distinction has been properly taken by my brother Gaselee in Smith v. Backwell. The present plea as presenting two points for issue, ought

not to avail the defendant after affidavit of its falsehood.

GASELEE, J. This plea raises different issues, and has something improper on the face of it, for it is improbable that the defendant should be unable to produce a deed executed in December last. Those who put in these false pleas, would do well to look to the practice in early times, when, it appears, they were liable to be severely punished.

ALDERSON, J. I agree with Lord Ellenborough, who said that no perverse

ingenuity should be allowed in framing these pleas.

Rule absolute.

*STRATTON v. GREEN. May 12.

[*437

Held, that a reference to arbitrators to balance accounts and settle all matters in dispute respecting the leaving and occupying of two corn-mills and a dwelling-house, did not authorize them to decide on the costs of an action for fixtures, at least up to the time of paying money into court, when the submission was entered into.

THE defendant paid 441. 18s. 2d. into court in an action for fixtures, which the plaintiff had relinquished to him at his request; but, before the cause was brought to issue, the parties, by a submission which did not mention the subject of costs, appointed arbitrators "to balance their accounts, and settle all matters in dispute respecting the leaving and occupying of two corn-mills and a dwelling-house."

The arbitrators ordered the defendant to pay 11. 13s. 10d. in addition to the sum paid into court, and directed that each party should pay his own law

expenses, together with the expenses of the arbitration.

Wilde, Serjt., obtained a rule nisi for the prothonotary to tax the plaintiff's

costs upon his taking the money out of court.

Heath, Serjt., on the part of the defendant, resisted this, on the ground that, assuming the arbitrators to have had no authority to decide on the question of costs, still their award was not equivalent to a verdict, and without a verdict, or an award for costs on a proper authority, the plaintiff could not claim them. The submission, however, of all matters in dispute virtually included the question of costs, which the arbitrators had decided.

Wilde. The plaintiff, when he takes the money out of court, is entitled to costs, at least up to the time when it is paid in; for he takes it out, not by virtue of the award, but because the defendant, by paying, *admits it to that extent, therefore, he admits the action to be well founded.

And the arbitrators had no authority to decide on the question of costs; for this

And the arbitrators had no authority to decide on the question of costs; for this was not a reference of the cause, or even of all matters in difference, but merely

of the account between the parties.

TINDAL, C. J. If I could perceive that this was a reference of the cause, I should be disposed to say, that the rule should be discharged. But I cannot see that the cause was referred, although the matters in difference were. If so, when money has been paid into court, and the defendant, by the payment, admits

he is wrong up to that time, it seems to me that up to that time the plaintiff is entitled to his costs.

PARK, J., concurred.

GASELEE, J. The justice of the case, perhaps, accords with the decision which has been pronounced; but I think the law is the other way, considering the submission to be, in effect, a reference of the cause.

ALDERSON, J. I think it may fairly be considered that the arbitrators had a power to decide as to the costs subsequent to the payment of money into court, but not before; and that agrees with the justice of the case.

Rule absolute for costs up to the time of pay-

ing the money into court.

*439] *The Dean and Chapter of ELY v. CALDECOT. May 12.

What evidence sufficient to establish a custom for the payment of a full fine by remainder-man upon admission to copyhold.

THIS was an action of assumpsit, brought to recover the amount of certain fines, alleged to be due from the defendant upon his admission to certain copyhold premises. At the trial before Alderson, J., at the Suffolk Spring assizes, 1831, a verdict was taken for the plaintiffs, damages 1821, subject to the opinion

of the Court on the following case:-

The plaintiffs are lords of the manor of Lakenheath, in the county of Suffolk. By the custom of the manor, fines payable upon admission to lands, parcel of the manor, are arbitrary, but not exceeding two years' annual value of such lands. The father of the defendant held certain premises, parcel of the said manor, as tenant for life thereof, under the will of the Rev. John Barnes, with remainder in fee to the defendant. The father of the defendant was admitted, under the said will, to the premises, at a court held the 14th of October, 1818, to. hold the same to him and his assigns for life, with remainder as in the will was mentioned; and paid a full fine upon such admission. After the death of the tenant for life, the defendant, at a court held on the 19th of May, 1828, was admitted in fee to the premises so devised to him by the will of the said John Barnes, in remainder after the decease of his father. In order to prove a special custom sufficient to warrant the claim of the plaintiffs to a fine in this case, Hugh Robert Evans was examined on their part. He stated that he had acted as steward of the manor for thirty-five years, and that the custom of the manor was, for a tenant in remainder to pay a full fine upon his admission upon *the death of tenant for life: but it appeared, upon his cross-examination, that his knowledge on that subject was derived entirely from an inspection of the different entries in the court rolls under his care, except that, during the time he had been steward, he had personal knowledge of two instances, and no more, of admissions of tenants in remainder after the deaths of tenants for life, namely, Willett's and Payne's admissions. Upon the former admission, namely Willett's, he received on the 3d of October, 1808, on the admission of Mary Willett, for life, 394l. 10s., and, on the 31st of October, 1821, on the admission of Anthony Willett, the tenant in remainder upon the decease of the tenant for life, to the same estate, 460l. 5s., being, in both instances, full fines; and, in the latter case (Payne's), Eliz. Payne, on the 25th of May, 1807, was admitted for life, and paid a fine of 201. 4s. 3d.: and, at the same court, Thomas Payne, the remainder-man to the remainder expectant on her decease, was admitted, and paid 101. 2s. 3d.; the former being a full, the latter a half fine. There was no evidence of reputation, or declarations by deceased tenants of the manor as to any such custom.

The following extracts from the court rolls were read in evidence on the part

of the plaintiff:

17th of October, 1735, Frances Malt admitted for life, under the will of John

Malt, to a cottage: and she paid her fine.

10th of October, 1737, Frances Malt, spinster, admitted in remainder in fee, on the death of the aforesaid Frances Malt, to the same cottage, under the same will: and she paid her fine.

11th of May, 1737, Mary Taylor admitted for life, under the will of her mother Mary Secker, to a messuage, rent; and twenty-two acres of land, rent

: and she paid her several fines.

13th of April, 1761, Matthew Taylor admitted in *remainder in fee, on the death of the said Mary, to the same premises: and he paid his fine.

22d of April, 1771, William Newton, and Alice his wife, admitted to them and the longer liver of them, and the heirs of the said Alice, under the will of John Evans, to a messuage, rent 2s. 1d.; and seven acres two roods of fen, rent 1s.; and three acres and a half of fen, rent 1s. 3d.: and they paid their several fines.

25th of May, 1807, William Newton admitted in fee, as eldest son and heir

at law of said Alice, to same premises: and he paid his fine.

18th of May, 1708, Mary Roper admitted for life, under the will of John

Roper, to a messuage: et fec. fin.

27th of April, 1721, William Roper admitted in remainder in fee to said premises, after the death of said Mary Roper, under the same will: et fecit fin.

3d of October, 1808, Mary Willett admitted for life, under the will of Anthony Willett, with remainder over, as in the said will mentioned, to a large estate:

and she paid her fine.

31st of October, 1821, Anthony Willett, for life, under the same will, and after the death of the said Mary Willett, then late Mary Murrell, to the same estate, with the remainder over, as in the said will is mentioned: and he paid his fine.

29th of April, 1730, Elizabeth Holmes admitted for life, under the will of her husband, Christopher Holmes, to a cottage, rent l., and a piece of ground,

rent l.: et fecit sepal. fin.

10th of April, 1844, Elizabeth, the wife of Robert Holmes, and daughter of the said Christopher Holmes, admitted in remainder in fee, on the decease of

the said Elizabeth Holmes, to said cottage and piece of ground.

27th of April, 1732, Susannah Harding admitted for *life, under the will of her husband, John Harding, to three acres two roods of arable land, twenty acres in New Fen, and six acres in Stallode, a tenement, and four acres of marsh, called Coat's House: et fecit sepal. fin.

7th of October, 1751, Robert Harding admitted in remainder in fee, after the death of Susannah Harding, his mother, to the above six acres in Stallode.

8th of April, 1782, Thomas Tunnell, for life, under the will of John Tunnell, to a messuage, a messuage and yard, eight acres in New Fen, four acres in White Fen: and he paid his fine.

20th of May, 1807, Simeon Mary Stuart Tunnell admitted in remainder in fee, on the death of said Thomas Tunnell, under the will of said John Tunnell,

to said four acres in White Fen: and he paid his fine.

28th of April, 1671, Phillis Hanslip admitted for life, under the will of William Hanslip, her husband, to one acre of arable land, in Middle Field, called Butcher's Acre, and three single half acres of arable land in South Field; and John Hanslip to the remainder in fee: et admissi sunt inde ten. et fec. fin.

24th of April, 1695, John Hanslip admitted in fee in remainder, after the death of said Phillis Hanslip, under the said will, to same premises: et fee.

finem.

4th of October, 1734, Hammond Eagle admitted for life, under the will of

Edward Eagle, to thirty-two acres of fen-land: and he paid his fine.

6th of May, 1740, Edward Eagle admitted in fee, after the death of said Hammond Eagle, to the remainder, under the same will, to eight acres, part of said thirty-two acres: and he paid his fine.

25th of May, 1807, Elizabeth Payne, for life, under the will of Thomas Payne, her husband, to a messuage and barn, and eighteen acres, one rood, and twenty perches of arable land: and she paid her fine. Same *court, said Thomas Payne, the son, admitted in remainder expectant on the decease of said Elizabeth Payne: and he paid his fine.

20th of April, 1632, Agatha Last admitted, on the surrender of John Last, to the reversion, when it shall happen, after the death of Alicia Morley, of three roods of land in Short Bryan, and the reversion of thirty acres of arable land, late Lincolns; and the reversion of thirty acres of arable land, late Bakers: et

fec. sepal. fin. et de sepal. Rev. con. fidce.

20th of May, 1717, John Lamming and Mary Roper, his intended wife, admitted, on the surrender of said John Lamming, to fourteen acres of marsh, rent; and to eight acres of marsh in Stallode; and half an acre of marsh in New Fen, to hold to said John Lamming and his heirs, until the solemnization of said intended marriage, with remainder to them for their natural lives, and the life of the longer liver of them, with remainder to the right heirs of the said John Lamming: et fec. sepal. fin.

23d of April, 1711, Thomas Hinson and Ann, his wife, admitted for their lives, and the life of the longer liver of them; with remainder to Thomas Hinson, son of said Thomas and Ann, his heirs: et fecer. fin. et admissi sunt.

On the part of the defendant the following extracts from the court rolls were

also read in evidence:-

Anno 1626, John Outlaw and Margaret, his wife, surrender to the use of Nicholas Outlaw and Helen, his wife, for their lives, and the life of the survivor; and, after the decease of the survivor, to the use of Thomas Morris, his heirs and assigns. Nicholas Outlaw and Helen, his wife, thereupon admitted for life, and Thomas Morris remainder in fee. Et dant. dmo. de fine.

*444] Anno 1633, Richard Whistler, senior, and Alice, his *wife, admitted for life; and Richard Whistler, junior, and Bridget, his wife, to the re-

mainder in fee: et admissi sunt inde tenentes, et fecerunt dmo. finem.

Anno 1641, Elizabeth Spicer admitted for life; William Spicer to the remainder in fee: et admissi sunt inde tenentes, et fecerunt dmo. finem.

Anno 1662, Mary Fuller admitted for life; John Furman to the remainder

in fee: et admissi sunt ind. tenen. et fec. finem.

Anno 1671, Phillis Hanslip, under will of William Hanslip, admitted for life; William Hanslip, the son, to the remainder in fee: et admissi sunt inde tenen. et fec. finem.

Anno 1762, Mary Morley admitted for life; Edmund Morley to the remain-

der in fee: et admissi sunt inde tenen. et fecerunt finem.

Anno 1709, Robert Secker and Maria Secker admitted for life; and Jane Secker to remainder in fee: et admissi sunt inde tenentes, et fecer. fin.

Anno 1790, Elizabeth Gathercole admitted, under the will of John Gathercole, for life; Ann Gathercole to remainder in fee: and they paid their fine.

Anno 1702, William Fuller admitted, on surrender of Samuel Hall, to eight acres of fen, or marsh ground, to use of said William Fuller and his assigns, during the term of his natural life; and from and after his decease, to the use of Thomas Fuller, his son: et fec. fin.

Anno 1738, presented that the last-named Thomas Fuller died seised of said premises, and that Thomas Fuller was his eldest son and next heir; who was

thereupon admitted, and paid his fine.

4th of October, 1818, John Caldecott admitted, under the will of the Rev. John Barnes, to hold unto the said John Caldecott and his assigns, for and during his life, with remainder as in the said will is mentioned: and he paid his fine.

*445] *It was agreed that the Court should be at liberty to draw any conclusion of fact as to the existence or non-existence of any special custom within the manor; and of the extent of such special custom as they might think the jury ought to have drawn.

Storks, Serit., for the plaintiff. By special custom a full fine may be claimed for the admission of a remainder-man, in addition to the fine for the particular Whitbread v. Jenny, 5 East, 522, 1 Bac. Abr. 735. And there is sufficient evidence in this case to show the existence of the custom in the manor of Lakenheath; for there are many instances of fines paid by remainder-men, and it is an inference of law, that where parties pay a fine, they pay a full fine. Where there is no custom, the admittance of tenant for life is the admittance Tipping v. Bunning, Moor. 465. The entries, therefore, of him in remainder. of admissions of so many remainder-men is conclusive to show the existence of the custom, the fine due to the lord being payable after admittance. Rex v. Hendon, 2 T. R. 484, Graham v. Sime, 1 East, 631, Hobart v. Hammond, 4 Rep. 28 a. A single instance, however, is sufficient to establish such a custom. Doe v. Mason, 3 Wils. 63, Bennet v. Jeffery, 2 M. & S. 92. The plaintiffs, therefore, having claimed their fine under the special custom, and the inference being, that upon payment of fines by remainder-men, the whole that was due was paid, it is for the defendants to show that payment to such extent did not take place.

Wilde, Serjt., contrd. What shall be the effect of admittance to a copyhold, and the amount of fine, if any, to be paid thereon, must depend upon the custom of *each manor. Co. Copy. 94. A fine, such as that claimed by the plaintiffs, can only be payable by a special custom, and not by the general law of copyholds. 1 Cruise, 312, par. 10, 13. Whitbread v. Jenny. But a special custom being in the nature of an exception, it lies on the plaintiff to establish its existence, and that, by conclusive proof; for customs in favour of the copyholder are construed liberally; customs in favour of the lord, strictly. Watk. 60. Now a fine is not necessarily payable on every admittance; Barnes v. Corke, 3 Lev. 308; nor is it to be inferred, that, wherever a fine is paid, it is a full fine. The fine for a remainder-man, where there is a custom for him to pay, is usually half the full fine. 1 Watk. 481. And the lord, in such a case, may apportion the fine between the tenant for life and the remainder-man; may exact the whole from the tenant for life; or allow the remainder-man to pay his share when he comes into possession. Blackburne v. Graves, 1 Mod. 120, 1 Ventr. 260, 3 Keb. 263; Brown's case, 4 Rep. 21; Tipping v. Bunning. The evidence in this case is not sufficient to establish the custom set up. The entries of most of them are equivocal; there is no entry of a full fine for a remainder-man, or of the word fines in the plural.

Storks, in reply, examined the various entries in detail, and contended that several of them established the payment of a full fine by the remainder-man.

Another point was argued as to the necessity of estimating the value of the land, subject to an allowance for the fen taxes; but, as the Court gave no opinion on that question, the portion of the case which relates to it is omitted.

Cur. adv. vult.

*TINDAL, C. J. In this case, which was argued before us in the last term, the facts were as follows:—The plaintiffs were lords of the manor of Lackenheath, in the county of Suffolk; and the premises in respect of which the question arose were copyhold, and holden of that manor. By the will of the Rev. John Barnes these premises were devised to the father of the defendant as tenant for life, with remainder to the defendant in fee; and, on the death of Barnes, the defendant's father was duly admitted as tenant for life, "with remainder as in the said will is mentioned;" and, on that occasion, he paid a full fine of two years' improved value, the fines being, according to the custom of that manor, arbitrary. On the death of his father, the defendant was admitted as tenant in fee to the same premises, and the plaintiffs claimed another full fine on that occasion. Upon the trial, it appeared that all the evidence applicable to this subject was of a documentary nature, and it was, therefore, agreed by both parties to state that evidence for the opinion of this Court in the form of a special case, referring it to the Court to find such conclusions of fact as they might

think the jury, properly directed, ought to have found at the trial, and thereupon to give such judgment as in point of law ought to follow.

We have duly considered the above facts submitted to us, and have arrived at

the conclusion that the verdict should be entered for the defendant.

It is conceded, on the part of the plaintiffs, that unless they are entitled to claim a full fine on the admittance of the defendant, they cannot succeed. question, therefore, is, whether they have affirmatively established that point. In order to do this, it is necessary that they should show a special custom for that purpose. That this is the law is clear from several authorities. In Barnes v. *448] Corke it is laid down, on argument by the *two Judges in Court, "that no fine was due on the admittance of a remainder-man after admittance and payment of a fine by the tenant for life, unless there be a special custom for . it, but that the admittance to the particular estate was an admittance to the remainder; and that which was said in 4 Rep. 22 6, that it shall not be to the prejudice of the lord in respect of his fine,' is to be intended where a fine is due by custom for an admittance of the remainder-man; but, without a special custom, none is due." And for this position various authorities are there cited. Indeed, in referring to 4 Rep. 22 b, it appears to have been so laid down in terms by Lord Coke; for he says that "the admittance of the tenant for life is the admittance of him in remainder to vest the estate in him, but shall not bar the lord of his fine, which he ought to have by the custom." (See also 23 a.) And he puts the tenant in remainder, in such a case, upon the same footing as the heir, who, though he is in by the admittance of his ancestor, may nevertheless be compelled to come in and be admitted, in order that the lord may have his fine, due by the custom of the manor, upon the descent. It should seem, therefore, that Lord Coke himself puts it on the custom; but, in Blackburn v. Graves, it is very distinctly laid down by Lord Hale, who, after stating that he did not see any inconvenience why the admittance of tenant for life or years should not be the admittance of all in remainder, for fines are to be paid not withstanding by the particular remainders, adds afterwards, "It shall not prejudice the lord; for, if a fine be assessed for the whole estate, there is an end of the business: but if a fine be assessed only for a particular estate, the lord ought to have another." The law, as thus laid down by Lord Hale, appears to us to explain and reconcile all the dicta on this subject, by distinguishing between *449] those *where the Judges, in speaking of a fine, must be understood as meaning a full fine; and others where, in using the same expression, they only mean an apportioned part of a full fine. It explains also all the instances of admittances, with exception of one, which are to be found in the statement of this case.

The first four instances of Malt, Taylor, Newton, and Roper are quite consistent with the idea that, in those cases, the tenants for life on their admittance paid a fine only for their particular estates, and the tenants in remainder another on their subsequent accession to the tenancy and admittance. The same observation applies to the cases of Holmes, Harding, Tunnell, and Eagle. On the other hand, in the cases relied on by the defendant, of Outlaw, Whistler, Spicer, Fuller, Morley, Secker, and Gathercole, where both tenants for life and in remainder are admitted at the same time, and pay their fine, it is not at all improbable that the fines were there assessed for the whole estate, and that there was in those cases, as Lord Hale expresses it, "an end of the business;" for we find in the manor-books no further admittance of the tenants in remainder in those cases. The case of Hanslip is probably inaccurate in some respects. It appears, that although in 1671 John Hanslip, the son, was actually admitted to the remainder in fee at the same time that his mother was admitted for life, yet he was afterwards admitted a second time in 1695, upon her death, and paid a Probably, however, this was really the case of an apportionment of the full fine, in 1671, between the tenant for life and the tenant in remainder; and, the part of the fine due from the tenant in remainder not having been then paid by him, he was, in 1695, called upon to be admitted, in order that

his apportioned fine might be paid to the lord. These cases being thus disposed of, there remain only two instances to be considered, that of Payne, in 1807, and *Willett, in 1821. The former is inapplicable to the present question, for the special custom, if any, which it is calculated to establish, is not the one now relied on by the plaintiffs; and as to the case of Willett, although it is an instance expressly in point, yet it is much too recent, even if unopposed by other instances, to be the foundation of a claim like the present on the part of the plaintiffs. But we also think that it is very difficult to reconcile this instance with the case of Fuller, adduced on the behalf of the defendant. There William Fuller, in 1702, is admitted, on a surrender by Hall, to eighteen acres of fen, to the use of the said W. Fuller and his assigns for life; and, after his death, to the use of Thomas Fuller, his son, in fee. Now Thomas Fuller, the son, does not appear ever to have been admitted or paid any further fine to the lord; for the next admittance to be found on the books is in 1738, being that of Thomas Fuller, the grandson of William Fuller, as heir to his father, Thomas Fuller, who died seised of the premises. It appears, therefore, that Thomas Fuller, the father, was considered as admitted under the original admittance, in 1702; for there is no trace of any other admittance of him, or of any fine subsequently paid by him. Upon the whole, therefore, we are of opinion that, if these different instances had been brought before a jury, and properly commented on by the Judge at Nisi Prius, they ought by their verdict to have found, that no special custom for taking one full fine on the admittance of tenant for life, and another full fine on the admittance of the tenant in remainder, was affirmatively proved on the part of the plaintiffs. And as the law appears to be clear (and, indeed, was admitted so to be on the argument of this case) that, without such special custom, no such fine would be claimable, we are of opinion that the verdict ought to be entered for the defendant. The present decision of the Court on this *point makes it unnecessary to give any opinion on the other [*45] point made in the course of the argument, as to the drainage tax.

Postea to the defendant.

GARTH v. HOWARD and FLEMING. May 11.

The declarations of a shopman are not evidence against his employer, unless made in the course of his employer's business.

DETINUE for plate. Plea, general issue. At the trial before Tindal, C. J., it appeared that Howard had, without authority, pawned, for 2001., certain plate belonging to the plaintiff. The defendant, Fleming, was a pawnbroker; but the only evidence to show that the plate had ever been in his possession, was a witness, who stated that, at the house of the plaintiff's attorney, he heard Fleming's shopman say that it was a hard case, for his master had advanced all the money on the plate at 5 per cent.

This evidence being objected to, was received, subject to a motion to this

Court; and a verdict having been given for the plaintiff.

Andrews, Serjt., obtained a rule nisi for a new trial, on the ground, among other objections, that the declarations of an agent can only be received in evidence when they have been made in the ordinary course of his employer's business; and that it is not in the course of a pawnbroker's business to lend 2001. on a single pledge, or at 5 per cent. interest.

Spankie, Serjt., showed cause. The declaration of the shopman was made in the ordinary course of his employer's business; for that business was to lend money *on pledges, and the amount of the pledge, or of the interest paid, r*452 are immaterial. Now it is established by Rex v. Almon, 5 Burr. 2686, that the law presumes a master to be acquainted with the acts of his servant in the course of his business; and slight evidence is sufficient to establish the fact

of agency. Hazard v. Treadwell, 1 Str. 506. The declarations of Fleming's shopman, therefore, being within the scope of his authority,—Schumack v. Lock,

10 B. Moore, 39,—are conclusive against his employer.

Andrews. The business which Fleming's shopman is alleged to have spoken to was, in effect, a private loan, and not the transaction of a pawnbroker's shop. It is inexpedient to extend the exception by which the declarations of agents are received in evidence on hearsay; and in Maesters v. Abraham, 1 Esp. 375, Lord Kenyon refused to admit even the letter of an agent as evidence of an agreement by his principal. Such evidence, if received, ought at least to be confined to declarations at the time of the transaction. In Helyear v. Hawke, 5 Esp. 74, it was expressly determined that the principal is not bound by the representation of the agent at another time.

Cur. adv. vult.

TINDAL, C. J. The rule in this case has been obtained upon two distinct grounds; but it is unnecessary to give an opinion upon any other than this, namely, whether the declaration of the shopman of the defendant Fleming, that the goods were in the possession of his master, was admissible: for it is clear that, unless Fleming is to be affected by such declaration, he is entitled to the verdict upon the general issue, non *detinet. If the transaction out of which this suit arises had been one in the ordinary trade or business of the defendant as a pawnbroker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawnbroker. In that case, the rule laid down by the Master of the Rolls in the case of Fairlie v. Hastings, 10 Ves. 128, which may be regarded as the leading case on this head of evidence, directly applies. But the transaction with Fleming appears to us, not a transaction in his business as a pawnbroker, but was a loan by him as by any other lender of money at 5 per cent. And there is no evidence to show the agency of the shopman in private transactions unconnected with the business of the shop. I doubted much at the time whether it could be received, and intimated such doubt by reserving the point; and now, upon consideration with the Court, am satisfied that it is not admissible. It is dangerous to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath: it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent; and it is brought before the Court and jury frequently after a long interval of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original hearer; and again to further suspicion, from the faithlessness of memory in the reporter and the facility with which he may give an untrue *454] account. *Evidence, therefore, of such a nature, ought always to be kept within the strictest limits to which the cases have confined it; and as that which was admitted in this case appears to us to exceed those limits, we think Rule absolute. there ought to be a new trial.

MARGETSON v. WRIGHT. May 12.

 Some splints cause lameness, others do not; a splint, therefore, is not one of those patent defects against which a warranty is inoperative.

2. The defendant having warranted a horse sound at the time of the contract, and the horse having afterwards become lame from the effects of a splint visible when the defendant sold him, Held, that the defendant was liable on his warranty.

THE defendant sold the plaintiff a race-horse called Sampson, which he warranted sound, wind and limb, at the time of sale. Some time after the sale, the Vol. XXI.—78

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horse became lame: whereupon the plaintiff sued the defendant upon his war-

ranty, and obtained a verdict.

It appearing, however, that the subsequent lameness was occasioned by a splint, the existence of which was known to the plaintiff at the time of the sale, the defendant obtained a rule absolute for a new trial. See antê, 7 Bingh. 603.

Upon the second trial, the plaintiff gave evidence as to the nature and consequences of various kinds of splints; that a splint may or may not be the efficient cause of lameness, according to the position which it occupies, and its size or extent; and that Sampson's splint was in a very bad situation, as it pressed upon one of the sinews, and would naturally produce, when the horse was worked, inflammation of the sinew, and consequent lameness.

The jury again found a verdict for the plaintiff; when the learned Judge who presided (Vaughan, B.) requesting them to tell him distinctly, whether, in their *judgment, the horse was sound; or, if unsound, whether the unsoundness arose from the splint of which evidence had been given; the jury said, "that although the horse exhibited no symptoms of lameness when the contract was made, he had upon him at the time of the contract, the seeds of unsoundness

arising from the splint." Whereupon

Wilde, Serjt., obtained a rule nist for a new trial, upon the ground, that upon this special finding, the learned Baron ought to have directed a verdict for the defendant, the defendant having limited his warranty to the time of sale, for the express purpose of exempting himself from liability for the consequences of a splint visible to all who inspected the horse. If, therefore, there were no symptoms of lameness when the contract was made, the defendant's warranty was satisfied.

Spankie, Serjt., showed cause. As the plaintiff could himself have ascertained whether or not the horse was lame at the time of the contract, the warranty would have been useless and unmeaning if it did not imply that, at the time of the contract, the horse was exempt from any infirmity which might occasion subsequent unsoundness. Now he was not so exempt; for he had a splint, which turned out to be the cause of the subsequent unsoundness. And a splint is not one of those patent defects, such as blindness or broken knees, on the subject of which a warranty is inoperative; for it is only by the event that it can be ascertained whether the splint is or is not of a mischievous nature. It was a defect, therefore, against the consequences of which the defendant might give a warranty; Liddard v. Cain, 2 Bingh. 183; and the object of the warranty was to assert that this was an innocent splint.

*Wilde. From the finding of the jury, it appears that the mischief of sa splint must depend chiefly, if not entirely, upon its position: if so, the possibility of its becoming mischievous was a patent defect, of which the plaintiff had the means of judging as well as the defendant. Taking it, however, as only an equivocal indication of unsoundness, the uncertainty as to its future effect was the very point on which the defendant proposed to guard himself by limiting his warranty to the time of the contract. But for the uncertain issue of the splint he might have given an unqualified warranty: and he derives no benefit from the limitation, if it be not held to be satisfied by the fact that the

horse had no symptoms of lameness when the contract was made.

Cur. adv. vult.

Tindal, C. J. This was an action upon a warranty, in which the defendant warranted the horse to be sound, wind and limb, "at this time;" that is, at the time of the warranty made. The jury at the trial found a verdict for the plaintiff. The learned Judge requested the jury to tell him distinctly whether, in their judgment, the horse was sound: or, if they believed him to be unsound, whether that unsoundness arose from the splint, of which evidence had been given. In answer to which inquiry the jury said, "That, although the horse exhibited no symptoms of lameness at the time when the contract was made, he had then upon him the seeds of unsoundness arising from the splint." The question upon this application for a new trial is, Whether this finding of the jury

sanctions the verdict for the plaintiff or not; that is, whether the Court can see with sufficient clearness that the jury thought that the horse was unsound at the time of the contract, and consequently that the warranty was broken. It appears that the evidence before the jury was, in substance, that a splint might or *might not be the efficient cause of lameness, according to the position which it occupied, and its size and extent; that this splint was in a very bad situation, as it pressed upon one of the sinews, and would naturally produce, when the horse was worked, inflammation of the sinew, and consequent lame-The jury, therefore, drawing their attention to the particular splint, to which the evidence related, appear to us to have intended that this individual splint, though it did not at the moment produce lameness, was, at the time of the contract, of that sort and in that situation as to contain, in their language, the seeds of unsoundness, that is, the efficient cause of the subsequent lameness. If the lameness complained of had proceeded from a new or different splint, or from the old splint taking a new direction in its growth, so as to affect a sinew, not having pressed on one before, such a lameness would not have been within the warranty, for it would not have constituted a present unsoundness at the time of the warranty made. But the jury find that the very splint in question is the efficient cause of lameness. On the former motion, our attention was not called to any evidence, if any such was given, as to the different nature and consequences of splints which the learned Judge reports to have been given upon the present occasion; but it now appears that some splints cause lameness, and others do not, and that the consequences of a splint cannot be apparent at the time, like the loss of an eye or any visible blemish or defect, to a common observer. We therefore think that, by the terms of this written warranty, the parties meant this was not a splint at that time which would be the cause of future lameness, and that the jury have found that it was. We therefore think that the warranty was broken, and that the postea must be delivered to the plaintiff. Rule discharged.

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*KINGSFORD v. MARSHALL.

Upon the ebbing of the tide, a vessel took the ground in a tide harbour, in the place where it was intended she should; but, in so doing, struck against some hard substance, by which two holes were made in her bottom, and the cargo damaged: Held not a stranding for which the underwriters were liable upon an insurance on corn warranted free from average, unless general, or the ship be stranded.

This was an action on a policy of insurance on wheat on board the ship Lady Anne, at and from London to Dunkirk. The policy contained the usual memorandum, by which corn, &c., was warranted free from average, unless general, or the ship be stranded. The plaintiff declared for an average loss upon the wheat by the stranding of the ship. At the trial before Tindal, C. J., London sittings after last Michaelmas term, the only question that arose was, whether there was a stranding of the ship or not? As to which, the facts were as follow:-Dunkirk harbour is a tide harbour, being nearly dry at low water. The ship entered the harbour about the time of high water, and was moored fore and aft to the shore, by order of the harbour master, in a place pointed out by him, where other vessels had been moored; and was also fastened by a running tackle from the mainmast head to a post on the shore, for the purpose of preventing the ship from settling over as the tide fell. Whilst the tide was ebbing, and before the ship took the ground, though as to the precise time there was contradictory evidence, the rope of the running tackle broke; and after the ship had settled, it was discovered, that, in taking the ground, she had struck against some hard substance, by means of which two holes were made in the bottom of the ship, in the second or third streak from the keel, and the water flowing through these holes had injured the ship, and also done considerable damage to the cargo.

Upon the fact, whether the ship took the ground precisely in the place and in the manner she would have done, if no accident had happened to the rope, there was contradictory evidence: and the jury were directed, that if the *ship took the ground merely in consequence of the ebbing of the tide, and at the very place where it was intended she should at the time she was moored, then there was no stranding within the meaning of the policy; but if, in consequence of the breaking of the rope, or any other casualty, the ship took the ground, not in the place where it was intended she should settle by the obbing of the tide, but in some other and different place, then there was a stranding. The jury found for the defendant; thereby, in effect, declaring that the ship had taken the ground merely through the ebbing of the tide, and in the very place where it was intended she should, and negativing that from the breaking of the rope, or any other accident, she had settled in a different place.

Taddy, Serjt., obtained a rule nisi for a new trial, on the ground of an alleged misdirection, contending that in cases of this kind, the question is, whether or not the loss takes place in the ordinary course of navigation: that this loss did not take place in the ordinary course of navigation; for though it was in the ordinary course that a vessel should take the ground in Dunkirk harbour, it was not in the ordinary course that she should settle down upon a large stone which should perforate her bottom. The jury, therefore, should have been told that this was a stranding for which the underwriter was responsible. Fletcher v. Inglis, 2 B. & Ald. 315, where a transport in government service, insured for twelve months, was ordered into Boulogne harbour, the bed of which is hard and uneven, and, the tide having left her, received damage by taking the ground; it was held, that that was a loss by the peril of the sea. So, in Rayner v. Godmond, 5 B. & Ald. 225, in the course of a *voyage along a canal, [*460] it became necessary, in order to repair the canal, to draw off the water; the ship, having been placed in what appeared to be a safe situation when the water was drawn off, impinged by accident upon some piles, the existence of which was not previously known: and this was held to be a stranding within the usual memorandum in the policy.

Wilde and Stephen, Serjts., showed cause in Hilary term. This was a stranding in the ordinary course of navigation, for which the underwriter is not responsible; and Hearne v. Edmunds, I B. & B. 388,(a) is in point. There, a vessel in charge of a pilot, going up Cork harbour, took the ground in the ordinary course of navigation, and afterwards, when moored at a quay, on the ebb of the tide took the ground, fell over on her side, and was injured; and it was holden,

that that was not a stranding for which the insurer was liable.

In Fletcher v. Inglis the loss was not occasioned by the vessel's taking the ground, but by succussation on the reflux of the tide; to which she could not have been exposed unless placed in an improper position. In Rayner v. Godmond, the accident did not happen in the ordinary course of navigation, for the drawing off the water of the canal for repairs was obviously an unusual occur-

In Carruthers v. Sydebotham, 4 M. & S. 77, a ship being under conduct of a pilot was, against the advice of the master, fastened at the pier of the dock basin at Liverpool, by a rope to the shore, and left there; when the tide retired she fell over on her side and bilged: that was held a stranding, for which the underwriters were liable. But the fact that the vessel was placed, contrary to the advice of the master, in a position which proved fatal to *her, establishes that such position was not taken in the ordinary course of navigation.

In Barrow v. Bell, 4 B. & C. 736, a ship, in entering a harbour, struck upon an anchor, and being thereupon in danger of sinking at her moorings, was warped higher up the harbour, where she took the ground, and remained fast: this was also held to be a stranding within the meaning of the policy; but the

⁽a) From Lord C. J. Dallas's notes of the trial, which Wilde now produced, it appeared that the bottom of Cork harbour is hard and stony.

blow which rendered the stranding fatal, was given by the anchor before the vessel took the ground. In Bishop v. Pentland, 7 B. & C. 219, where the ship was compelled to put into a tide harbour, and was there moored alongside a quay, in the usual place for ships of her burden, it became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over upon the tide leaving her; and the rope with which she was so fastened, not being of sufficient strength, broke when the tide retired, and the vessel fell over upon her side, which was thereby stove in: this was held to be a stranding. But the damage was manifestly occasioned by the negligence of the crew, and not in the ordinary course of navigation.

In the present case, the jury having found that the accident was not occasioned by the insufficiency of the rope, the stranding could only have occurred

in the ordinary course of navigation at Dunkirk harbour.

Taddy. In the ordinary course of navigation at Dunkirk harbour, vessels are compelled to take the ground; but they would not enter and do so if the practice exposed them to destruction or injury; the fact, therefore, that all vessels take the ground there, conclusively shows, that it is not in the ordinary course of navigation that they should be bilged in so doing. The *injury occasioned by the stone, in this case, was as much out of the usual course, as the injury occasioned by the sunken anchor in Barrow v. Bell, or the hidden piles in Rayner v. Godmond. Though the taking the ground was contemplated by both parties to the insurance, the accident which occasioned the injury was unforeseen, and comes therefore within the scope of the insurance. In Carruthers v. Sydebotham, the insurers were held responsible, because in the judgment of the master, the ship had been placed by the pilot in an improper position: and such was the case here; for the harbour-master, not the captain, stationed the vessel where the accident happened. The jury, therefore, should have been directed that this loss occurred, not by such a stranding or taking the ground as the parties contemplated, but by an unforeseen accident, the consequence of which was a stranding for which the underwriter was responsible.

·Cur. adv. vult.

TINDAL, C. J. (after stating the facts as above), proceeded;—A rule has been obtained for a new trial, upon the ground of a misdirection to the jury; but after hearing the argument of counsel against and in support of the rule, we think, upon those facts, the direction of the Judge, and the finding of the jury, were right, and that a new trial ought not to be granted. That the injury done to the ship or goods by settling on a hard substance at the bottom of the harbour, would be a damage recoverable on a policy on ship, or a policy on goods not included in the memorandum, as an injury occasioned by perils of the sea, is beyond all doubt. But the question is, whether, as the goods insured fall within those in the memorandum enumerated, the present case is taken out of the exception contained in such memorandum, by reason of the ship being stranded; inasmuch as it has long been *settled that the words "if the ship be stranded" are words of condition, and that if such condition happens, it destroys the exception and lets in the general words of the policy. (See Burnett v. Kensington, 7 T. R. 210.) In considering this case, therefore, it will be better to treat the fact, that the damage to the wheat was occasioned by the very act of the ship's taking the ground, as a circumstance altogether immaterial in the determination of the question. For if the ship was stranded in Dunkirk harbour, an average loss upon the whole would be equally recoverable, though it had happened from perils of the sea at any former time, or any other place in the course of the voyage insured. In this point of view it is of very great consequence that the meaning of the word stranding should be distinctly understood. Now it is perfectly clear, and has been settled by various decided cases, that by the term "stranding," neither of the contracting parties could intend a taking of the ground by the ship in the ordinary course of navigation used in the voyage

upon which she was engaged. It is needless, therefore, to say, that when a

vessel, in the course of a voyage insured, is sailing in a tide river, or puts into a tide harbour, the taking the ground from the natural cause of the deficiency of water, occasioned by the ebbing of the tide, is no stranding, within the meaning of the policy. Otherwise, at every ebb of the tide there would be a stranding; and the memorandum intended for the security of the underwriter against partial losses upon perishable commodities, would be altogether nugatory, as the smallest injury to the cargo, occasioned at an early part of the voyage, would always be a loss within the policy, by reason of the ship discharging her cargo in a tide harbour. The mere taking of the ground, therefore, in a tide harbour, in the place *intended by the master and crew, or the proper [*464] officers of the harbour, cannot, upon any principle of construction or common sense, be held to constitute a stranding. What more, then, is neces-We think a stranding cannot be better defined, than it has often been in several of the decided cases, viz. where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause. Such was the case in Carruthers v. Sidebottom, 4 M. & S. 77, where the ship was taken by the pilot who had her in charge, against the direction of the master, and moored in an improper place. Such, also, was the case in Barrow v. Bell, 4 B. & C. 736, where, the vessel having struck on an anchor, whereby she sprung a leak, and being in danger of sinking, was, in consequence, warped further up the harbour of Holyhead, where she took the ground. Such, again, was the case of Bishop v. Pentland, 7 B. & C. 219, where, the ship having entered a tide harbour by stress of weather, was moored, fore and aft, with the addition, as in the present case, of a tackle from her mainmast, fastened to posts on the pier to prevent her falling over. The rope, being of insufficient strength, broke, and by means thereof the ship fell upon her side, whereby she was stove in and injured Such, lastly, was the case of Wells v. Hopwood, very recently decided in the King's Bench, in which case the ship, having arrived in Hull harbour, was in the course of discharging her cargo at a quay alongside of which she was moored At low water she grounded on the mud; but on one occasion, the rope by which her head was moored to the opposite side of the harbour stretched, *and the wind blowing from a particular quarter, instead of grounding entirely on the mud, as it was intended she should have done, she partly grounded on a bank of rubbish and stones. This grounding was held, by a majority of the Judges, to be a stranding within the meaning of the policy. Now, all these cases were decided upon the principle, that the taking the ground was occasioned by some extraneous and accidental cause; and was not a taking of the ground in the usual course of navigation. We think the attention of the jury, in the present case, was called to the very point to which it ought to have been directed, viz. whether the grounding was such as the master and crew intended, that is merely by the ebbing of the tide, in the ordinary course of navigation; or, whether the grounding in the particular spot where she took the ground, was the effect of accident. Upon the facts before them, we think the jury found a right verdict; and, therefore, the postea should be delivered to the defendant Rule discharged.

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*REGULÆ GENERALES.

It is ordered, That the days between Thursday next before, and the Wednesday next after, Easter day, shall not be reckoned or included in any rules or notices or other proceedings, except notices of trial and notices of inquiry, in any of the courts of law at Westminster.

TENTERDEN.
N. C. TINDAL.
LYNDHURST.
J. BAYLEY.
J. A. PARK.
J. LITTLEDALE.
S. GASELEE.
J. VAUGHAN.
J. PARKE.
W. BOLLAND.
W. E. TAUNTON.
E. H. ALDERSON.
J. PATTESON.
J. GURNEY.

It is ordered by the Court, That after the posteas and inquisitions have been left with the clerk of the judgments, conformably with the rule of court made in Trinity term, 13 G. 2, it shall be lawful for the clerk of the judgments to permit the same to be taken out of the office for the purpose of being produced to the sealer of the writs, in order to obtain a writ of execution. And it is hereby further ordered, That the attorney or agent, who procures such posteas or inquisitions from the office of the clerk of the judgments, shall cause the same to be returned again to the same office during the office hours of that day.

N. C. TINDAL.

S. GASELEE.

J. A. PARK. E. H. ALDERSON.

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*MEMORANDA.

In the course of the vacation, John Gurney, Esquire, king's counsel, and John Taylor Coleridge, Esquire, were called to the degree of the coif, and gave rings with the following motto:—Justo secernere iniquum.

J. Gurney, Esquire, was afterwards appointed one of the Barons of his Majesty's Court of Exchequer, in the room of Mr. Baron Garrow, who resigned, and received the honour of knighthood.

END OF BASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS.

OTHER COURTS,

Easter Cerm.

AND THE VACATION ENSUING.

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV. 1882.

Ex parte CHUCK, in the Matter of STARKEY and WHITESIDE, Bankrupts. May 10.

In July 1820 W. advanced to S. and S., then carrying on business in partnership as brewen, the sum of 24,000L, and all three executed a deed, by the express terms whereof a partnerthe sum of 24,000., and all three executed a deed, by the express terms whereof a partier, ship stock was created, in which they had all a joint property; W. however was not to have any definite aliquot proportion of the profits, but was to have an account of the profits between themselves, so as to get 2000l. or 2400l. a year, as the case might be, out of the clear profits: W.'s name never appeared to the world as a partner; Held, that W. was a partner; and the new firm having become bankrupt in 1826, held, that the creditors of the old firm and the creditors of the new firm were both entitled to prove

against the property of the new firm.

In July 1820, and for some time previous, John Cross Starkey and William Starkey carried on business in partnership as brewers; when, upon the sum of 24,000l. being advanced to them by Whiteside, then a minor, they all three executed a deed, by the express terms *whereof a partnership stock was created, in which they had all a joint property; Whiteside, however, was not to have any definite aliquot proportion of the profits; but was to have an account of the profits, as between themselves, so as to get 2000l. or 2400l. a year, as the case might be, out of the clear profits.

This deed was confirmed by Whiteside in March 1821, after he came of age,

but his name never appeared to the world as a partner.

In 1826 the Starkeys became bankrupt; whereupon a question arose, first, whether Whiteside was to be considered a partner; and, secondly, admitting him to be a secret partner, whether persons who were creditors of the old firm, had, not only a claim against all the property of the new firm, but also a right to prove their debts, to the exclusion of the creditors of the new firm, on the ground, that under the new firm the Starkeys were the apparent or reputed owners of the whole property, within the meaning of the statute 6 G. 4, c. 16, s. 72,

(624)

having in their possession, order, and disposition, the property of Whiteside, and with his consent.(a)

At the request of the Lord Chancellor, TINDAL, C. J., and LITTLEDALE, J., assisted in the decision of these questions, (b) and their united opinion was deli-

vered as follows, in the Court of Chancery, by

TINDAL, C. J. The first question to be considered is, Whether William Whiteside ever became a partner with John Cross Starkey and William Starkey, either as between themselves, or with prospect to third persons; that is, whether there was ever any joint partnership stock belonging to all these three persons. And *471] we are of opinion, that by the deed of July 20th, 1820, *confirmed by that of March 2d, 1821, which was executed after Whiteside came of age, Whiteside did become a partner with the two Starkeys, both as between themselves, and also with regard to third persons; that by the express terms of the deed of July 20th, 1820, there was a partnership stock created, in which they had a joint property; that, although Whiteside had not any definite aliquot proportion of the profits, yet that he was entitled to an account of the profits as between themselves, so as to get his 2000l. or 2400l. a year, as the case might be, out of the clear profits; that he was, to all intents and purposes, a partner, though his name did not appear to the world; and that a joint commission against all the three, as such joint partners, might be well supported. Whiteside, then, being thus a partner, but unknown as such to the world, any creditor of the three might, at his election, have maintained an action either against the two Starkeys, the known partners, or against them and Whiteside jointly, as appears by the case of De Mautort v. Saunders, 1 B. & Adol. 398, Ex parte Hamper, 17 Ves. 403, and Ex parte Norfolk, 19 Ves. 455; and if an action had been brought against the three partners, it is clear that the joint effects of the partnership might have been taken in execution. So also, generally speaking, the joint effects of the partnership would be distributable amongst the joint creditors, under a joint commission of bankruptcy against the three. And unless there be something particular in this case to vary it from such general principle, we should be of opinion that the joint creditors of the three are entitled to have the partnership effects divided amongst them. Thus then stands the claim of the joint creditors of the three partners.

The claim of the creditors of the two Starkeys under the old partnership, must next be considered. It is *contended, on the part of those creditors, that after the partnership with Whiteside, who was a secret partner, the two Starkeys, with the consent and permission of Whiteside, who had a share of the joint property, had his interest in such joint property in their possession, order, and disposition, and were reputed owners thereof, and took upon them the sale, alteration, and disposition as owners; and that, under the 6 G. 4, c. 16, s. 72, which follows 21 Jac. 1, c. 19, s. 11, they are entitled to have the benefit of that interest of Whiteside under the commission. And for that doctrine they rely on the case Ex parte Enderby, 2 B. & C. 389, which, they contend, must be taken now to be the law on the subject, and to have settled all the former conflicting cases. To the authority of that case we certainly subscribe. In that case, indeed, the partnership had expired by effluxion of time before the commission issued; in the present case it continues up to the date of the commission; but we cannot think that circumstance makes any difference in principle between the two cases; and in the present instance, if Whiteside had been solvent and able to pay all the creditors of the three, and a commission of bankrupt had issued against the two Starkeys, we do not think that he could have claimed to be entitled to his share of the joint effects any more than Enderby could in his case. It may be argued, however, that the rule of law laid down in that case may well apply against the solvent partner himself, who is in default, by suffering his share to remain in the possession and order of the bankrupt, and who, therefore, is excluded by the policy of the law from claiming anything to the prejudice of creditors whom

 ⁽a) See Ex parte Jennings, 1 Mont. 45, S. C.
 (b) For the argument see 1 Mont. & Bligh. 364.

he may have been, in part, the means of misleading, but that it forms a very different question whether the same rule should he allowed to hold where the *interest of the creditors of Whiteside is affected by its application, and where, as in the present case, the creditors of the three have trusted the firm when Whiteside's 24,000% formed part of the capital. However, upon the best consideration we can give to the subject, we think the principle of the case Ex parte Enderby may and ought to be extended to a case circumstanced like the present.

The question, then, arises, whether, if the old creditors are entitled to treat this as a case within the seventy-second section of 6 G. 4, they may not exclude all other persons, on the ground, that if the funds of Whiteside have, under the circumstances, been placed in the hands of the two Starkeys contrary to the policy of the law, no persons but the old creditors can prove. But we think they are not to have that privilege. In fact, the new creditors have a better right, upon principle, than the old creditors; because the new creditors trusted the firm on the faith of their apparent funds, including Whiteside's capital; whereas the old creditors never did trust them upon the faith of these funds, but only forbore to sue them upon the faith of their apparent stability. And unless there be some principle which forbids different classes of creditors claiming upon the same funds, we think both sets of creditors ought to be permitted to prove; that is, the new creditors, on the ground of the funds belonging to persons whom they certainly trusted; and the old creditors, on the ground of the two Starkeys being the apparent owners of the whole. Still further, if the creditors of the old firm claim to exclude the creditors of the new firm, another answer may be given, to which, indeed, we have already referred, viz. that as Whiteside was a secret partner, the creditors of the new firm might have brought actions, or such out a commission of bankrupt against the two Starkeys (according to the cases of De Mautort v. Saunders and Executors, Ex parte Hamper, and Ex parte *Norfolk, before referred to), and then, as Whiteside was a dormant partner, and the two Starkeys were the apparent owners, the new creditors might have insisted upon Whiteside's share being distributable under such a commission, and, consequently, would have the same right to insist upon the apparent ownership as the old creditors have. We are therefore of opinion, upon the whole of this case, that both the creditors of the two Starkeys by themselves, and also the creditors of the two Starkeys and Whiteside jointly, should be admitted to prove pari passu upon the joint estate of the three. Then, supposing the old creditors are entitled to prove upon the joint estate, it is to be considered whether those who had notice of Whiteside becoming a partner, can be admitted to the benefit of the proof? And upon that point, inasmuch as the proof is upon the ground of apparent ownership in the two Starkeys, we think it can make no legal difference whether the old creditors knew of the change or not, inasmuch as none of the old creditors trusted the firm while Whiteside's property was in it; and, therefore, the knowing or not knowing of the change seems to us to make no difference. We see, therefore, no objection to those particular creditors being allowed to prove, as well as the rest.

*475] *IN THE HOUSE OF LORDS.

DOE dem. F. HEARLE and A. M. HEARLE, his Wife, v. HICKS.

May 25.

J. H. devised his copyhold premises called P., &c., to the use of trustees, in trust for his wife, during her life or widowhood, or so long as she should reside upon the premises; remainder to the uses declared of his residue: he devised to the same trustees a freehold estate, charged with an annuity, in trust for his daughter for life, remainder to the use of her children in tail, and in default of issue, upon the trusts declared as to his residue; he further devised to the same trustees certain freehold premises, and all the residue of his real estates, in trust for his son H. for life, charged with an annuity to testator's wife, remainder in tail male to the issue of his son; on failure of such issue, a further annuity being thereupon payable to testator's wife, to the use of his grandson G. for life, remainder to the sons of his grandson in tail male; and in failure of such issue, to the use of the sons of his daughter in tail male, remainder to his own right heirs. He bequeathed all his ready money to his wife absolutely; the dividends of all his money in the funds to his wife for life; and all the personal property in and upon the copyhold premises, in trust for his wife, during such time as she should be entitled to the copyhold premises, and on the determination of her estate therein, for his son, the devisee of the residuary real estate. The testator, by his first codicil, referring to his will, and reciting the death of his son, devised to the husband of his daughter, after her death, the freehold estate devised by his will to her; charged his residuary estate with a further annuity to his wife, over and above those already limited thereout for her benefit; bequeathed two further annuities to his daughter and to her husband, and revoked the bequest of his we turtuer annuties to his daughter and to her husband, and revoked the dequest of his personal property in and about his copyhold premises, giving the same and the residue of his personal property absolutely to his wife, and in the event of her death before him, to his nephew. By a second codicil the testator appointed his wife sole executrix and residuary legates of his personal property; and by a third codicil directed the proceeds of certain shares in the County Fire Office, to be enjoyed by his wife for life; after her death, by his daughter and her husband for life; and after their decease by his heir in possession. By a fourth codicil, revoking and making void several of the dispositions therefore made by his will and codicils of all his frashold convival and revoked the and officets of a revoked and codicils, of all his freehold, copyhold, and personal estate and effects of every kind and description, instead and in place of such devise, disposition, and bequest thereof, gave, devised, and bequeathed all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever and wheresoever situated, to his daughter for life, remainder to his grandson and his heirs in strict entail, the rents to accumulate for his benefit till he was twenty-one; and on failure of issue, as by his will directed: he ratified and confirmed the several annuities and donations by his will and former codicils bequeathed; and gave and bequeathed to his wife a further annuity, with the like restrictions as the former were payable; in all other respects confirming his will and codicils. Held, that the devise to testator's wife of the copyhold premises called P. was not revoked by the fourth codicil. To revoke a clear devise, the intention to revoke must be as clear as the devise.

devised his copyhold messuage, &c., called Plomer Hill House, to the use of *trustees, in trust for his wife during her life, or widowhood, or until she should cease to reside, &c.; remainder to the uses declared of his residue; his freehold estates, called Treravel, to trustees and their heirs, in trust to raise an annuity of 201. per annum, and to pay the same to the separate use of his niece Frances Mountstevens; in trust to dispose of the residue of the rents to the separate use of his daughter Anne Maria Hearle for life: and in case his niece should die in the lifetime of his daughter, then in trust to pay the whole to his said daughter: after the decease of his said daughter, but subject to the said annuity of 201. to his niece, to the children of his daughter as tenants in common in tail; but in default of issue, then upon the trusts declared as to his residue; and all the residue to trustees and their heirs, to the use, intent, and purpose that his wife might take thereout one clear yearly rent charged of 300l. per annum, with power of distress, &c.; and subject to the rent charge, to the use of his son William for life; remainder to trustees, to support contingent remainders; remainder to the first and other sons of the said son in tail male; on failure of issue, to the intent that his wife might take a further annuity of 1001. during her life or widowhood; with a term for ninety-nine years in two of the trustees, to raise an annuity for his daughter, Anne Maria Hearle, for her separate use; remainder to the use of testator's grandson, John Graves, for life;

remainder in strict settlement to his first and other sons, &c.; remainder to the

By a special verdict in this case, it was found that in April 1821, John Hicks

first and other sons of his daughter, Anne Maria Hearle; with a proviso, that if any son of his daughter should be born in the lifetime of testator, he should take a life estate only with remainder to his first and other sons in tail male; *powers of charging and leasing, except the Plomer Hill House, &c., remainder to testator's own right heirs: all money in the funds, &c., to his trustees, to pay the interest and dividends to his wife during her life or widowhood, with power to her to appoint 500% for the benefit of his said son and daughter: all his ready money, &c., which might happen to be in his mansion called Plomer Hill House, and the wines and stock, &c., on his said copyhold premises, to his wife for her own absolute use and benefit: all the furniture, &c., to his wife during such time as she should be entitled to his copyhold mansion: remainder, &c., as to all the rest and residue of his personal estate, to his said son for his own absolute use and benefit; with a charge upon his funded property, and if insufficient, upon his residue for payment of debts. The testator declared that the annuities to his wife were to be in addition to those settled on her at her He then appointed the trustees his executors. By a codicil, dated the 10th of May, 1822, the testator, referring to his will, and reciting the death of his son Horatio, devised Treravel, after the death of his daughter, to her husband, Francis Hearle, for life; with remainder to the same uses as in the wil; charged all his residuary real estate with a further annuity of 100% to his, testator's, wife during her life or widowhood, over and above, and in addition to, the several annuities or yearly rent charges of 300l. and 100l. by his will charged thereon, or limited thereout to or in favour of his wife, as therein mentioned, and which he did thereby ratify and confirm, and all other provisions made for her by his will and codicil: he also charged the residuary estate with a further annuiv of 2001. to his daughter, and of 1001. to her husband; he likewise, after reciting the bequest of his personal property at Plomer's Hill to his wife for life, revoked that bequest, giving the same to his wife absolutely; and gave the residue of his personal property, *bequeathed by his will to his son, to his wife absolutely; he also made a provision for his great-nephew, William Mountstevens, and ratified his will in all respects, save and except as altered by that codicil. On the 15th of July, 1822, by another codicil, he appointed his wife sole executrix and residuary legatee of his personal estate; and on the 18th of July, 1822, by a further codicil, directed that the proceeds of five shares, which he held in the County Fire Office, should be enjoyed by his wife for life; after her death, by his daughter and her husband for life; and after their decease, by his heir in possession. By his fourth codicil, of 14th September, 1822, "revoking and making void several of the dispositions theretofore made by him in his will and codicils, of all his freehold, copyhold, and personal estate and effects of all and every kind and description, instead and in the place of such devise, disposition, and bequest thereof, he gave, devised, and bequeathed all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto his daughter for life; remainder to his grandson, John Graves, and his heirs, in strict entail, the rem to accumulate for the benefit of J. G. in case he should not be twenty-one on the death of testator's daughter, and on failure of issue, that his estate should go and descend as by his will he had directed; he thereby ratified and confirmed the several annuities and donations by him in his will and former codicise bequeathed; and gave and bequeathed to his dear wife a further annuity of 1001., to be paid with the like restrictions as the former ones given her by his will and codicils; thereby in all other respects, but what were above mentioned, confirming his will and codicils." And by a fifth codicil, dated 13th of July, 1823, he declared the property bequeathed to his daughter to be to her separate use; granted an annuity to her husband; gave and confirmed to his dear *wife, and at her disposal, any sum of money she might be entitled to **479 from the effects of her late father, or any other friend should leave her; and ordered his executors, in case she should die before him, to fulfil her will and disposal thereof.

The will and codicils were duly executed to pass real estates; and the testator died in June 1825, seised of the estates therein mentioned, leaving his wife, the defendant, and A. M. Hearle, him surviving.

Judgment was given for the plaintiff in the Court of Exchequer, by Alexander,

Judgment was given for the plaintiff in the Court of Exchequer, by Alexander, C. B., in Hilary term, 1827, which was reversed on error, in the Court of Exchequer Chamber, in Trinity term, 1827.(a) And upon error to the House of Lords, Tindal, C. J., now delivered the opinion of the Judges as follows:—

Lords, TINDAL, C. J., now delivered the opinion of the Judges as follows:—
TINDAL, C. J. My Lords, the question which your Lordships have been pleased to propose to his Majesty's Judges is this; whether, according to the true construction of the will and codicils which have been stated upon this appeal, the devise in the will of the testator's copyhold messuage or mansion-house, barns, stables, buildings, and pleasure-grounds, lands and hereditaments, called the Plomer Hill estate, was revoked by the fourth codicil. And upon this question, though it must be admitted to be difficult to draw any very certain conclusion as to the intention of the testator, the opinion which we have formed upon the best consideration of those instruments is, that the devise in the will above specified, was not revoked by the fourth codicil.

The general principle upon which this opinion proceeds may be stated thus: The testator does by his will show a clear and manifest intention to devise the *480] Plomer Hill estate to his wife for life, or during her widowhood. *If such devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt, as the original intention to devise. For if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand.

My Lords, it is the opinion of my learned Brothers and myself, that the clause of revocation contained in the fourth codicil, does not apply to the devise in question with such clearness and certainty as to operate as a revocation of that

plain and explicit devise contained in the will.

In this general conclusion we all agree; but it is scarcely to be expected, that in the discussion of a question of this nature, we should all arrive at the same conclusion upon grounds precisely the same. In stating, therefore, to your Lordships those grounds upon which I have formed the opinion, not simply that there is no clear intention to revoke the devise, but that, upon the clear construction of the codicil, the clause of revocation does not apply to this particular devise, I cannot undertake to say I am expressing the opinion of all my learned Brothers in each particular reason which I may advance, although in most of those reasons all concur, and I am not aware that there is any material dissent

or diversity of opinion in respect to any.

That the testator not only intended to devise to his wife the enjoyment of the house and premises in which he lived during her life or widowhood, but that it was a paramount object with him, appears abundantly by the first will and codicil. It forms the first subject of devise in his will. "In the first place, I give and devise all that my copyhold messuage or mansion-house, barns, *stables, and buildings, pleasure-grounds, lands, and hereditaments, called Plomer Hill House, in the parish of West Wycombe, and now in my own occupation, together with the cottages or tenements or premises thereto belonging, to trustees (therein named), and their heirs, upon trust for my present dear wife Susanna Jemima Hicks during her life or widowhood, or until she shall cease to reside at the same premises, or let the same, or permit the same to be occupied by any other person than herself, she paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair;" and then, in the event of her death, second marriage, ceasing to reside, or letting the premises, or permitting any other person than herself to reside therein, he directs the trustees to be seized and possessed of these copyhold premises upon the same trusts as

(regard being had to the nature and quality of the tenure of the said copyhold premises) will best correspond with the uses declared concerning the residue of his real estate.

He afterwards devises to his wife all his money in the funds during her life or widowhood; and after her death or marriage, to such person as should be either tenant for life or in tail of his residuary estate, with a power to her to appoint 500l. as therein mentioned; and then gives to her absolutely, all the ready money which shall happen to be in his mansion called Plomer Hill House, at the time of his decease, all the articles of plate brought by her on her marriage, his family carriage, and the wines, provisions, and provender, live and dead stock, which at the time of his decease shall be on his copyhold "premises;" and then devises "all his household goods, furniture, books, prints, pictures, china, glass, and plate not thereinbefore bequeathed, unto the trustees in trust for his said wife during such time as by virtue of his will she shall be entitled to his copyhold *mansion and premises; and after the determination of her estate in the same, in trust absolutely for the person who then, either as tenant for life or in tail male, shall be in the actual possession of his residuary real estates."

The testator, therefore, by his will has not only devised the mansion to his wife, but has shown a clear and anxious desire that his wife should continue to reside in the mansion which he then occupied, and that it should not be in any manner dismantled or unfurnished, but should be enjoyed by her in exactly the

same state as that in which it was left at the time of his death.

In his first codicil, made after the interval of a year, it is evident that the same intention that his wife should reside in the mansion-house, in the same state as left at the time of his death, continued to be predominant in the testator's mind; for after reciting the bequest in the will to his wife of the plate, furniture, and other articles before adverted to, he proceeds to revoke such bequest in plain and direct terms, and in lieu thereof bequeaths all his farming stock, household goods, &c., "and all other his effects which should be in or about his residence at Plomer Hill aforesaid, and usually considered as comprised in and constituting his establishment there," unto his wife, for her own use and benefit absolutely.

It is further to be observed, that the testator's wife appears to have been from the time of the making of the will down to the time of making the fifth and last codicil, the object of his peculiar bounty and regard; there being no codicil, with the exception perhaps of the third, which does not materially add to the provision already made for her by his previous dispositions in her favour.

The will gives his wife a rent-charge of 300l. a year for life charged upon the residue, with a contingent increase of 100l. per annum, in case of the failure of *issue of his son. By the first codicil, made after the death of his son without issue, he gives his wife absolutely the additional annuity of 100l. [*483] per annum, and bequeaths to her the residue of his personal estate absolutely to her own use. By his second codicil he constitutes her sole executrix and residuary legatee. By the third codicil he gives her the proceeds and profits of the five shares which he held in the County Fire Office, for her life. By the fourth, the codicil in question, he gives to his wife a further annuity of 100l. per annum for life. And by the fifth he gives to her, and at her disposal, all sums of money which she or the testator might be entitled unto, out of the effects of her late father, or that any other friend might leave her; and he orders his executors, "in case she shall die before him, to fulfil her will and disposal thereof." This codicil was executed about nine months subsequently to that upon which the question arises.

The will thus containing such a clear devise to the wife, with such a manifest indication of intention that she should reside in the mansion-house called Plomer's Hill, and each codicil containing proof that the regard of the testator for his wife continued unabated and unimpaired until long after the execution of the fourth codicil, the first observation that arises is, that it is extremely impro-

bable in itself that the testator should by general words, without making any reference to his wife, or any disposition in lieu thereof in her favour, revoke the only devise of land which he had made to her, which forms the first subject of his will, to which repeated allusions are made in the will itself, and first codicil, and her residence in which during her widowhood appears to have been the favourite object of his mind.

Still, however, the question arises whether he has by the fourth codicil re-

voked this devise or not?

*484] *That the words used in the codicil do not necessarily revoke this devise, is sufficiently manifest by referring to them. The testator begins by saying, "I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicil of all my freehold, copyhold, and personal estate and effects of all and every kind and description," and concludes it by saying, "hereby in all other respects but what is above mentioned confirming my said will and codicils."

There are no words, therefore, expressly revoking this devise; on the contrary, if we hold all the dispositions of his real estate to be revoked, we construe the codicil directly against the testator's declared intention. It is as much open to argument that the devise to the wife may be one of these, or the very one which the testator intended to confirm, as that it was one of the several which he intended to revoke. Whether, therefore, this devise was revoked must be determined, not by any express words to that effect, but by the consideration whether, upon the construction of the codicil, the devise and disposition therein contained must of necessity be held inconsistent with the devise to the wife; or whether such a construction may be put upon the devise in the codicil, that both the will and the codicil may stand together.

To consider this question, it is necessary in the first place to observe how the disposition of the testator's property stood under the will and the first codicil at the time when the fourth codicil was made. And upon a careful inspection of the will and first codicil it will be found, that at the time of executing the fourth codicil, the testator's real property stood thus disposed of; viz. the copyhold estate (the Plomer Hill house) was devised to the wife for life, the re-

mainder forming part of the residue.

*485] *The Treravel estate stood thus: an equitable estate to his daughter, Anna Maria Hearle, for life, for her separate use; remainder to her husband for life; remainder to her children in tail as tenants in common; the re-

mainder forming part of the residue.

The residue of his property, consisting of the manor and advowson of Bradenham, two freehold farms in the county of Bucks, and so much of the testator's estate in the Plomer Hill House and the Treravel property as were undisposed of, and also comprising all his personal property, except the partial interests given to the wife, which have been before enumerated, formed one mass; which, at the time of making the fourth codicil, in consequence of the death of his only son without issue, stood devised immediately to the testator's grandson, John Graves, for life; remainder to his first and other sons in tail male; remainder to the first and other sons of the testator's daughter, Anna Maria Hearle, in tail male; remainder to his own right heirs.

Whilst his property stood thus disposed of, the fourth codicil is made, in which, after declaring his intention to revoke several of the dispositions made by him in his said will and codicils, of all his freehold, copyhold, and personal estate and effects of all and every kind and description, "instead of and in the place of such devise, disposition, and bequest thereof, he gives, devises, and bequeaths all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto his daughter, Anna Maria Hearle, and from and after the determination of that estate, unto his grandson, John Graves, and his heirs, in strict entail, as in the said will mentioned," with the additional clause in the codicil as to the time

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when John Graves shall take; "and in failure of such issue of the said John Graves he orders that his said estates and effects shall go and descend, as is by his said *will directed;" and then ratifies and confirms the several annuities and donations by him in his said will and former codicils given and bequeathed, and gives a further annuity of 100l. to his wife under the same restrictions as the former.

Now, if this devise in the codicil can be construed to be confined to the property which formed the testator's residue only, then the devise in the will of the copyhold estate in question to the wife for her life, will remain unrevoked, and the object of the testator in his codicil may still be carried into effect.

And that such may be the construction, without violating the words of the codicil, appears to be by no means unreasonable. In the first place, the codicil professes to make void "several of the dispositions heretofore made by him in his will and codicils of all his freehold, copyhold, and personal estate and effects of all and every kind and description;" now, the only disposition made of all his freehold, copyhold, and personal estate and effects, is that devise which relates to the residue, in which all his property, freehold, copyhold, and personal, is brought together in one mass, with the exception of that part of the personal estate which is given to the wife absolutely by the will, and which is expressly confirmed to the wife by the subsequent part of this very same codicil.

In the second place, the testator says, "instead of such devise, disposition, and bequest," using the singular number, which would, in strict grammatical construction, be applicable to the devise or disposition of the residue, but not to the various dispositions contained in the will.

In the third place, the death of his only surviving son, William, who was the first taker for life under the clause disposing of the residue, makes it not improbable that he should wish to substitute in the residuary clause his *only surviving daughter, to take the same estate therein which was be-

fore given to the son.

In the fourth place, if the devise to the wife, of the copyhold estate, is to be held to be revoked, then, not several only of the dispositions of the real property contained in the will, but all such dispositions, are revoked or altered. For the wife's life estate in the Plomer Hill property is gone; the equitable estate for life given by the will to the daughter in the Treravel estate, for her separate use, is merged in a legal estate for life given to her generally; and the daughter has a life estate in the residue now for the first time interposed before that of John Graves. But to revoke all the dispositions of the realty in the

will and codicil, is against the express directions of the testator.

Still further, if the devise of the Plomer Hill estate to the wife is revoked, inasmuch as the codicil confirms the donations made in the will and codicil, the wife would still be entitled absolutely to the furniture, and to everything which constitutes the establishment of the house. So that the house, upon the death of the testator, would immediately go to the daughter, but stripped and dismantled of all its furniture and establishment, which the testator appeared auxiously to intend should be kept together. Again, the codicil gives an estate for life to A. M. Hearle, and from and after the determination of that estate, to his grandson John Graves, and his heirs in strict entail, "as in his said will directed." Now this express reference to the will draws the attention to that part of the will in which alone there is any mention of John Graves, that is, to the disposition of the residue. It seems, therefore, a very reasonable construction of the codicil, that as the ultimate remainder of the property intended to be thereby disposed of, is limited by express reference to the clause in the will which contains the devise to John *Graves in strict entail, to infer that the property itself devised by the codicil is the same property as that contained in the devise of the will to which such reference is made, viz., the residue By this construction the only alteration effected by the codicil is, the substitution of a devise to the daughter for life, instead of that given to the son, to take place immediately next before the estate given to John Graves. But if

the devise operates on the residue only, as before observed, it leaves the particular estate already devised to the widow, untouched.

There are, undoubtedly, some difficulties attending the construction of the will and codicil, whichever way they are construed. It may be said against the construction above made, that the words of devise in the codicil to the daughter. are immediate; and that the testator, by his first codicil, shows that he knew how to interpose a new estate by proper terms, between those already created by It certainly is so; but it is obvious on comparing the frame of the first and the fourth codicil, and looking to the description of the witnesses to each respectively, that the former was made with, the latter without, legal assist-

ance, so that no great reliance can be placed on that argument.

It may be argued again, that the testator by the codicil directs that in case his grandson shall not be twenty-one at the time the estates shall devolve on him by the death of the testator's daughter, the rents shall accumulate for his benefit: and that if the wife took a life estate in the copyhold, non constat but that she might survive the daughter; in which case the Plomer Hill estate would not devolve to the grandson on the daughter's death. But it is not at all surprising that a testator, in preparing such an instrument, should have overlooked, or not cautiously have provided for, the possibility of his wife outliving his daughter, the more *especially where the devise to the wife related only to a part *489] of the estate.

It may further be contended, that by the fifth codicil, the testator has proved that he was aware that the fourth codicil had revoked the estate for life which he had previously given by the first codicil to his son-in-law; for he would not otherwise have devised to him the rents and profits of the Treravel estate during It must be granted that the fourth codicil has necessarily that effect; but this arises, not from his devise of the life estate to his daughter, for the only effect of that devise was to convert her equitable estate for her own separate use into a legal estate for life; but it arises from the devise to the grandson being made "from and after the determination of that estate;" words that necessarily excluded the devise to the son-in-law, which he had before made by his first This argument, therefore, does not seem to bear upon the question, whether the life estate to the widow is revoked or not.

Upon the whole, although these, and perhaps other, difficulties may be urged against the construction above proposed, we think the onus probandi of showing that the devise to the wife is included in the clause of partial revocation, is cast upon those who claim under such revocation, and that it is not shown with sufficient certainty that this devise to the wife is included in such clause; on the contrary, that, upon the proper construction of this codicil, the intention appears to have been that the devise to the wife should not be revoked by the codicil.

Upon these grounds, we think that the devise in question has not been re-Judgment of the Exchequer Chamber affirmed. voked.

*IN THE HOUSE OF LORDS.

*4907

MIREHOUSE and Another, who have survived GEORGE, BISHOP of LIN-COLN, plaintiffs in error, v. RENNELL, Wo., defendant in Error. May 25.

An advowson belongs to a prebendary in right of his prebend: the church becomes vacant, and prebendary dies without having presented: the presentation belongs to his personal representative, according to the opinion of six Judges out of eight, delivered in the House of Lords.

THE judgment of the Court of Common Pleas in this cause, delivered in Michaelmas term 1825, 3 Bingh. 223, having been reversed by the Court of Vol. XXI.—80

King's Bench in Trinity term 1827, 7 B. & C. 113 (Tenterden, C. J., discation to the House of Lords, the question was

tiente); upon error to the House of Lords, the question was,

An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented. Does the right of presentation belong to his personal representative?

Upon which, the following opinions were delivered by eight of the Judges, who have so reviewed the whole of the authorities cited, as to render any report

of the argument superfluous.

BOSANQUET, J. My Lords,—The question proposed by your Lordships to the Judges for their opinion is this: An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, does the right of presentation belong to his personal represent-ative? In offering my humble reasons to your Lordships for answering this question in the affirmative, I propose, with permission, to consider it, first, with reference to the right of presentation itself, to which the question relates; secondly, with reference to the person (a prebendary of *a cathedral church) to whom the right first accrued; thirdly, with reference to the deceased prebendary's personal representative, whose right is the immediate subject of the question. With respect to the first point, I take it to be clear, that the patron's right of presentation to an ecclesiastical benefice is a temporal right. pressly said by St. Jerman, in the 36 cap. of the Doctor and Student, that the right of presentation is a temporal thing, and a temporal inheritance. It was insisted, however, at your Lordships' bar, that the right of presenting is a personal spiritual trust; and the authority of Bishop Gibson was relied on in support of that position. Bishop Gibson (Codex, Tit. 33, cap. 1) does indeed question the propriety of calling it a temporal inheritance, or that it ought, legally speaking, to be considered otherwise than as a spiritual trust. But he refers to no authority in support of his view of the subject. And in the very same chapter in which he suggests this doubt, he says that the right of nominating, which at first was annexed to the person building or endowing the church, became by degrees appendant to the manor in which it was built; that the right of advowson, though appendant to a manor, castle, &c., may be severed from it; and that being severed, it becomes an advowson in gross. And he calls the right itself an incorporeal inheritance which may be granted by deed or will. The grounds upon which it has been considered that the advowson, or patron's right to present, is a temporal and not a spiritual inheritance, are well stated by Godolphin (Repertorium Canonicum, p. 209); who was, as your Lordships know, an eminent civilian and king's advocate after the restoration of King Charles II. "It hath ever been held," he says, "that by the common law an advowson is a temporal inheritance: for which he gives the following reasons: that it lieth in tenure, and may be holden either of the king or of a *common person; and hath been held of the king in capite or in knight's service; that a writ of right of advowson lieth for him who hath an estate in an advowson in fee-simple; that a præcipe quod reddat lieth for it; that a common recovery may be suffered of it; that an advowson, as other temporal inheritances, may be forfeited by attainder, or lost by usurpation, negligence, and other means there specified; that the wife shall be endowed thereof, and the husband be tenant by the curtesy; that it may be taken in coparcenary; that it may pass by way of exchange for other temporal inheritance; that by grant of all lands and tenements an advowson doth pass; and if not by livery, yet by deed, is transferable as other temporal inheritances, which pass with the manors whereunto they are appendant. It is said that the object of an advowson is of a spiritual nature, since it is to provide a spiritual person to serve the church; but the right to nominate such person is not the less a temporal estate." That right, according to Fleming, C. J. (Starkie and Pool's case, I Bulstrode, 21), is an interest and not all the spiritual interests of the church are provided for by subjecting the fitness but the exercise of the (Starkie and Pool's case, 1 Bulstrode, 21), is an interest and not authority. of the person nominated to the judgment of the bishop, but the exercise of the patron's right of nomination is not subject to the jurisdiction of any court but

the king's temporal courts. On this point, Godolphin (p. 256) says, "It is sufficient for the ordinary's discharge, if the presentee be able, by whomsoever he be presented; which authority is acknowledged on all sides to have ever been inherent in the ecclesiastical jurisdiction. But as to the right of presentation itself, to determine who ought to be presented, and who not, and at what time and when the church shall be judged to become void, and when not, all these appertain to the king's temporal laws."

It appears to me, therefore, my Lords, to be indisputable that a right of presentation is temporal property, *the alienation of which must be governed
by the rules and analogies of the common law; and that it is no more to
be considered in contemplation of law as a trust, than all other temporal property
for the proper use of which the owner is responsible in foro conscientive.

An advowson, being an incorporeal hereditament, may be taken by descent, conveyance, or devise, like other temporal property of that class. It may be

limited in fee or in tail for term of life or for years.

If the advowson be held in fee or in tail, it descends to the heir general or special. If for life, it passes to the remainder-man or reversioner; all these being freehold interests. A term of years or a single turn goes to the executor or administrator; such interest being less than freehold: and the whole estate, or a portion of it, or a single turn only, may be sold for a pecuniary consideration.

If, indeed, the church be vacant, the right of presentation for that turn cannot

be granted by a subject either for value or gratuitously.

This restriction, however, is not peculiar to a right of presentation: it applies to annuity or rent actually due, which may be granted before the day of payment, but which cease to be alienable at law after they have accrued; yet the arrears

in both cases are unquestionably temporal rights.

The nature of the difference which subsists between the right to present on the next turn which may accrue, and the right of presentation to a vacant turn, it is now material to consider. The right to present upon the next turn which shall accrue, is an interest carved out of the fee in the advowson, and if reconveyed to the owner of the fee, will merge. But the right of presentation to a vacant

benefice, though arising from the advowson, is no part of it.

*It has sometimes been called a chattel, sometimes a chose in action, *194] sometimes a fruit fallen. It is called (in Dyer, 283) a mere personal thing—a thing in right power and authority, a thing in action; and in effect, the fruit and execution of the advowson, and not the advowson. See Co. Lit. 120 a. It said to be not merely a chose in action; for it survives to the husband, which a bond does not. But, by whatever name it may be called, it is treated in law as a right of a distinct nature from the ownership of the advowson itself. Jenkins's Cent. p. 236, it was held by all the Judges of England, that where the next presentation to a church then void had been granted, the grant, being made by a subject, was void. For the present avoidance (it is said) is a thing in action and privity, and vested in the person of the grantor (the patron), and is like a relief or arrear of rent, or an obligation or a debt; and it is added, if a grantee of an annuity in fee grants an annuity for lives or years, it is good; for this is an estate settled and of continuance; but a grant of the arrears of the annuity is void, causa qua supra: that is, because the subject of the grant is become a chose in action; and notwithstanding what is stated in the note to the Bishop of Lincoln v. Wolforstan, 3 Burr. 1504, respecting the fictitious nature of this reason, it appears to me fully warranted both by analogy and authority in point. No instance can be shown in our books in which a right of presentation to a vacant church has accompanied the ownership of an advowson in the hands of a subject, if the person, to whom the right of presenting accrued, has ceased either by death or otherwise to hold the advowson. If a right of presentation accrues to the owner in fee of the advowson, it does not pass to his heir. If the right accrues to a tenant in tail or tenant for life of the advowson, it does not pass to the issue in tail or the remainder-man. But in all these cases it goes to *495] the *executor, as the representative of the personal rights of the indi-

vidual to whom it accrued. If the right accrues to a lessee for years of the advowson, and the term expire within six months afterwards, the lessee is entitled to present, notwithstanding the expiration of the term, in preference to the reversioner. Upon what principle can such a claim be sustained, but that of a personal right vested in the individual during the term, distinct from his interest in the advowson? If a feme covert be entitled to an advowson, and the church become void during the coverture, and the husband survive, he shall present; but if the avoidance happened before the coverture, he shall not present, such right being, as it is said, only a chattel real in action, not reduced into possession during the coverture. And if the avoidance happen during the coverture, the husband shall present, though he be not tenant by the curtesy, as in cases where the wife had but a life estate, or where there has been no issue of the marriage: and in such case, if the husband himself die before presentment, his executor shall present, and not the heir (Watson's Clerg. Law, cap. 9). Can any reason be assigned for this, but that the right which had accrued during the coverture was distinct from the estate in the advowson?

The uniformity of the law in all these instances appears to me manifestly to show the general rule to be, that the right to present to a vacant church vests in the individual to whom it accrues as a personal right, which, though accruing from the advowson, is no part of it, is not annexed to it, and does not follow it when it devolves upon any other person than the individual to whom the right of presentment first accrued. Two instances, indeed, may be mentioned, in which, though the right of presentation does not pass to the succeeding owner of the advowson, it does not pass to the personal representatives of the decased individual to whom it *first accrued. These are the cases of a bishop and a tenant in capite of the crown, in both of which cases the right belongs to the king.

This right of the king upon the death of a bishop is sometimes said to arise by reason of his title to the temporalities, and sometimes by reason of his prerogative. But it is equally consistent with either form of expression, to say that it arises by reason of the relation in which a bishop stands to the king.

The temporalities of a bishop, of which his advowsons form a part, are held

of the king per baroniam.

The title of the king to seize the temporalities upon the bishop's decease, may reasonably be referred to the tenure by which they are held: and the further title to one of the fruits of these temporalities accrued during the life of the bishop, and vested in him as a chattel at his death, may, consistently with analogies of the law, be referred to the same source.

That the right in question is a condition of the bishop's tenure per baroniam, there is great reason to suppose, from the similarity of right which accrues to

the king in the case of a tenant in capite by knights' service.

If tenant in capite be seised of a manor with an advowson appendant, and the church become void, and he die, his heir within age, the king shall not only have the wardship with the right of presenting to such livings as become void during the infancy of the heir, but to any right of presentation which accrued during the life of his tenant.

In this respect the case of tenant in capite is strictly analogous to that of a bishop. Yet, if the land be holden by knights' service of a common person, and not of the king, the executors of the deceased tenant shall present, and not

the guardian. (Co. Litt. 90 a, 388 a.)

And if tenant in socage be seised of an advowson, and the church become void, and he die, his heir under *age, the guardian in socage shall not pre-

sent, but the executor or administrator.

Sir E. Coke, in one place, gives as a reason why the king shall present in the case of a bishop, that the presentation is but a chose in action $(90^{\circ}a)$; and in another, that nothing shall be taken for the presentation, and, therefore, it is no assets (888 a). The circumstance of the presentation being a chose in action is a singular ground of objection to its going to the executor; and that of its not being assets would be equally applicable to the cases of a tenant who holds in

socage, and to a tenant par avail who holds by knights' service; in both which cases the executor is entitled. How far, indeed, it is quite correct to say that a presentation is not assets, will be seen hereafter. If the right of the king to a presentation accrued before the bishop's death, be not a condition of tenure, it may possibly be derived from the same principle which entitled the king to other personal property of the bishop upon his death. It will be recollected that the king is entitled (according to Sir E. Coke, 2 Inst. 491) to six things:-the bishop's best horse or palfrey, with his furniture; his cloak, or gown, and tippet; his cap and cover; his bason and ewer; his gold ring; and, lastly, his muta canina, his mew or kennel of hounds; which, says the record quoted by Sir E. Coke, ad dominum regem ratione prerogative sue spectant et pertinent. The origin of the king's right to these chattels is not very clearly ascertained. Coke says, that it was not any mortuary; but was given to the king as a fine, that the bishops might have power to make wills, and grant probates and administrations. Blackstone, on the other hand (vol. ii. p. 245), thinks that it was in the nature of a mortuary, which he calls a sort of ecclesiastical heriot,—a term which imports a duty due to a superior, either by service or custom. Whether it is to *be referred to the cause assigned by the one or the other of these learned persons, it is clear, that in cases to which the king's right did not extend, the chattels would pass to the executor. To show that the right of presentation is not distinct from the advowson, the following case is relied on in Fitz. N. B. 33:--" If the king have an advowson in fee which voids, and during the voidance the king granteth the advowson in fee, the king shall not present to this avoidance." Now, it will be observed, that this proposition turns altogether upon the effect of the king's grant; and that a chose in action is grantable by the king, which it is not by a subject. That the proposition is founded on the operation of the king's grant, may in some degree be inferred from what follows, vis., "But if the king have advowson by reason of the temporalities of a bishop, and during the avoidance the king restore the bishop the temporalities, yet he (the king) shall present to the advowson, and not the bishop for this avoidance." In this case the restoration of the temporalities, of which the advowson is part, does not carry with it the presentation which has fallen while the temporalities were in the king's hand; though it is said, in the former part of the passage, that a grant of the advowson would have that effect. A difference, therefore, is taken between a grant of an advowson by the king, and a restoration of the temporalities, including the advowson. Moreover, it must be observed that Sir Matthew Hale, in his notes on Fitz. N. B., does not implicitly adopt the position in the text, but cites some authorities to show that even the grant of an advowson will not carry the presentation, unless there are special words of the avoidance in the grant. His note is as follows:—"Vide contrd, except there are special words of the avoidance. 16 H. 7, 8; Dyer, 282, 302 a, 458 a. And see Accordant, 18 Ed. 3, 58 a, but contrary in the *case of a common person, 11 H. 4, 54 B. And an avoidance fallen is not grantable by a common Dyer, 283, 348; Staund. Prerogative, 44: 46 Ed. 3, Grants, 59; 18 Ed. 3, 22, and in margin:" and Watson agrees with the suggestion of Hale; for he says, "If, when a church is void, the king grants a manor, with all advowsons appendant, the void turn does not pass thereby, unless he also mention it in his grant" (ch. 10); and another case, arising upon a grant of the king, is stated in 2 Roll. Abr. 345, from which the distinct nature of the presentation strongly appears. "If the king has an advowson by reason of a wardship, and he grants to another during the minority of the ward, and after the church becomes void, and continues so until the ward attain his full age, whereby the interest of the grantee determines, yet the grantee shall have the presentation, and not the king." This case is analogous to that of the lessee of an advowson, whose interest having expired, he is entitled to present to a church which had become void during the term. But for the grant, the king would be entitled in preference to the heir; and by virtue of the grant, the grantee is entitled in preference both to the king and the heir.

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I will trouble your Lordships with only one more instance, which occurred in the reign of Queen Elizabeth, to show how clearly the right of presenting to a void church was considered as distinct from the advowson itself.

If an advowson comes to the queen for forfeiture by outlawry, and then the church becomes void, and the queen presents, and then the outlawry is reversed for error, yet the queen shall enjoy the presentment, because it came to the queen as a profit of the advowson; but if the church be void at the time of the outlawry, and the presentment be forfeited as a chattel principal and distinct, and then the outlawry is reversed, the *party have restitution of the presentment. Beverleigh and Cornwall's case, Moore, 269.

Here the queen's right to the presentment, as a profit of the advowson while in her hands, is asserted in the first part of the case: and the subject's right to restitution of the presentment upon an avoidance before the outlawry, is acknowledged in the latter part, because such right of presentment became a distinct

chattel before the outlawry.

Secondly. I am next to consider the question with reference to the person (a prebendary of a cathedral church) to whom the right of presentation accrued. A prebendary is a sole corporation existing by charter of foundation; or by prescription, which presumes a charter; and all the possessions of the prebend are derived either from the endowment of the founder, or of subsequent benefactors.

The right of presentation to a parish church must, therefore, have been derived mediately or immediately from the original patron of the living, who, as such,

was seised of a temporal estate in the advowson.

The nature and incidents of that estate could not be changed by its transfer to any particular person or body politic. What the heir of a natural person cannot take, will not go to the successor of a sole corporation. For (as it is said in 4 Rep. 65, Fulwood's case) succession in a body politic is inheritance in the case of a body private. And, therefore, in case of a sole corporation or body politic, be it created by charter or prescription, as bishop, parson, vicar, master of an hospital, &c., no chattel either in action or possession shall go in succession, no more than the heir of a private man can have them; but the executors or administrators of the bishop, parson, &c., shall have them.

*On this ground it is that a bishop, parson, &c., or any sole corporation which are bodies politic by prescription, can take a recognisance or

obligation only in their private and not in their public capacity.

If, indeed, there be a custom that the successor of any particular corporation sole, as the chamberlain of London, shall have a recognisance acknowledged to his predecessor, he shall take it, because the same custom which made him a corporation in succession for the particular purpose, has enabled his successor to take recognisances, obligations, &c., made to his predecessor, in the absence of which he would not be entitled to do so. The exception founded on custom in the chamberlain of London's case, establishes the general rule in those cases in which custom cannot be relied on. And, according to Sir E. Coke, in the case of bodies politic by prescription, such as bishops, parsons, &c. (in which &c. is manifestly included prebendaries), there wants such custom to take a chattel (or, as I apprehend, any interest distinct from the inheritance), in their politic or corporate capacity. Independently, however, of this negative argument arising from the incapacity of the successor, I am led to infer from analogy, that the personal right of the prebendary, existing at the time when the church becomes void, is to be preferred to that of his successor.

be preferred to that of his successor.

The appendancy of an advowson to a manor is analogous to its union with a prebend. Yet if the church is void, and the lord of the manor die leaving the church vacant, his executor, and not his heir, shall present. The title of a husband in right of his wife endowed of an advowson by a former husband, is not unlike the seisin of a prebendary in right of his prebend: yet if the church become void during the coverture, and the second husband survive, he, and not the heir of the first husband, shall present; and if the second husband die before exercising his right, his executor would be entitled to stand in

his place. The ecclesiastical character of the prebendary does not appear to me to make any material difference between this case and that of any other corporation sole. A prebendary before the statute 13 & 14 Car. 2, c. 4, might have been a layman; a prebendary, as such, has no cure of souls; and was not obliged by the 13 Eliz. c. 12, to subscribe or read the thirty-nine articles. (Burn's Ecclesiastical Law, vol. ii. p. 79.)

Nor would the ecclesiastical character, supposing the prebendary always to have been a priest in holy orders, necessarily entitle his successor to a right of nomination or presenting to a benefice accrued to him in right of his prebend. transmission of an archbishop's option to his personal representatives, and the right to dispose of them by will, is a strong instance to show that a personal right, though arising from the ecclesiastical character, does not pass to the suc-Another, and strong instance, is that mentioned by Fitzherbert in his Natura Brevium, 34 N., "If a vicarage happens void, and before the parson presents, he is made a bishop, &c., yet he shall present unto this vicarage, because it was a chattel vested in him." Whether the case here put was founded upon any actual decision or only upon Fitzherbert's own understanding of the law prevailing in his own time, it has the sanction of his great name, and must be deemed of high authority. One distinction, indeed, is recognised between lay and ecclesiastical patrons in respect to the right to vary a clerk presented. If an ecclesiastical patron once present a clerk, and then vary his presentation by presenting another, the bishop is not bound to receive either. Whereas, if a lay *503] patron having presented one clerk, afterwards *present another, the bishop cannot absolutely refuse to institute, but may make his choice. ground of which distinction is, that the ecclesiastical patron has not the same excuse as the lay patron for omitting to ascertain the sufficiency of the clerk first Keilway, 154. But this distinction has no bearing on the question of succession to the right of presentation.

It has been urged at your Lordships' bar that where a judicial officer, entitled to appoint to some office, dies without having made an appointment, the succes-

sor in the office shall appoint.

The first answer to this case is, that such right of appointment is not property of any kind; and the next, that the same law, whether old or new, which has established the superior office, has regulated the right of appointment; in which respect the case resembles that of the chamberlain of London, the principle of which is, that the law which regulates the right of succession is coeval with the establishment of the office.

It now only remains for me, in the third place, to consider your Lordships' question with reference to the personal representatives of the deceased pre-

bendary.

The right of the personal representatives of a natural person, where a right

of presenting has accrued, was not disputed in argument.

It was admitted to be too firmly established upon authority to be now called in question; but it was contended to be an exception from the general rule of law, which ought not to be extended to a new case, the exception itself, though established, being, as it was said, inconvenient, and founded on a vicious principle.

I do not propose to offer to your Lordships any observation upon the convenience or inconvenience of the existing law, by which the personal representative *504] in ordinary cases is preferred to the owner of the *advowson; but if the view which I have taken of the right be at all correct, the law which prefers the personal representative is the general rule, and it lies on those who deny its application to an administrator of a prebendary to establish a ground of exception.

It may be admitted that the right of such administrators has never been the precise subject of any judicial decision: but little is to be inferred from that circumstance either on one side or the other. If any argument is to be built

upon the absence of litigation upon the subject, I should rather conclude that the general rule has prevailed, than that an exception to it had been admitted

without dispute.

There can be no doubt that (generally speaking) the executor of a prebendary as well as every other ecclesiastical corporation sole, takes the personal right of his testator, whether in possession or in action, which accrued to the deceased in right of his probend; such as the produce of the prebendal lands actually severed, or rent become due before the death of the prebendary. So a ward, relief, heriot, &c., accruing from the prebendal lands would pass as chattels to the executor; and on the other hand, the successor does not take any such rights or interests as are less than freehold. Even if a bond be expressly given to a corporation sole (as the dean of St. Paul's), and to his successors, the successor shall not sue upon it but the executor. 20 Ed. 4, 2 Bro. Corporation, 60. It is urged, however, that the right of presentation to a vacant church is not a matter of profit, and that the personal representative of the deceased prebendary ought not to take it, because it would not be assets.

But the same argument applies to the personal representatives of a natural person, in which case their title is admitted to be unimpeachable. If the right of *presentation be not part of the freehold, it cannot be exercised by the successor; by whom, then, should it be exercised, but by the person

who represents the personal interests of the deceased?

The title of a personal representative is not confined to those things which become assets in his hands. All the personal estate of the deceased, whether held for his own benefit or for that of others, passes to his executor or adminis-Terms of years producing no benefit, covenants and obligations for the benefit of strangers, vest in the personal representative. If the patron be disturbed in presenting to a vacant church and die, his executor and not his beir must bring the writ of quare impedit.

It can scarcely be argued that the successor of a deceased prebendary, who was disturbed in his lifetime, could maintain such a writ; and if not, who but the executor could maintain it? And who is to have the writ to the bishop? Moreover, it is to be recollected, that in such an action damages are recoverable, and

that damages would be assets.

In Smallwood v. The Bishop of Coventry, Cro. Eliz. 207, it was expressly held by the Justices that this action was within the equity of the statute of the Edw. 3, for the presentment is a chattel that should go to the executors, if the disturbance had not been; and for a disturbance in their own time they shall recover damages to the use of the testator; by the same reason, for a disturbance in the time of the testator, they shall recover damages by the equity of the statute 4 Edw. 3; and according to the report of the same case in Saville, 118, it was held, with reference to the objection that the presentment could not be assets, that everything which the law gives by *execution should be said to be valuable, and, consequently, assets; that by recovery in quare impedit, the damages would be assets; and so, as the advowson is assets in the heir, the presentment shall be in the executor.

Will it be said that such assets belong to the successor of a prebendary, or that he, rather than the executor, is to sue for them for the benefit of the deceased's personal estate? It has been objected in argument against the right of the personal representative, that he cannot present in the right of the prebend; yet that he ought to present in that right in which the deceased prebendary must have presented. But the same difficulty, if it be one, would apply to the case of a husband, who, though not tenant by the curtesy, presents, after his wife's death, in respect of an advowson vested in the wife, to a living becoming vacant during the coverture; and also to the case mentioned by Fitzherbert, of a parson to whom a right of presenting to a vicarage has accrued in right of his church, and who presents a vicar after having vacated his rectory by promotion.

In both these cases, the title which accrued alieno jure, is asserted by the resenter as a personal right vested in the individual to whom it accrued.

My Lords, the observations which I have humbly submitted to your Lordships, have been confined to the case of a presentative advowson, the object of

your Lordships' question being in terms a right of presentation.

The case of a donative advowson, in which there is no presentation to the bishop, stands altogether upon a different ground; not forming, as I conceive, any exception to the general rule which has been mentioned, but being of a nature to which the rule is inapplicable.

*507] The principle of the rule which carries the right of *presenting to the executor is, that the right which accrued to the testator, as patron, is

become distinct from the advowson.

It belongs to the patron for a limited time only; which time is independent of his interest in the advowson. If not exercised within six months, it passes as a separate and distinct interest to the bishop; and if not exercised by the bishop within six months more, it passes in like manner to the king, neither the bishop nor the king having any interest in the advowson.

In the case of a donative, the right of presenting is subject to no limitation. Though the patron forbear to fill the church for any length of time, his right is not lost; it does not pass from him to the bishop, or to the king, or to any other person; and if he never fill the church at all, the common law has made no

regular provision for compelling him to do so.

So different is the right of the patron of a donative from that of a presentative advowson, that, even during the incumbency, the sole right of visitation and connexion continues in the patron, independent of the jurisdiction of the ordinary.

The patron alone can deprive the incumbent; and it is to him that resignation

must be made.

It is unnecessary here to consider whether by the spiritual court or by any other means, the owner of a donative might be obliged to supply a minister for the service of the church, upon the ground of his having dedicated the church to the public for spiritual purposes; for, admitting such obligation to lie upon the patron, yet, during the vacancy of a donative, either by death, resignation, or otherwise, the freehold of the church, of the glebe, and of the tithes, reverts to the patron, and remains in him, till by a new gift he confers it on a *508] new incumbent; and it would therefore be inconsistent with *the title of the patron, that any other person should have a right to divest his freehold by collation.

For these reasons, my Lords, I am humbly of opinion, that where an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presenta-

tion belongs to his personal representative.

BOLLAND, B. Your Lordships have proposed, as a question for the opinion of the Judges, Whether, if an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation belongs to his personal representative.

It is highly probable that the state of facts, out of which this question arises, has in very many instances existed, and it is remarkable that no light is thrown upon the subject by any decision at law, nor by any practice of the church upon a presentation to a benefice under circumstances precisely similar to the present. If any such decision exist, it has escaped the industry of the experienced counsel, who argued this case in the Court below, and at the bar of this House, and the researches of the learned Judges of those Courts, whose inquiries were so sedulously directed to the discovery of some authority, upon which their judgment might be founded. It is to principle, therefore, and to cases analogous to the present, if any can be found, that the attention is to be turned, in order to arrive at a satisfactory conclusion.

In pursuing this inquiry, I do not mean to dispute that by the law, as it stands, if a presentative church, the advowson of which belongs to a layman, become vacant, and the lay patron die without presenting, his executor shall

present, and not his heir or devisee or *the next owner of the advowson, it being considered that the next turn is a chattel; though this seems to have been doubted in the case of The Queen v. The Archbishop of Canterbury, Fane and Hudson, and the Court left it undecided. The report is to be found in 4 Leon. 109. The distinction which I shall endeavour to make, will be, that the right of the owner of an advowson does depend, though the contrary is contended for on the part of the defendant in error, upon the character in which he holds, and that as the deceased was seised of and in the prebend of South Grantham, with its appurtenances, to which prebend the advowson of the rectory of the parish church of Welby, with its appurtenances, belonged, in his demesne, as of fee, in right of the said prebend, the right of presentation to the church, when it should become vacant, arose out of his office of prebendary, was a spiritual trust to be executed for the support of and for the promotion of the welfare of the established religion, and that to him, and to him alone was confided the choice and appointment of an incumbent.

It appears from history, that for six or seven centuries the parochia was the diocese, or episcopal district; there was the residence of the bishop and his clergy at the cathedral church; all tithes, offerings, and ecclesiastical profits belonged to the bishop, and his clergy for their support, for the repairs and ornaments of the church, and for other works of piety and charity. Such community, and collegiate life of the bishop and his clergy, was the practice of the

British, and was afterwards adopted by the Saxon church.

Many causes contributed to the existence of parochial churches. In some places the liberality of the inhabitants raised them, and by supplying preachers with houses, induced them to settle and become the pastors; kings founded free chapels for the purposes of worship *for their court and retinue. The chapels for the purposes of worship *for their court and retinue. The people, built churches; but the great source from whence the increase of the number of buildings for divine worship arose was the piety of the great lords, who, having large possessions and territories, founded churches for the use of their families and tenants within their respective domains; and hence it seems a title to patronage in laymen first sprung; hence the boundaries of parishes became commensurate with the extent of manors; hence the several portions of the same church were divided according to the separate interests of the several lords.

But, although for the purpose, and in the hope of more firmly establishing religion, and more widely extending its divine influence, these changes in the constitution and management of the church were permitted, the right of the bishop, either in respect of spirituals or temporals, was not invaded. He still had the cure of souls, and a title to all the ecclesiastical revenues within his whole diocese; by his authority and consent priests were ordained, as assistants given to him; no church could be used for public worship till consecrated by him;

no priest could officiate there without his delegation.

From the causes I have above stated, the privilege of nominating fit persons to officiate in churches, which the piety and liberality of private persons had founded or endowed, was given; and the bishops were content, in such cases, to forego the privilege of appointing the ministers, who were to perform the duties in such churches; this power was conceded to the founders or benefactors ratione fundationis, where they were founders; ratione donationis, where they endowed the churches; and ratione fundi, where they gave the soil upon which they were built; the bishops reserving only the power of deciding upon the fitness of the persons nominated, 1 Co. Litt. 119 b. In process of time this practice *became the law of the church. The church having made these concestions, and having thus parted with the right of presenting, it became a matter of indifference to the bishops, whether, upon the death of the lay owner of an advowson, during the vacancy of the church, belonging to it, the right should belong to his heir, or should belong to his executor; the church left that question to the courts of law to determine, and I am bound to admit, that in such cases, the claim of the

executor is established: but I cannot apply that rule to the case in question, because the advowson, of which the late prebendary of Grantham was seised, was given to him as a member of the church of Salisbury, was appendant to an ecclesiastical dignity, and is not to be governed by the same law as is applicable to advowsons in lay hands.

If I am wrong in taking this view of the question, the error arises from my considering the right of the executor of a lay patron to be an exception from the rule which governed property of this description in the hands of the church, as there appears to be a manifest distinction between lay and spiritual property.

In the note upon the tenth section of Littleton, Co. Lit. 17 b, it is said, "Of an advowson wherein a man hath an absolute ownership and property, as he hath in lands and rents, yet he shall not plead that he is seized in dominico suo ut de fædo, because that inheritance savouring not de domo, cannot either serve for the sustentation of him and his household, nor can anything be received for the same for defraying the charges, and, therefore, he cannot say that he is seised therein, in dominico suo de fædo." In the section of Littleton, upon which this is a commentary, the author is treating of an advowson in lay hands, and these authorities are adduced by Gibson in his Codex, p. 757, in speaking of spiritual property to illustrate the difference he points *out. In the pleadings in the present case, the prebendary is alleged to be seised of the advowson in his demesne as of fee, and why is it so pleaded? The answer is, it is not a lay title; but that, to use the language of Coke, it savours de domo, may be made serviceable for the sustentation of him, as a spiritual person, and his household. The case of London v. The Chapter of the Collegiate Church of Southwell, Hob. 303, is a further proof of the distinction I have taken between lay and spiritual property.

I shall next call the attention of your Lordships to the ecclesiastical character of the officer, in whom, till his death, it cannot be denied, the right of presentation was vested, to the object of the founder of the prebend, and to the

nature of the property with which he endowed it.

A prebend, as defined by Dr. Cowell, is the portion which every member or canon of a cathedral church receiveth in the right of his place for his mainte-So canonica portio is property used for that share which every canon or prebendary receiveth out of the common stock of the church; and prebenda is a several benefice rising from some temporal land or church appropriated towards the maintenance of a clerk or member of a collegiate church, and is commonly named of the place where the profit groweth. And these prebends be either simple or with dignity. Simple prebends be those which have no more than the revenue towards their maintenance. Prebends with dignity are such as have jurisdiction annexed to them, according to the divers orders in every Of the object of the founders of prebends there cannot be a doubt; it was to provide for the maintenance and support of the prebendaries; and it cannot be supposed that it was the intention of any *founder that the instalments of the prebend should be appropriated beyond the life of the party in possession. I shall not stop to inquire whether this charitable intention of founders has not been in a great measure defeated; but I shall confine myself to the consideration of whether the particular right contended for by the executrix is founded upon any decision, or can be supported upon principle.

It is admitted on all hands that no authority is to be found on the subject; let us then look to the character of the person under whom the right to present to the church of Welby is claimed by the defendant in error. He was an ecclesiastic; as a layman he could not at this day have enjoyed the dignity; the office was conferred on him by the church; its emoluments and profits were intended by the founder for his support; to him was confided the sacred trust of providing a proper minister for the church appendant to his prebend. Looking back to the times when similar benefactions were bestowed upon the church, no one can hesitate to be convinced that the founder of the prebend of South Grantham intended the prebendary to become incumbent of the church, or, at least, that he

should (unless provided for in such a manner as to render the living of Welby untenable) have the power of being so. The selection of the prebendary by the bishop was a voucher for his piety, and a sanction and authority to him that in presenting himself, or any other clerk, the true interests of religion would be promoted. Can it be contended that the trust can be carried further? To do so is to put into the hands of a stranger to the church a trust, the execution of which was confided to a member of its own body; is to divert the course of the founder's bounty into a different channel from that in which he intended it should flow, and to establish a precedent by *which the best interests of the church (I admit the instances would probably be few) might be affected.

If I am correct in considering an advowson in the hands of a prebendary in right of his prebend, as a separate trust which is vested in him jure ecclesion, it should be inquired whether such a trust can be transferred to another, or whether it survives, and will go to the representative of the deceased person in whom it was placed. I find in Colt and Another v. The Bishop of Litchfield and Coventry, Hob. 154; it is said, that "if a lapse occur, and then the ordinary die, the king shall present, and not the executors of the ordinary, for it is rather an administration than an interest." Fitz. N. B. 34, (G), 25 Ed. 3, 24. Dyer, 87. The case of Chester College is doubtful, whether to the king or to the metropolitan. So again, Hob. 154, "A lapse, as I have said, is an act and office of trust reposed by law in the ordinary, metropolitan, and, lastly, in the king; the end of which trust is to provide the church with a rector in default of a patron, and yet as for him and to his behoof; and, therefore, as he cannot transfer his trust to another, so cannot he divert the thing wherewith he is trusted to any other purpose." The reason given by the learned Judge why the presentation does not go to the executors of the ordinary, viz., that it is an administration rather than an interest, appears to me mainly to fortify the position for which I am contending.

I cannot fail also to pray in aid the weight that is to be derived from the further consideration of the legal character of a prebendary. He is an ecclesiatical sole corporation; and, as such, he can have no heir nor personal representative. To his natural heir his prebendal rights cannot pass, nor can they vest in his personal *representative; but the right of presenting to the vacant church must remain unsevered and in abeyance till the appointment of a successor. In treating this matter, I have not commented upon, nor attempted to remove the effect of, those arguments that have been drawn from several of the authorities that have been relied upon in support of the claim of the defendant in error; because, as they have proceeded upon lay patronage, they have, in the view I have taken of the subject, no bearing upon the question.

From what I have said, your Lordships will have collected, that the opinion to which I have come is, that if an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation does not belong to the personal re-

presentative of the deceased prebendary.

J. PARKE, J. To the question which your Lordships have been pleased to refer to the Judges, I answer, that in my opinion the right of presentation belongs to the personal representative of the deceased prebendary.

The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any Court; nor is there to be found any opinion upon them, of any of our Judges, or of those ancient text writers to whom we look

up as authorities.

The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common law system consists in applying to new combinations of circumstances, those rules of law which we derive from legal principles and judicial precedents: *and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules where they are not plainly unreasonable

and inconvenient, to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.

I propose, therefore, to inquire by reference to those sources from which we usually derive them, what the rules and maxims of the common law upon this subject are, and it will be found that there is little difficulty in the inquiry, and none as it seems to me in their application to the facts under consideration.

The decision of the present case depends upon two propositions, both of which appear to me to be established by authority, and neither of which can be shown to be unreasonable or inconvenient.

First, That in every presentative benefice, the void turn is a personal right or interest which is disannexed from the estate in the advowson, and vested in the

person of the individual to whom the advowson then belongs.

Secondly, That whether valuable in a pecuniary point of view or not, all personal rights and interests of the nature of property, and which are not extinguished by death (with some exceptions, which are easily explained, and which have no bearing upon the present case), vest on the death of the owner, in his personal representatives.

The first of these two propositions, I say will be found to be supported by *517] authority; for in every case *which is reported, and in every book in which the subject has been treated of or mentioned, as far as I have been able to discover, the void turn or right of presenting to a vacant presentative benefice, is either expressly stated to be a personal right or interest under a considerable variety of description, or the cases mentioned are capable of a satis-

factory explanation upon that supposition only.

It is true that the great majority of the authorities, to which I refer, relate to benefices in lay hands, but all do not; and there is no one case, text book, or dictum, of which I am aware, in which any intimation is conveyed that there is any exception to this general rule. Surely it is impossible to argue, with such a constant, uniform, and unvarying course of precedent on one side in all cases in which the subject has been in question; and in the absence of all authority for such an anomaly on the other, that the case of an advowson in spiritual hands is an exception to the general rule; and if the absence of authority were not sufficient, it seems impossible to show in what way the exception could have arisen.

I have said that this rule exists in all presentative benefices, and I confine it to these, for donatives are a very different species of property, and are governed by different rules. This subject is most clearly explained, and all the authorities referred to, in the very learned judgment of my brother Littledale in the Court below (7 B. & C. 145), and it is enough to say the result is, that in donatives the complete dominion over the vacant benefice and the freehold in it remains in the patron, together with the right to take the intermediate profits, until it is again *518] granted out by him to a new *incumbent, in the nature of a new investiture. This freehold, in the case of the death of the patron during a

vacancy, of course passes to the heir.

I do not propose to occupy your Lordships' time by citing all the authorities, to prove that the void turn of a presentative benefice, is a personal right or interest. They have been all referred to in the argument at your Lordships'

bar, and in those in the Court below.

In some cases this interest is called "a chose in action;" Leach v. Babington, Cro. Eliz. 811; in some a "chattel;" as by Perian, Justice, in the Queen's, Fane's, and the Archbishop of Canterbury's case, 4 Leon, 109. In others, as in Fitz. N. B. Quare Impedit, 34 N., and 3 Keble, 152, "a chattel vested." A "personal chattel;" Vin. Abr. Executor, Z. 2, pl. 4, note. A "chattel vested, and severed from the manor;" Fitz. N. B. 33, P. In one it is called "a personal thing annexed to the person of him who was patron in expectancy at the time

of the vacancy:" also, "a thing in right, power, and authority;" and also "a chose in action, and in effect the fruit and execution of the advowson, and not any advowson;" by six justices. Stephens v. Wall, Dyer, 282. In 3 Leon, 256, "a power to present, and an authority annexed to the person." In Digby v. Fitch, 1 Brownlow & Goulsborough, 167, Warburton, J., said, "the presentment is the possession in Quare Impedit, as in rent, the receiving, in common, the taking of the profits." In Brokesby v. Wickham, 1 Leon, 17, it is also compared to rent. And this analogy will be found to be the most perfect; the advowson is the estate, which descends, may be conveyed, limited, and escheats as such: the presentation, is the mode of enjoyment, the profit or rent of the estate; and like the rent or profit belongs to the owner of the estate at the time it accrues in the nature *of a personal chattel, distinct and severed from [*519] the inheritance: it belongs to him, not as owner, but as an individual.

These authorities, in which the right of presenting on a void turn is treated as a personal right, are not confined to the case of passing to the executor, in the event of the patron's death during vacancy. There are many others, in which it is so treated. A termor in the advowson has a right to present, though after the term has expired, to a vacancy which happened during the term: Fitz. N. B. Quare Impedit, 33 A., Bro. Presentation à l'Eylise, 22: and he would be equally entitled to the rents in arrear, of an estate granted for the same term. A husband is entitled to present after his wife's death on an avoidance during his wife's lifetime of a church of which she had the advowson: Co. Litt. 120 a, Bro. Present. à l'Eglise, pl. 22: as he would also be entitled to the arrears of rent of his wife's estate. It is incapable of being assigned, Dyer, 288, or released by one joint tenant to another, 1 Leon, 167, as arrearages of rent are. If the patron be outlawed, in trespass, the church being void, the king is entitled, as to the other goods and chattels of the outlaw, and as he would be to the rents of his lands. Bro. Presentation à l'Eglise, 22, Fitz. N. B. 34, Q. cases of advowsons in lay hands; but a void turn is treated in one case as a personal right, disannexed from the advowson when in spiritual hands. In Fits. N. B. 34, N, it is said, that if a vicarage happen void, and before the parson present, he is made a bishop, &c., yet he shall present unto this vicarage, for it was a chattel vested in him.

All the authorities which I have cited are uniform, and many others might be adduced, to show that the right of presentation is a personal right, disconnected from the estate of the advowson, and belongs to the person of the *owner; and the last applies to the case of a spiritual person, and is in point.

But, on the part of the successor, it is argued, so far as his case is put upon the ground of authority, that the last case is single and unsupported; and that all the others are anomalies; that, in truth, the general rule is, that the void turn continues part of the advowson; that these exceptions have been introduced in all cases of lay patronage without any reason at all, though they have been too firmly established by authority to be now disturbed; but that the general rule still continues, and ought to be maintained, in the case of spiritual advowsons. Of course, the burthen of proving the existence of this rule lies on those who assert it; but the singularity of this argument, which was urged at your Lordships' bar, is, that whilst it treats all the cases in the reports and books as anomalies and exceptions to a supposed general rule, without the least authority for stating that they are exceptions and anomalies, it asserts the general rule, as will be found, without any authority for it, for there is no one case or dictum cited, which makes any mention of such a general rule.

But it is contended that it must be *implied* that there is such a rule, from four cases, which lead to the inference that the next turn continues part of the advowson.

One was, where the incumbent was also patron, and died seised in fee of the advowson, the heir was held entitled to present; and it was said that this must be because the turn continued a part of the advowson. Hall v. Bishop of Winton, 8 Lev. 47. But this case was decided, not on the ground of the next turn con-

tinuing parcel of the advowson; but expressly on the ground, that the descent *521] to the heir, and the fall of the avoidance *to the executor, happened in one instant, and that the elder right should be preferred. The general nature of the interest which arises on an avoidance was distinctly admitted, and the right of the heir put upon a ground which is perfectly consistent with it.

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Two other cases, from which this inference was raised, were those referred to in Co. Litt. 388 a. A bishop dies, a church being vacant in his life, and after his decease, the king shall present, and not the executor or administrator. So, also, in the case of the death of a tenant by knight service in capite, with an advowson appendant, which has become void in his life, his heir within age, the king presents, and not the executor or administrator; and this is said to be another proof that the void turn is still a part of the advowson. But though the king omit to present till he restore to the bishop his temporalities, or till the heir be of age, and sue his livery and hath it, the king still has the right to present; and this shows that in neither case the void turn remains parcel of the advowson, and belongs to the person who is owner of it. For both these positions, Fitz. N. B. 33 N, O, is an authority. Besides, it is said in Co. Litt. 388 a, that if the land be holden of a common person, in that case the executor shall present; but if the void turn were still part of the advowson, why should not a common person, as well as the king, who both take the advowson, exercise this right? It is quite clear, therefore, that neither of these can be explained by the supposed rule. We must look for another explanation. Both are clearly referable to the king's prerogative, which entitles him, in these special cases, to this personal interest. It should be observed, also, that Roll. Abr. Presentation à l'Eglise, C, pl. 4, and Bro. Present. à l'Eglise, 10, which state that the king is entitled, both state that the bishop's executors are not; which *shows that these great lawyers thought the void turn was disannexed, and that the successor, at all events, had no right whatever.

A fourth case, from which the inference of this continuance of the void turn, as part of the advowson, was deduced, was that of a conveyance by the crown of an advowson, whilst the church was void, which, according to Fitz. N. B. 33 N, passes the void turn. Admitting that authority to be correct (and it is doubtful, from what is said upon this subject in Dyer, 328 b), it is a question only as to the effect of the king's grant, and never could have arisen, unless the void turn had been severed and distinct from the advowson.

The case, in truth, amounts to no more than this, that the grant of an advowson, which involves in it every present and future right of presentation, passes in the case of the crown, the next presentation, to a void living, which the crown can grant (Dyer, 283 a), though, in the case of a subject, it would not; for a subject cannot grant over such a personal right.

None of those four cases, therefore, which are relied upon as proofs of the existence of this supposed rule (and there are no others), in reality do prove it at all, and all are capable of being satisfactorily explained upon another supposition.

There is, therefore, as it appears to me, a great body of authority in favour of the position, that the void turn is a personal right in all cases; and when the cases are investigated, a total absence of authority to the contrary.

If it be conceded that this interest is of a personal nature, and dissevered from the advowson in all cases, it must be contended, that, in the case of a spiritual person, this personal interest or chattel will go by succession. But *523] that is a violation of the established rule, that a *corporation sole cannot take a chattel by succession, whether in possession or action. Fulwood's case, 4 Rep. 65: and no authority can be cited that this special chattel interest is an exception.

I have shown, therefore, that there is no authority for the alleged general rule, that the void turn continues annexed to the advowson, and is not of a personal nature; and if it be of a personal nature, there is not only no authority, but it is against the rules of law that it should pass to a successor.

Upon the hypothesis in favour of the successor, all the decided cases are anomalics; upon that made by the personal representatives that the right of presenting is, in all cases, both of lay and spiritual patronage, a personal interest, we have an uniform and consistent system. As this right, when in lay hands, is analogous to rent in the case of land; so it is when the advowson is in spiritual hands; and as a parson or prebendary who resigns, or his executor, when he dies, is clearly entitled to arrearages of rent and profits which accrued before his resignation or death (Fitz. N. B. 122, D. 120, L., 19 Hen. 6, 44), so he or his personal representative ought to be entitled to the right of presenting which fell during the same period.

Besides, if this anomalous principle is introduced on the ground of the spiritual character of the prebendary, what is to be said of it whilst the prebend was in lay hands, which it clearly might have been before the act of uniformity, according to the case of Bland v. Maddox, Cro. Eliz. 79. Is the void turn to be dissevered or not, according as the prebendary is a layman or ecclesiastic?

It is said, that this patronage is so annexed to this spiritual corporation as to be incapable of separation from it; but not only is there no authority for this *position, but many precedents are against it, in which bishops, and other ecclesiastical corporations sole, have granted away their right to laymen, which grants have been considered good against themselves. I need not refer your Lordships to the authorities, further than by saying, that they are collected in the reported cases in the courts below.

And, indeed, I am at a loss to see, in what way the alleged difference, if there be one, between the qualities of an advowson in lay hands and in those of a spiritual proprietor, could have arisen. It is highly probable, to say the least of it, that all rectories were originally created in the hands of laymen, who received the patronage from the bishop in lieu of those lands which they granted on the foundation or endowment of a church; and if this be so, what is there to raise the presumption that when they afterwards granted these advowsons to the church, they wished them to have new properties and qualities different from those they had in their own hands; or, if they did wish it, what power had they to communicate them? They could no more alter the rules of law and make chattel interests be taken in succession by a corporation sole, than they could make the estate in a freehold descend to executors. Succession in a body politic is inheritance in a body private (Fulwood's case); and no grantor can, however much he may wish it, limit his estate against the rules of law.

And supposing that there were instances in which a bishop or other ecclesiastical person, and not a layman, had originally founded or endowed a church out of the lands belonging to him in that character, and became the proprietor of the advowson which he or his successor had granted to the prebendary, the same difficulty occurs in proving the intention of the donor, and a similar difficulty in carrying that intention into effect; and if these difficulties are overcome, the alleged difference in *the quality of lay and spiritual advowsons must, [*525 others.

others.

The next proposition which the authorities establish is, that all personal rights and interests of the nature of property, and which are not extinguished by death, vest, on the decease of the owner (with some few exceptions), in his personal representatives.

The executors or administrators are not constituted for the purpose of paying the debts of the deceased; their liability to those debts is a consequence of their representative character. Litt. s. 337, says, that "executors represent the person of their testator." So Yelverton, 103, is to the same purpose: "He is in law the testator's assignee." Wentworth Off. Ex. 100: As to estate committed to his trust, he may charge others and be charged himself, sue and be sued, as the testator himself might. Shephard's Touch. 401: Executors take, therefore, all the personal estate and interest of the testator, and are identified with him in respect to all personal property; but their obligation to pay debts is only to the

extent of the value of those effects which are valuable. They have all the deceased's effects, but they are liable only for assets.

It is a fallacy to suppose that they take nothing but what is valuable, and therefore do not take rights of presentation to void benefices: a fallacy which has led to the argument that all the cases in which a personal representative has taken a void turn, which certainly cannot be sold, are unreasonable anomalies.

The 31 Edw. 3, c. 11, s. 1, puts administrators, who are the deputies of the ordinary, on the same footing as executors. Vide New Shep. Touch. 401.

To this rule, that the personal representatives take all the personal rights of the deceased, of the nature of property, there are some exceptions which the *5063 common *law, in the case of private individuals, or the king's prero-

gative right, has established.

Chattels touching the realty; deer in a park; fish in a pond; evidence of title; heir-looms, which go to the real representative, and the analogous case of the ornaments of a bishop's chapel, which pass to the successor, are of the former description. The right of the crown to the void turn, in the case of the tenant in capite, and the bishop, stated by Coke, p. 388 a, are instances of the latter; and it is to be observed, that both those instances are put by him as exceptions to the general rule "that chattels, as well real as personal, shall go to the executors or administrators." None of the excepted cases have any bearing upon this; there is no mention anywhere made of an exception of the right in question when in spiritual hands; and it would violate the rule of law as to succession by a corporation sole to chattels if it did.

My Lords, I must own that it appears to me to be quite clear that if this case is to be decided, as I conceive all similar cases ought to be, according to the rules deduced from former decisions, and legal precedents and principles, there is no doubt as to the right of the personal representative of the prebendary to present to the void living. These rules cannot be shown to be contrary to sound reason and just policy. We are not inquiring whether other rules might or might not have been more wise or reasonable, and whether the heir in the case of lay property, and the successor in that of spiritual property, might or might not have been likely to exercise the right of presentation more beneficially to the public If such an alteration is proper, and it is not my province to inquire whether it is, it must be made by the legislature. What ground has a Judge, says Lord Keeper Henly, to alter the law because he cannot approve the reasons that others have *given, or may not be able to assign a satisfactory one himself? At present the system is, at all events, uniform and consistent, and uniformity and consistency ought not to be lightly sacrificed. The law of England, which has treated from the first, advowsons as property, the founders or benefactors of churches having had the patronage granted to them as property for a valuable consideration, has not relied upon the person or character of the patron for the due exercise of the trust; but has adopted other securities for that important purpose. The incorrupt exercise of the trust is secured by the penalties against simony, and the selection of a fit clerk by the examination of the ordinary. Subject to these provisions, it has left the patronage of churches to descend, be limited, and enjoyed like other real property.

For these reasons, I am of opinion that the right to present to the void turn

passed to the personal representative of the deceased prebendary.

GASELEE, J. This, my Lords, is not the first occasion on which my attention has been called to this question. Your Lordships are aware that in the case out of which it arises there have been conflicting judgments in the Courts of King's Bench and Common Pleas, and that full reports of these judgments are to be found in 3 Bingh. 223, 11 B. Moore, 139, and 7 Barn. & C. 153.

The case has been since very fully and ably argued at your Lordships' bar, and in the course of the several discussions which it has undergone, I believe every authority that can be brought to bear upon the subject has been cited; and

they are all mentioned in the Reports I have alluded to.

I shall therefore not trouble your Lordships with going through them at

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length, but shall state, as shortly *as I can, the grounds upon which I found my answer to your Lordships' question in the affirmative.

It is extraordinary that although cases similar to the present must have happened, there are no traces of any such having been made the subject of legal investigation; nor upon the best inquiry that I can make, have I been able to

ascertain what the practice in such cases has been.

It is admitted that the general rule with respect to presentative livings is, that if after a vacancy the patron of the advowson dies without having presented, the right of presentation to the vacant turn belongs to the personal representative, and not to the heir of the patron: and the reason given in the books for this is, that it is a fruit fallen, a chattel severed from the inheritance, or, in other words, that the moment a church becomes vacant the turn is separated and disannexed from the advowson, and is vested in the person of the individual to whom the advowson at that instant belongs; see 4 Leon. 109, Fitz. N. B. 33 P., 34 B., and 34 N. P., and many other authorities; and it is so far considered as disannexed from the inheritance, that the grant of an advowson during the vacancy does not carry the vacant turn. Where the husband is tenant by the curtesy, and the church becomes void during his life, and he dies before it is filled up, yet the heir of the wife, who takes the advowson, shall not have the vacant turn, but the husband's executors. So, where the wife is seised of the advowson, and the church being void, dies without having had issue, so that the husband is not tenant by the curtesy, yet the husband shall present to the vacant turn, and not the heir of the wife. Again, in the case of a termor, if a vacancy happens during the term, and he does not fill it up during the continuance of the term, he is entitled to do so after its expiration. And there are many cases which decide, that although the grant of *the next presentation be made to a man and his heirs, yet it shall go to his executors and not to the heir.

But it is said there are exceptions to this general rule: one of which is, that where the patron is the incumbent, the vacancy occasioned by his death shall not be filled up by his executors, but by his heir upon whom the advowson descends; and for this is cited the case of Hall v. The Bishop of Winchester, 3 Lev. 47. But what is the reason given by the Court for this? It is, that all is done in an instant, the descent to the heir and the falling of the advowson to the executor; and that, where two titles do accrue in the same instant, the elder shall be preferred. As in the case of joint tenancy, where one devises his part, the title of the devisee and of the survivor happens in the same instant, and the title of the

survivor being the elder, shall be preferred.

Another exception is where the patron is a bishop, and entitled to the living in right of his see; in which case, if the bishop dies after the vacancy, and before it is filled up, the king, and not the executors of the bishop, shall present. Various reasons are given in the books for this; one is said to be, for that nothing This surely can be taken for the presentation, and, therefore, it is not assets. cannot be the reason, for if it were, it would apply to every case, and entirely do away with what is admitted to be the general rule in presentative livings. Another reason given is, that it is a spiritual trust; and, consequently, on the vacancy of the see vested in the king as the supreme patron and head of the church. Is that the reason? The vacant turn is, by all the authorities, considered as part of the temporalities of the see. The king takes it as such. It passes to a third person by the grant of the temporalities, and nothing can be more strong to show that it is considered as disannexed from *the advowson than that if the vacancy remains unfilled, not only until after the consecration of the new bishop, but after restitution of the temporalities, the vacancy is still to be supplied by the king or his grantee, and not by the new bishop, to whom, if not considered as so disannexed, it would a turally pass as part of the advowson. The rights of the crown upon this subject are stated in Watson's Complete Incumbent, cap. 9, p. 48. If the rule be, that all ecclesiastical patronage is a spiritual trust, and cannot be transferred into lay hands, what becomes of the case of an archbishop's options, which are to all purposes

considered as chattels and his personal property. He may devise them, and if he does not they pass to his personal representative. It is true, that after the vacancy happens, the options cannot be sold; and, although it cannot be supposed that any archbishop would sell it during his lifetime, yet there may be cases in which his executor or administrator might be compelled to do so before a vacancy happens; as, for instance, on the application of a residuary legatee, or one of the next of kin.

A distinction is attempted to be made between ecclesiastical and lay patronage, because it is said that in the latter the church is secure from an improper person being presented by the bishop's right to refuse the party presented. But there is, in fact, no ground for this distinction. In this very case the administratrix claims only to present. The bishop of Lincoln is to judge of the fitness of the person presented. And so it is in all presentative livings, whether of ecclesias-The bishop of the diocese in which the benefice is situtical or lay patronage. ate, is to examine and decide upon the fitness of the presentee. I am not aware of any authority which has determined that a grant by an ecclesiastical patron of a presentative living, to which he was entitled in respect of his ecclesiastical preferment, is void, although, of course, he cannot grant it beyond his In Watson, p. 53, it is said to have been held, that a grant by a bishop of an archdeaconry for twenty-one years, though void against the successor and the king, is good as against himself. And many of such grants in ancient times are to be found in the books of entries; I will not trespass upon your Lordships' time by stating them at length, but merely refer to the books where they are to be found: The King v. The Abbot of --- and Another, Vet. Intr. 110, Stanhope v. Bishop of London and Others, Winch. 285, Hob. 237, Webster v. Archbishop of York and Woodroffe, Co. Ent. 507, Hill v. Bishop of London and Others, Co. Ent. 508, Adamson v. Bishop of Lincoln and Others, 2 Brown, 233, Rastall, 522, Overton v. Syddal, Co. Ent. 122, Byng v. Bishop of Lincoln, Winch. 853. Although there does not appear to have been any decision in these cases, yet Mr. Justice Ashhurst, in 2 Term Rep. 636, says that the forms of legal proceedings are evidence of what the law is. In one case, indeed, that of London v. Southwell, Hob. 304, the pleadings of which are in Winch's Entries, 810, it was held that an advowson did not pass by a lease made by a prebendary, not because the grant of an advowson by a spiritual person was illegal, which, if the law were so, would have been a short answer to the case, but because the words of the lease were not sufficient to comprise it. the case of Armiger v. Bishop of Norwich and Holland, the Court said, that the grant by a bishop of an advowson, though void under the 1 Eliz. c. 19, against the successor and the queen, was good against the bishop whilst he continued to And in Poyner v. Charlton, Dyer, 135, it appears that the grantee of a dean and chapter of the next avoidance recovered it in quare impedit. Much stress has been *laid by the counsel for the plaintiff in error, in the case of Repington v. Governors of Tamworth School, 2 Wilson, 150, in which it was held, that in the case of a donative, the right of donation descends to the heir, and that the executor has no title, which the Court said he would have had if it had been a presentative living. This case is so very miserably and scanfily reported, that it is impossible to ascertain the grounds of the deci-It does not militate against the general rule which I have stated in the early part of what I have addressed to your Lordships' notice, as I have above stated, the Court in giving their judgment in the case of Repington v. The Governors of Tamworth School, said, would have governed this case if it had been one of a presentative living.

Another ground of objection taken to the plaintiff's claim is, that admitting the vacant turn to be a chattel, still the plaintiff is not entitled to present, because it is said the prebendary is a sole corporation, and that a sole corporation cannot take a chattel by succession, except in the case of the king.

That a sole corporation, except in the case of the king, cannot take a chattel in succession, is true; but what appears to be the fallacy of the argument in this part of the case is, that the prebendary did not take the void turn by succession. The advowson goes to the next prebendary by succession; and if the void turn went with it, it must be as a part of the advowson, for if disannexed from it, and a chattel, as it is stated by the authorities to be, he could not take it. It appears to me, however, that the moment the vacancy happens, it becomes a chattel vested in the then prebendary in his individual capacity, and passes to his representatives in the same manner as rent or any other fruit of the prebend which has accrued or fallen during his lifetime; *and for this I would refer to the case cited in Mr. Justice Holroyd's judgment, from Co. Lit. 99 a, and to the passage in Fitz. N. B. 34 N., that if a vicarage happen to be void, and before the parson presents he be made a bishop, yet he shall

present to the vicarage, because it was a chattel vested in him.

With respect to any distinction that arises from the form of the presentation of the last incumbent, which is set out in 3 Bingh. 279, supposing your Lordships can take notice of it, which I apprehend your Lordships cannot, framed as the record in this case is, in which the patron states himself to be prebendary of the prebend of South Grantham, anciently founded in the cathedral church of Sarum, and in right of that prebend the true and undoubted patron of the rectory of Welby in the county of Lincoln, in the diocese of Lincoln, I am not aware of any determination that so much need be stated, or that the common form which is to be found in 1 Burn Eccl. Law, 150, would not be sufficient. That forms runs thus: "I, Sir W. P. B., true and undoubted patron of the rec-, in the county of tory of the parish church of , and in your , now vacant by the death of A. B. the last incumbent thereof," diocese of &c.; but though that form be necessary where the presentation is made by the prebendary himself, it does not follow that, because the administratrix cannot use that precise form, she cannot present at all. In the common case the executor or administrator cannot use the precise form used by the patron. It must of course be adapted to the particular situation of the party. In considering the answer I shall give to your Lordships' question, I have confined myself to the matters contained in this record. Of the several documents stated in the judgment of the noble Lord who was Chief Justice of the Court of Common Pleas when the case was determined in that court, we have no judicial notice. were not, they could *not, have been given in evidence upon this record. Nothing decisive can be drawn from the general history of the foundation of prebendal churches, or the appropriation of livings to them; there does not appear to have been any general mode of appropriation; they are stated to have been made to the body, or to some one particular member of it. Of what was the course pursued in the case before us we have no judicial notice, nor any evidence, either judicially or otherwise, respecting the will of the founder. Under these circumstances, therefore, in a case admitted to be of the first impression, and upon which no precise authority can be found, it seems to me that the safest course is to follow the general rule applicable to presentative benefices. humble answer to your Lordships' question is, that the right of presentation belongs to the personal representative.

LITTLEDALE, J., concurred with the majority of the Judges; intimating, that

he saw no reason for altering the opinion he gave in the court below.

Park, J. When the case out of which the question propounded by your Lordships for the opinion of his Majesty's Judges first came before the Court of Common Pleas, I took infinite pains by reading much in ecclesiastical history, by consulting our text writers (for as to decided cases there are none), and after that, after hearing two very elaborate arguments at the bar, and long consultations with the then Lord Chief Justice of the Common Pleas, I came to the conclusion that Mrs. Rennell, as administratrix of her deceased husband, was not entitled to that which she claimed; and in giving which opinion I am happy to say I concurred with Lord Chief Justice Best (now one of your Lordships' house), and Mr. Justice Burrough, a man who for legal knowledge and sound and correct understanding was of no ordinary size. To err in

*judgment with two such Judges, if err we did, can be no disgrace to *535] any man. When this case was removed from the Common Pleas into the King's Bench by writ of error, three of the learned Judges of that Court reversed the judgment of the Court below against the opinion of Lord Tenterden the Chief Justice. So here again the Judges were three to one against the judgment; thus four Judges were opposed to four, and therefore we need not wonder that this case has found its way into your Lordships' house. I have again heard this case argued with great learning and ability at this bar. I have considered every argument, and studied the judgments of my different learned brethren, and the authorities they have quoted; and though I do not deny that my mind has now and then fluctuated, which great learning and great ingenuity at the bar will frequently occasion, I have arrived at the same conclusion I did in the Common Pleas, namely, that the administratrix of Mr. Rennell is not entitled to the presentation to the church in question, the advowson of which belonged to Mr. Rennell as prebendary in right of his prebend in the church of Salisbury, and that is the answer I propose to give to your Lordships' question. Before I enter into the argument, which must be almost a repetition of what I formerly delivered, and which is now in print, I hope I may be allowed to assert, that had anything passed either in the Court of King's Bench or in this House which had convinced my understanding that my former opinion was erroneous, I should be one of the first to acknowledge my mistake and to retract my judg-I have done so on two other occasions in this House, and shall never be ashamed to make such an avowal, for none but a weak, nay a wicked mind will persist in error if the understanding and more matured reflection convince a person that he has before formed a wrong judgment. It is admitted, then, that it is *not necessary for your Lordships to decide upon this record who has the right of presentation to the living in question. The point is, whether Mrs. Rennell, as administratrix to her deceased husband (which must be in his natural capacity), has established her claim to a living the advowson of which belonged to her deceased husband in right of his prebend of South Grantham? Not that upon that question I have not a clear opinion, for I do not think it goes to the crown, as it was surmised it did, but I think it goes to his successor in the stall or prebend in the church of Salisbury. A point has been much insisted and argued upon, which seems to me to be the foundation of all the misconception in this case; but it is a point upon which there is no difference of opinion, namely, that in the case of lay patronage in the events which have happened, the patron dying after the actual vacancy, the personal representative, and not the heir, would have been entitled to the presentation, because in merely lay patronage the church having become vacant in the lifetime of the last possessor, it thereby became a chattel, went to the executor as personal property, being severed, and therefore no longer remained with the advowson as a part of the possessions of the heir of the person seised of the advowson; and in that case it is a mere question between the representatives of the same patron. this law there is now no doubt, grounded upon the authority of decisions and of a practice long known, although I own I cannot state or discover any reason very satisfactory to myself for deciding that the void turn in the lifetime of the patron is a mere chattel, when the question arises between the heir and the executor of a natural person. For Lord Coke, in his first Inst. 388 a, says, "that such a turn is not assets," and therefore nothing can be made of it for the payment of debts: therefore the rule between heir and executor cannot depend upon considerations of that *sort. But I agree with Lord Tenterden that the want of a satisfactory reason is not a sufficient ground for overturning a practice long established. This, however, in my way of considering this case, leaves the point still open; and I cannot find from any of my learned brethren in any court who have judicially given any opinion, nor from any industry displayed at the bar in the courts below, or in this House, nor from my own laborious reading and research upon this subject, that in any court in England has such a case in specie ever been decided. The question is, in my view, whether lay and

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spiritual patronage are not to be considered as standing upon a very different That facts similar to those which have occurred in this case must have existed many hundred times, no man can doubt; and that ecclesiastical patrons thought it clear one way or other, must be the reason why no decision upon such a point is to be found in our books. I myself verily believe that till this claim was set up, no spiritual person ever imagined that those rights which a man held jure ecclesiae merely could be exercised by others after his death, the words of the grant to such a person being "we duly and canonically invest you (not your executor, &c.) in and to the said prebend and canonry, and invest you with all and singular the rights, members, privileges, and appurtenances thereunto belonging;" otherwise one cannot but think that in 500 or 600 years such a claim would have been contested and the point by some legal decision ascertained. No distinction can be more broadly drawn in the whole law of England than that between the lay and spiritual function and character; even the variety of cases and statutes quoted by my learned brothers, who have gone before me, and which I shall not fatigue the House by wading through, establish the dis-Certain personal *rights belong to one of these characters which do not belong to the other.

The transmission of church property also stands under very different considerations from the transmission of lay property. For instance, a person seised of a freehold right is said to be seised in his demesne as of fee: a clergyman, as in this declaration, is said to be seised in his demesne as of fee in right of his prebend or canonry. I cannot deny that many of the evils and absurdities, which I contemplate by giving effect to Mrs. Rennell's claim, will also arise in lay patronage; because it must be admitted, that by giving the presentation to the personal representative of a lay patron, it may fall to a very inferior person to present; but this evil arises out of the unfortunate situation in which lay patronage stands, but which, I contend, ought not to be carried one single point further, especially where the rule hardly applies, the lay patron acting in his

natural, the other in a politic or corporate character.

What was the origin of lay patronage? I have looked much into it, and the result of all my researches is this,—that it arose in the infancy of society, and under these circumstances, that though the appointment of fit persons to offciate throughout a diocese was originally in the bishop, yet when lords of manors and other great men of old were willing to build churches, and to endow them with glebes and mansion-houses for the accommodation of fixed and resident ministers, the bishops, for the encouragement of such pious undertakings, were content that those munificent persons should have the nomination to churches so built and endowed by them, reserving to themselves still the right of judging of the fitness of the persons so nominated. "Si quis ecclesiam cum assensu diocesani construxerit, ei jus patronatus acquiritur;" and hence have followed all the *consequences to a mere lay possession or property. Chattels, where chattels go to the executor; the rights of the heir to the heir, in cases where, by the common law, the rights of the heir were paramount to those But still the question recurs, Do those rules of the personal representative. apply to the spiritual patron, and can the rights and property which belong to his politic character be dealt with as if he were a private person? Of this there can be no doubt, that in our law, now, and, I hope, ever, lay and spiritual patronage will be upon a very different footing.

Bishop Gibson, in his Codex, p. 757, decisively makes this distinction. That very learned prelate says,—and his authority upon subjects of this nature has always been considered as entitled to great respect,—"The right or property which the patron has in an advowson will not warrant a plea, as it is in temporal property (of course, therefore, the bishop is contrasting it with an advowson in spiritual hands), that he is seised in dominico suo ut de feodo, but only de feodo." The reason of which is given by Lord Coke, Co. Lit. 17, because that inheritance (viz. an advowson) savoureth not de domo, and cannot serve for sustenance either of himself or his household, nor can anything be received of the same for

defraying of charges. And in the case of London v. The Church of Southwell, Hob. 304, where the words of the lease were, commodities, emoluments, profits, and advantages to the prebend belonging, it was adjudged that the advowson did not pass by the said words; because, said the Court, all the words used imply things gainful, which is contrary to the nature of an advowson regularly. is this so? I say it is so because an advowson in the hands of a sole corporator, *540] a churchman, is not a matter of profit, but of naked trust merely; *and the churchman who has an advowson appendant to an ecclesiastical dignity, has it as a mere matter of trust, in jure ecclesiae, which he can only exercise for the benefit and advantage of the church of which he is a member, and of which only as a member of the church, could he have a right to dispose. Mr. Rennell, therefore, had only a right as member of the church of Salisbury, and the moment he expired, all his rights as a member of that church ceased. Suppose, instead of his death, he had resigned his prebend in South Grantham, having omitted to fill up this living, could it have been for a moment alleged that he still had a right to it as fruit fallen during his holding the prebend?

Am I right in stating to your Lordships that this is a matter of trust only, for upon that, much of the argument has turned? I wish to found myself again upon the authority of Bishop Gibson. On this point, in pp. 757, 758, founding himself on the authority of Lord Coke, even in cases of lay guardian in socage, the patron shall not present to an advowson, because he can take nothing for it, and by consequence he cannot account for it; and by the law he can meddle with nothing he cannot account for. Which said doctrine and the plain tendency thereof are exactly agreeable, not only to the nature of advowsons, which are merely a trust vested in the hands of the patrons, by consent of the bishop, for the good of the church and of religion, but also to the express letter of the canon law, the rule of which is, jus patronatus cum sit spirituali annexum vendivel emi non potest. In another place, the bishop says, they are mere trusts for the benefit of men's souls.

If this be so in the origin of these things, even as to lay patronage, however the exercise of the right of selling advowsons and next presentations, when the churches are full, may have grown up, am I not right in stating to your Lord-ships that great difference exists between *lay and ecclesiastical patronage; and though it may now be impossible to shake the custom of making profit of advowsons in the hands of laymen, the other has always been considered as a mere trust, to be exercised by the patron for the benefit of the church, for the due discharge of which he alone is to look, which he alone is competent to consider with a view to the welfare and advantage of religion, in this respect committed to his sole care, and upon which his personal representative may be

absolutely unable to form a judgment.

It may appear to your Lordships a low and unfit argument to state to this house, but when I gave my judgment in the Court below, I thought, and I think so still, that it is one of vital importance to the interests of that church, which every good man must love and revere, and to which I have never received a specious answer, except that the same inconvenience may occur in lay patronage, and which I admit, -Suppose a prebendary dies insolvent as well as intestate. and that all his next of kin, as they probably would in such a case, renounced administration, and that his butcher, baker, or other inferior tradesman, being a creditor, took out administration: must such a person present? is such a person capable of forming a correct judgment of a person fit for the care of souls? and yet I defy the ingenuity of man to get out of the dilemma; for if Mrs. Rennell is to present, the butcher or baker must, under the circumstances supposed, have exactly the same right. I lament that the same consequences would follow in lay patronage, but I am quite sure till compelled by the judgment of your Lordships' house, I cannot consistently with my feelings to your Lordships nor to myself declaring a judicial opinion, advise that such lamentable consequences be carried one step further. That the presentation now under consideration is not

assets of value is quite clear; it may be a chattel, but in the *hands of an ecclesiastic, a chattel of mere trust. It is admitted by every Judge and by every counsel that has spoken upon this subject, that there is a total silence of our law books during the whole period of our ascertained law of England, upon this precise point, although circumstances similar to the present must have existed many times, and this to me is a strong convincing proof that till these days of novelty no such idea was ever entertained upon this question, and I verily believe that no man now living ever before heard of such a claim being advanced. Nothing I think can be put in a stronger light than was done by my learned brother Burrough when this case was before the Court of Common The allegations of this declaration are, that the late prebendary in his lifetime and at his death was seised of the prebend or canonry founded in the church of Sarum, with its appurtenances, to which said prebend the advowson of the said rectory of the parish church of Welby belongs, in his demesne, as of fee, in right of the said prebend or canonry. By the law of England, a prebendary or canon is an ecclesiastical sole corporation. As such he can have no heir, he can have no personal representative: as such, his prebendal rights or property cannot go either to his natural heir or to his personal representative. Where then must they go? to his successor. In their corporate capacities, in estimation of law, the predecessor and successor being one, it is a continuance of the same corporate body. A prebendary or canon is a corporator in two respects; in one respect, as a member of the corporation of dean and canons. He is one of the chapter, having sedem in ecclesia et vocem in capitulo: and he is a corporator sole as prebendary. In every relation in which he stands to the church, he is a corporator.

I do not presume to state to your Lordships anything particular respecting the constitution of this canonry *of South Grantham, though much pains have been taken respecting it by Lord C. J. Best and Mr. J. Burrough in the Court below; because, though there be no doubt of the authenticity of the documents from whence their information was drawn, yet we are not judicially informed of the foundation of this particular prebend. When, therefore, in this declaration, the prebendary is said to be seised in his demesne as of fee in right of his canonry, it cannot be meant a seisin to him and his heirs; for, as a canon, he has no heir, it must therefore mean to him and his successors. We find, in all our law books, the same law that I have above stated as to ecclesiastical sole corporations, from the highest to the lowest order of the church. Thus it is always said, the freehold is vested in the spiritual incumbent; but if we could suppose it vested in him in his natural capacity on his death, it might descend to his heir, which cannot be; the law has, therefore, wisely ordained, that the spiritual person, as such, shall never die, any more than the king, by making him and his successors a corporation. By which means, all rights are preserved entire to the successor: for the present incumbent of a spiritual charge and his predecessor, who lived centuries ago, are, in law, one and the same person; but if the personal representative, or even the natural heir were to intervene, the

succession would be broken. 1 Black. Com. 470.

The position of Lord Tenterden agreeing with the majority of the Court of Common Pleas, though differing from his own more immediate brethren, has put this case in a strong and luminous point of view. "It is clear," says his Lordship, "that the administratrix cannot present in right of the prebend, because the prebend is not vested in her. If, therefore, she be allowed to present, she must present in a right different from that in which the intestate would have presented, and this will not be conformable to the general rights of an *administrator, which are those only that belonged to the person or personal property of the intestate. She is the administratrix of the personal rights and property of the intestate; but I find no authority for saying that she is the administratrix of his politic rights or property also. If, in the case before the Court, it be held that the administratrix is entitled to present, it cannot be denied that a right generally annexed to a prebend will, in the particular instance, be

exercised not merely by a person who has not the prebend, but by a person claiming as if he from whom the title is derived, and who had the advowson in his politic capacity only, had in part held it in his natural capacity; a decision

to this effect will be contrary to the nature of the right."

Some stress was laid in arguing this case upon the stat. of 21 Hen. 8, c. 11, and I own I was at first impressed with the argument arising upon it. But, upon considering the statute, and the motive for making it, it now appears to me to have no bearing upon the case. The statute was made at the dawn of the reformation; and it appears that the then heads of the church, following in that respect the example of the see of Rome, exercised or endeavoured to keep in their hands the temporalties of the church, which belonged to them in their corporate character, whether aggregate or sole, an unreasonable time for their private benefit, to the great ruin and impoverishment of persons appointed to livings: the statute deprived them of that right, and gave the benefit to the new incumbent from the death of the last, and to the executors of such new incumbent if he should happen to die before he realized those interests which the statute thus gave to him. Much stress has also been laid, both at your Lordships' bar and at the bar of the Courts below, by the options of the archbishops, which I admit are allowed to be the subject of devise, and may go to executors. But, I answer, they *are anomalies in the law, and the exception proves the general rule. were originally, Mr. Justice Blackstone thinks, derived from the legative power formerly annexed by the popes to the metropolitan of Canterbury, and that right has been continued to the archbishops in their respective provinces of Canterbury and York even after the power of the popes has ceased in this country. But all these anomalies, I again repeat, support my general argument to show that the rights of lay and ecclesiastical persons stand upon a totally different foundation, and that the law, attaching as it may upon property of this description in the hands of a lay person, does not attach upon the same species of property in the

hands of one who holds jure ecclesia.

The case from 2 Wils. 150, Repington v. The Governors of Tamworth School, has been much pressed, but it is difficult to ascertain the grounds of that judgment; it was a case of a donative, and Lord Tenterden thinks that the decision may have proceeded on the ground that the Court thought the rule as to presentative benefices in lay hands not well founded, and, therefore, not to be extended. A donative, however, is of a very peculiar nature; and, therefore, any decision respecting that may be considered as anomalous also. And, indeed, Mr. Justice Blackstone, speaking of donatives, considers them as exceptions; for he says, these exceptions to general rules and common right are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If, therefore, the patron (of a donative) in whom such peculiar right resides does once give up that right (by presenting his clerk to the bishop, and procuring institution and induction), the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever, and will, therefore, reduce it to the standard of other ecclesiastical livings. The ground of my opinion is, *that this species of interest in the case of spiritual patrons, whether aggregate or sole, is a mere personal trust to be exercised by him or them in the spiritual character which he cannot, consistently with his high duty if he be a sole corporator, either devolve upon another during his life, or at his death leave to be exercised by his heir or personal representative. He holds jure ecclesiae, and in that right only; and if he had it not in that right, he could not have it at all; and when he dies, all his rights, powers, and privileges derived from the church absolutely cease as if he had never existed. This is no new notion; for that laborious and learned writer upon ecclesiastical law, Dr. Burn, in his vol. ii. 7th ed. p. 92, tit. Deans and Chapters,—Dr. Godolphin having said that after the death of a prebendary the dean and chapter shall have the profits, but by the statute 28 Hen. 8, "the profits of a prebend during the vacation shall go to the successor,"-Dr. Burn reconciles this apparent contradiction thus, which bears on the discussion now before your Lordships: "the issues of those possessions, Vol. XXI.—83

which he has in common with the rest of the chapter (that is, a corporation aggregate), shall after his death be divided amongst the surviving members of the chapter; but the profits of those possessions, which he has in his separate capacity as a sole corporation of himself, shall be and enure to successor." Dr. Burn seems well supported in this distinction by the case of Young v. Lynch,

Sayer Rep. 84.

Therefore, if a member of a chapter, which is an aggregate corporation, should die after a living had become vacant, it seems to me that his personal representative might as well contend for a voice in the chapter as to the filling it up, as that such representative might have it to himself exclusively, where a living belonged to him *as a sole corporator merely; although Dr. Burn more justly says, it would go to the surviving members of the chapter; in the other to the successor. When Bishop Gibson says, "advowsons may be granted by deed or will," &c., he is evidently speaking of lay patronage only, for he adds, "This general rule is to be understood with limitations, that it extends not to ecclesiastical persons of any kind or degree who are seised of advowsons in right of their churches; all these being restrained as to bishops, by stat. 1 Eliz., and next by 13 Eliz. from making any grants but of things corporeal, of which a rent or annual profit may be reserved; and of that sort advowsons and next avoidances, which are incorporeal and lie in grant, cannot be." This distinction be tween laity and clergy pervades every page of our ecclesiastical history, and those well versed in the history of our venerable church will immediately recognise the justice and accuracy of those principles I have been endeavouring to establish It is well known that, in the early periods of the church history of this country, the parochia or parish was the episcopal district. The bishop and his clergy lived together at the cathedral church, and all the tithes and oblations of the faithful were brought into a common fund for the support of the bishop and his college of presbyters and deacons, for the repair and ornament of the church, and for other works of piety and charity. At this time, and in the infancy of society, the stated ordinances of religion were performed only in these single choirs, to which the people of each whole diocese or parochia resorted, especially at the more solemn seasons of devotion. But, in order to supply the inconvenience of distance from the mother church, the bishop was wont to send forth some of his clergy to preach and dispense the word and sacraments; and these missionaries returned to give the bishop a due account of their labours and success. As the wants of *society for spiritual instruction increased, and when the members of the episcopal college found it inconvenient to go forth, certain churches were allotted, some by laymen (where they had the patronage given them, as a compensation for having built and endowed churches, and hence the origin of by patronage, as before shown), some by the bishops to the prebendal body at large, some to one particular member of the body, all which may be seen by those who will take the trouble of looking into the ancient records of the church. Thus, these churches which were not in lay hands, became prebendals, and the supply of the duty was left to the aggregate corporation where the perpetual advowson was in the whole community of the dean and chapter; or to that sole corporation or single canon or prebendary, who was to have his prebend or exhibition from In process of time the representative curates, who were to account for their profits, and only to receive a small stipend for their services, were so ill paid, that the bishop obliged his clergy, who had such advowsons, to retain fit and able capellans, vicars, or curates (for these are all nearly of the same import), with a competent salary. This failing, the bishop again interfered, and obliged the clergy (that is, the chapters, or the single prebendary, in whom the perpetual advowsom in right of the chapter, or in right of his prebend, of which he was seised jure ecclesice, was vested) to make the presentation to spiritual persons to be endowed and instituted, who should thenceforth have no more dependence upon their spiritual than others had upon their lay patrons, with a competent maintenance to be assigned by the latest th to be assigned by the bishop. Much of this information may be inferred from the statutes 15 Rich. 2, c. 6, and the 4 Hen. 4, c. 12. I have not thought it

necessary, in giving this detail to your Lordships, to refer to authorities; but *549] what I have advanced will be found as the *early history of our church in various books well worthy the attention of the curious, such as Spelman de non temerandis Ecclesiis, Bishop Kennett on Impropriation, and Burn, tit. Appropriation. But I have presumed to trouble your Lordships with this short history of the church, because it seems to me to prove incontrovertibly that what is thus vested in the church for spiritual purposes vests in them as a body politic, and can never be allowed to fall into the common private stock of the body at large, or of the individual sole corporator. And it will be found that what is said of the church at large is no less true of the church of Salisbury, as was luminously shown by Lord Wynford and Mr. Justice Burrough, in the court below.

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Thus, then, an ecclesiastical person during his incumbency is entitled to all the profits that may fall of a chattel nature. But when a living falls vacant, to which he has a presentation in right of his church, as it is not a matter of pro-

fit, he merely presents quasi incumbent.

I have shown to your Lordships, that the living in the present case was probably endowed out of the prebend, or the advowson attached to the prebend of South Grantham; in either case the prebendary, as a sole corporator for the time being, has the right of presentation; and upon the avoidance, he may present in right of his church; he presents as a trustee; the trust is personal, without profit, and cannot be transmitted.

How, then, can a private personal representative of a deceased prebendary, who dies after avoidance, but before presentation, claim the presentation? Is it that he makes it a chose in action, out of which to pay the debts of testator or intestate? That cannot be, for it is not assets. Does he claim to present because this trust had devolved upon him, or, as it were, became vested in, the *550 not in his own right; but as the declaration truly states, in right of his prebend; the presentation is in him, not for his own use or benefit, but for the use and benefit of the church, confided to his spiritual, not to lay hands, for the dignity and ornament of the church,—a trust which he, and he only, must execute upon his great personal responsibility, for the cure of souls, and for the advancement of the interests of religion,—a duty which his personal representative in his natural capacity cannot, in law, be deemed qualified to discharge.

I fear I have fatigued your Lordships with the length of the argument; but as some of my brethren unfortunately differ from me, I could not satisfy my conscience upon the great, and, as I think, awfully momentous question, without satisfying your Lordships that I have not come to the conclusion I have done without most anxious consideration and deep research. The result, then, of my opinion is this, that whatever is attached to a spiritual, sole, politic body, sinks

with the death or resignation of the party who possesses that right.

BAYLEY, B. As the opinion I delivered when this case was before the Court of King's Bench is in print, and as I see no reason to vary from any of the grounds upon which that opinion was founded, I shall not be obliged to detain your Lordships at any considerable length. I take the general rule, with the single exception of benefices in the gift of bishops, to be, that when a benefice becomes vacant, the right to present is immediately detached from the estate which gives that right; it vests as a mere personal power of presenting in the individual who had the right of patronage at the time that vacancy occurred, and will continue in him and his personal representatives, let what will become of the estate which gave such right. Therefore, if the right to present to *an advowson appendant, or an advowson in gross, when a vacancy oc-*551] curs, be in tenant in fee or tenant in tail, and he die without presenting, though the estate will pass to his heir or devisee in the one case, and to the issue in tail or remainder-man in the other, the right to present will devolve upon his executor or administrator. F. N. B. 83, P. 84 B. Co. Litt. 388. Dy. 283 a. 21 Hen. 7, pl. 6. Bro. Present. d l'Eglise, 84. If the right to present when a

vacancy occurs be in tenant pur auter vie, or in a termor, and before he present cestury que vie dies, or the term expires, so that the estate which gave him the right to present is gone, that right nevertheless remains in him, and he may still present. F. N. B. 34 B. Bro. Pres. à l'Eglise, 22. Again, if husband and wife be seised in fee or in tail, or in right of dower, in right of the wife, and the church become void, and the wife die before the husband present, though the fee descends upon her heir, or the estate tail passes to the heir in tail, or the estate in dower ceases, the right to present remains in the husband. 21 Hen. 6, B. 38 Hen. 6, 36 B. 14 Hen. 4, 12. Bro. Pres. à l'Eglise, pl. 22. Co. Litt. 120. And if a vicarage become vacant, and the person to whom the right of presenting belong be made bankrupt (whereby his right in the patronage ceases), he shall nevertheless present. F. N. B. 34 N. So, had Mr. Rennell been presented to a bishopric, would be have lost the right? The general rule, however, is not disputed; but its application to the present case is denied, and the ground of that denial is, first, because Mr. Rennell was a spiritual corporation, and had this right of presentation annexed to a spiritual dignity, and clothed with a spiritual trust My answer is, that though Mr. Rennell was a spiritual person, the dignity to which the right of presentation was attached, was not in its creation spiritual; and, that if it were, it was not clothed with any spiritual trust. Mr. *R.'s dignity was a prebend only; and at common law a layman might be prebendary. Bland v. Maddox, Cro. Eliz. 79. A prebendary has no cure of souls; he is called "prebendary," because his duty is prebere auxilium episcopo. He has his possessions annexed to his prebend to enable him to provide for himself and his family. It is only by the restraining statutes that he is prevented from alienating, with consent of patron and ordinary, all his possessions to the disherison of his successor; and he has of himself the full power of alienating them so as to bind himself; and it is not of necessity that he should have any possessions. 3 Rep. 75 b. Dy. 61 b, pl. 30. 50 Ed. 3, 26. 2 Roll. Ab. 341. It is only under 13 & 14 Car. 2, c. 4, s. 14, that he need be in holy orders.

But admitting that a prebend were a spiritual dignity, does it follow that church preferment in the gift of the prebendary in right of his prebend, is clothed with a spiritual trust? Is the spiritual preferment to which a bishop is entitled in right of his see, clothed with any spiritual trust? May he not grant away the next avoidance of any church, though the advowson be in gross, which he as bishop is entitled to fill, or as many avoidances as shall happen within his own time? and will not such grant bind himself? Watson says he may make the grant, and it will bind him. Watson, c. 10, p. 135, 136, c. 45, p. 873. If an advowson be appendant to a manor usually let, and a lease be made thereof, it will, at all events, bind the bishop who made it, and his lessee shall present Gibson, 793, says, "Advowsons may be granted by deed or will, either for the inheritance, or one or more turns. But this extends not to ecclesiastical persons seised in right of their churches, nor to colleges or hospitals seised in right of their charter; for they are so far restrained by the statutes of Eliz., that their grants, *though confirmed, will not bind their successors. But they will bind the grantors for their own times." And if it be made conformably to the statutes, it will bind the successors. Watson, c. 10, p. 137, c. 45, p. 875, 876. In Smallwood a Richor of Court of wood v. Bishop of Coventry, Cro. Eliz. 207, the bishop had made a grant of the next avoidance of an archdeaconry (a spiritual dignity), and he afterwards disturbed the grantee; the grantee died, and his executor brought a quare impedit, and the bishop's grant was held good, and the executors had judgment. In Foord's case, 1 Anderson, 47, 5 Rep. 81, Dyer, 338 b, Cro. Eliz. 447-472, a prebendary of this very church made a lease of a rectory, parcel of his prebend, for seventy The dean and chapter confirmed it for fifty-one years. The successor disputed it within fifty-one years. Watson says, it would have been good for his own time without confirmation; Watson, 481; and all the Court (except Griffin), held it good for fifty-one years. In London v. Chapter of Southwell, Hob. 303, where plaintiff claimed in quare impedit as lessee of a prebend to which the advowson belonged, the question was, whether the lease had words

sufficient to carry the prebend or not; and it was only because the words were not sufficient, that the decision was against the plaintiff. Presentations to a vicarage belong of common right to the parson; but by consent of patron and ordinary he may grant it to another: F. N. B, 34 a. The case of Sharrock v. Boucher, T. Raym. 88, 1 Lev. 125, seems to show the distinction between what is clothed with a spiritual trust, and what is not; and what may be alienated, and what cannot. A prebendary leased his prebend for three lives, and whether that passed the right to fill up the office of commissary within the prebend was *554] the question; the judges agreed it did not, *if the right belonged to his spiritual functions; but on that point they were divided.

The only remaining point is founded upon the rule which prevails in the case of the king and a bishop, and a supposed analogy between that case and When a bishop dies, leaving a church in his gift vacant, the king is to present, not the executors of the bishop. And if this rule be founded upon the spiritual character of the act of presenting, it is an authority in this case; if it be founded on the relation between the bishop and the king, and is referred to the king's prorogative, it is not. And I am of opinion it is referable to the relation between the bishop and the king, and to the king's prerogative. The king is the sovereign patron of every bishopric: 17 Ed. 3, 40. And though he gives the chapter leave to elect, the patronage is in him: 17 Ed. 3, 40. And upon the death of a bishop, the see comes to the king as the bishop left it; and if the deanery or a stall be left vacant, the king shall fill it up: 17 Ed. 3, 40. A prebendary of Abergavilly, the bishop (of St. David's), died. The temporalities were seized into the king's hands; a new bishop was appointed, and filled up the stall. The king brought quare impedit, and it was adjudged that he had the right; and a writ was awarded to the bishop: Rex v. Bishop of St. David's, 50 Ed. 3, 26. The temporalities came to the king as founder by prescription: Mall. 65 n. to pl. 1. And this is so high a prerogative, and so far united to and inseparable from the crown, that a subject cannot claim it by grant or prescription: Mall. 65, n. to pl. 6. And if the king die, sede vacante, the succeeding king shall have the temporalities, not the king's executor: Mall. 65, n. to pl. 4. Bro. Chattels, 2, 2 Roll. Abr. 211. And if the king die, leaving a church void, the succeeding king shall present: Semb. Mall. 65, pl. 4, and Mall. 42, pl. 16. Bro. Chattels, 2. 2 Roll. *Abr. 211. And this, though the church became void in the bishop's *555] life, and though the new bishop has sued out living out of the king's hands before the king presents: Mall. 65, pl. 5, Watson, 73, F. N. B. 33, n., 2 Roll. Abr. 343, pl. 5. In the case of a bishopric, therefore, if the bishop dies, whatever spiritual preferment in the gift of the bishop was vacant at the bishop's death, and whatever shall become vacant till the see is filled up, devolves upon the crown, and is inseparable from the crown, so that the crown cannot grant it away; and in case of the demise of the crown, it will pass, not to the executors of the deceased king, but will accompany the crown, and go to the succeeding Upon this, two observations occur, one, that in the case of the crown, and in the case of the crown only, can a sole corporator, which the king is, take a chattel by succession; so that, what is the rule in the king's case where the right to present may, by reason of the prerogative, pass from bishop to king, from king to king, will not apply to the case of a prebendary where there is no such prerogative, to pass the right from prebendary to prebendary: 16 Vin. Q. 14, 17 Vin. Y. The other, that what is the case of the crown with reference to a bishop who holds per baroniam, is the case with every other tenant in capite, where the tenancy, by reason of infancy in the heir, becomes as it were suspended, and the tenancy returns in wardship to the king. Co. Lit. 388 a, is express upon this point, and he puts the two cases together, that of the king's tenant in capite, and that of a bishop's. If the king's tenant by knight's service in capite be seised of a manor to which an advowson is appendant, and the church become void and the tenant die (leaving his heir in ward), the king shall present, not the executor. And if a church, in the gift of a bishop, become void, and the bishop die, the king shall present, not the executor: Co. Lit. 388 a.

*The right, therefore, of the king, in the case of a bishopric, appears to me to be referable, not to the spiritual character of the person from whom the right comes, but to the king's prerogative, because it obtains equally in the case of every tenant in capite, whether he be a spiritual person or not. Upon the whole, therefore, I am of opinion that the general rule is, that if a church becomes vacant, and the patron die, the right to present devolves upon his execu-That this is the rule also, where a prebendary in right of his church is patron, because, until the statute of Car. 2 (13 & 14 Car. 2, c. 4, s. 14), it was not necessary a prebendary should be a spiritual person; and, because, in the case of spiritual persons, their right to present to churches is temporal, not spiritual, inasmuch as they may grant it away before a vacancy occurs, as they may their other temporal possessions; and that the excepted case of a bishop is not applicable to other spiritual persons seised of advowsons in right of their dignities or churches, because the case of a bishop is referred to the prerogative of the crown, which enables the crown to take a chattel in succession, and to the relation in which the crown stands to a bishop, the bishop being tenant in capite to the crown, not to the spiritual character of the bishop, nor to any spiritual nature in the right. My answer, therefore, to the question proposed by your Lordships is, that in the case that question propounds, the right of presenting belongs to the executor of the prebendary.

TINDAL, C. J. My Lords, upon the best consideration I can bring to this case, I have come to the conclusion, that the right of presentation belongs to the personal representative of the late prebendary; but at the same time I am ready to admit it is after considerable doubt upon the question which has been sub-

mitted to us by your Lordships.

*If I felt myself at liberty to look at the particular foundation of this prebendal stall, or to consider, upon general principles, what might be most fitting and expedient in the case of patronage belonging to an ecclesiastical corporation, such as is a prebendary, I could bring myself without difficulty to the conclusion that the right to fill up the term which was vacant at the time of the late prebendary's death, ought to devolve upon his successor, and not to go to his personal representative.

But neither upon the abstract question proposed by your Lordships, nor upon the facts stated on the record in this case, can I take judicial notice, either of the circumstances attending the original foundation of this prebend, the endowment thereof with this particular advowson, or the form of presentation which has been

used and adopted on occasion of former vacancies.

And as to any considerations derived from general expedience, I feel myself restrained from entering into them, because there appears to me to be an analogy of sufficient strength and certainty, to bring the present case within the reach of acknowledged principles of law, and the authority of various decided cases.

It is upon the ground of this analogy which exists between the present case and those principles and authorities, that I feel myself bound to concur in the opinion which has been expressed by the majority of his Majesty's Judges: thinking it a safer course upon this occasion, as I find has been the opinion of other Judges from the earliest periods of the law, to adhere to any rule which can be safely inferred from the cases, rather than to substitute another, although it may appear upon general principles more reasonable and more just.

I assume it to be settled law, admitting of no doubt or dispute, and not requiring to be supported by reference to any authorities, that where an advowson *presentative is vested in any person in his natural capacity, either in [*558 avoidance without making any appointment, the right to appoint to the vacant turn belongs to the executor, and not to the heir, or to the next owner of the advowson. Indeed, so clearly is this principle recognised, that all the books concur in calling this vacant turn a chattel vested in the testator. (Fits. N. B. 33 P. 34 N. 4 Leon. 109.)

In the case in Fitz. N. B. 33 P., it is stated, that if a man be seised of an ad-

vowson in fee, in gross, or in fee appendant unto a manor, and the advowson becomes void, and he dieth, his executor shall present, and not his heir, because it was a chattel vested and severed from the manor. If the chattel is severed from the manor in that case, why may it not be considered as severed from the prebend in this? And if once severed, it is difficult to assign any legal principle upon which it can be remitted. Unless, therefore, some solid ground can be laid down, upon which a distinction can be made between a prebendary seised of the advowson in right of his prebend, and a person seised in his own natural right of a manor to which an advowson is appendant, there can be no doubt but the case falls within the general rule, that the right to present is a chattel interest, and would go to his personal representative. It will be advisable, therefore, to refer to some of the cases and principles which carry the analogy more closely to the particular question now under discussion.

closely to the particular question now under discussion.

In Fitz. N. B. 34 N., is found this case; if a vicarage happen void, and before the parson present he is made a bishop, &c., yet he shall present unto this vicarage, because it is a chattel vested in him. The authority referred to is 24 Edw. 3, 26; but the case, which is not to be found in the Year Book, will be found inserted nearly in the same words in Fitz. Abr. Quare Imp. 22. *that case, as in the present, the patron was seised in jure ecclesia: and notwithstanding he ceased to be rector, he still carried with him in his natural capacity this chattel interest, the right of appointing to the vacancy. In that case it was held that the chattel interest which had once vested in him, did not afterwards reunite with the corporation sole, the parson. That case appears to me to be a direct authority upon the present question, to this extent; that if the living had become void, and the prebendary had vacated the prebend, the right of appointment would have belonged to him, not to his successor. and he still retained the right to appoint, notwithstanding his loss of the prebend, on what principle shall his death be held to reunite the presentation with the prebend from which it has once been severed? The case in 2 Rol. Abr. 846, F. pl. 4, shows the law, where the avoidance of a vicarage happens after the vacancy of the rectory, and before the new rector is appointed. "If the parson has the right to present to the vicarage, yet if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage shall present." So that although the rector be in the nature of an ecclesiastical corporation sole, and although the rector be seised of this right of presentation jure ecclesia, yet it shall not devolve to the successor; but if it happen before the vacancy, the former rector shall still appoint, if during the vacancy, the patron. Both which cases are strong to show, there is no indissoluble union between the right of presentation and the prebend itself.

To which may be added the case stated in Fitz. N. B. 33 P., "that if a bishop die seised of a manor to which an advowson is appendant, and the advowson happen void before his death, the king shall present unto the same by reason of the temporalities, and not the bishop's executor." The reason is that the king takes the *temporalities by reason of his prerogative, and the term being once vested in him, cannot be got out of him but by matter of record. Now although the express point adjudged by that case does not apply here, because there is no prerogative in this case, yet it furnishes an observation which appears not unimportant. Fitzherbert puts this case in opposition with that which had immediately preceded it, namely, the case in which he has stated "the executor shall present and not the heir, because it was a chattel vested and severed from the manor, &c." He then puts the case of the bishop; and the inference to be drawn is, that but for the prerogative the executor would have presented: otherwise he would not have said, the king shall present, and not the bishop's executor; the observation would have been, the king shall present, and not the successor.

If this is a just inference, the authority of the case last referred to would go the length of deciding the present; if the executor of the bishop would be entitled to present to the turn which fell vacant in the bishop's life, and which belonged to the bishop, jure ecclesia, had not the prerogative stepped in and prevented him; it would follow in the present case, where no such prerogative

exists, the executor has the right to present to the vacant benefice.

The power of the prebendary to grant the next turn to a stranger before it becomes vacant, affords a further argument against the notion that the right of presentation is to be considered as inseparably annexed to the prebendary himself for the time being, on the ground that it is an ecclesiastical trust to be exercised by him only to whom the foundation has given it. Such grants are of very frequent recurrence in the old books of entries containing pleadings in quare impedit; and it is impossible to conceive they should be found there unless the practice was common, or that they could have been *put upon the [*561 record if such grants were against law; inasmuch as the plaintiff deriving title under them would only be showing the insufficiency of his right to sue. Again, the universal practice of grants made to the archbishops by bishops of their province, of those rights of presentation well known by the name of options, furnish at least the inference, that though the right to present comes to an ecclesiastical person, by virtue of his ecclesiastical character, still there is no rule of law that it must be exercised in person, but that the law allows it to be transferred to another. It may indeed be said, that this is not a transfer to a layman or a stranger, but merely to an ecclesiastic of the same or higher dignity; and therefore this ecclesiastical trust may be presumed not to be violated by such transfer of its execution. Admit it to be so, still how can we reconcile to that principle the right which the archbishop has to devise these options to any one he chooses to select? And that such power exists, appears from the case of Potter v. Chapman, Ambl. Rep. 98, where the only question before Lord Hardwicke is made upon the propriety of the particular appointment by the trustees under the archbishop's will, but none whatever upon the right of the testator to bequeath them to his trustees. If then the bishop may sever and disannex from his bishopric a right of presentation to which he becomes entitled jure episcopatus, and no otherwise; still further, if the archbishop to whom the grant hath been made may bequeath it to a stranger by his will; or what is an identical proposition, if it would devolve upon his personal representative in case he had made no such bequest; it will surely be dangerous to build an opinion that the presentation now in dispute must belong to the successor, on the ground that it is of an ecclesiastical *character, in the nature of an ecclesiastical trust, and by reason thereof must be exercised by the person who fills the prebendal stall, and by him only. So that the doctrine laid down in Doctor and Student would appear to be correct, where no distinction whatever is introduced between presentations made by laymen or presentations made by corporations; between advowsons appendant to manors, or advowsons appendant to offices of the church; but it is laid down generally thus (see Dial. 2, cap. 26)-" It is holden in the law of the realm, that the right of presentment to a church is a temporal inheritance, and shall descend by course of inheritance from heir to heir, as lands and tenements shall, and shall be taken as assets, as lands and tenements be." And again, "the goods of spiritual men be temporal, in what manner soever they come to them, and must be ordered after the temporal law, as the goods of temporal men must be." Now if the vacant turn in a benefice be a chattel interest, as the authorities above referred to seem abundantly to show, if it passes by grant, is devisable by will, or in case of no bequest, goes to the personal representative; then indeed is the passage above cited a strong proof of the opinion of learned men at the early period when that book was written, that no just distinction can be taken between a right of presentation vesting in a spiritual man, by whatever means it may come, and a similar right in a layman. It affords a further argument that the right to present to the vacant living, cannot devolve upon the successor, and go along with the prebend, that a prebendary is a corporation sole, and that by law a corporation sole, and the corporation sole, poration sole is incapable, except by custom, of taking in succession chattels real or personal, either in possession or action. (Co. Litt. 9 a, 46 b, Hob. 64.) If

this be the law, how can this vacant turn, once severed from the prebend, be-

come reunited, and descend with the corporation sole?

*That such would be the case as to some of the profits of the prebendal stall, where they fall due in the lifetime of the predecessor, appears Rent which accrued due in his lifetime would go to his executor. clear. the statute 28 Hen. 8, c. 11, gives to the successor the rent only which accrues during the vacancy; leaving the right to the rent due in the predecessor's lifetime where it then stood, that is, as a chose in action or a personal chattel, which would go to the personal representative. But it is very difficult to draw a sound distinction between rent which has fallen due, and a right of presentation which has attached during the life of the former prebendary, except upon the ground that the one is a right of a temporal nature, the other of a spiritual; and whether that be a sound distinction or not, I must lean upon the names and authorities which I have before given.

The case of the donative, cited from 2 Wils. Rep., does indeed furnish some inference for a different opinion from that which I have formed; but I must confess myself unable to see the ground upon which that judgment proceeded in so short and unsatisfactory a report, with such degree of clearness as to place it in competition against the other principles to which I have referred, and

which lead my mind to a different conclusion.

I have therefore felt myself bound by the analogy to be drawn from cases decided as to lay advowsons, to adopt the opinion, that the right of presentation in this case belongs to the administratrix of the late prebendary. I must admit, at the same time, that it might be more fitting and expedient that it should devolve upon the successor; but I am not asked by your lordships what is most expedient, but what the law at present is upon the question submitted to us.

*5647 *WORTHAM and Another v. MACKINNON. May 2.

B. devised to his only son E. for life, remainder to his issue in tail; remainder to B.'s two daughters in tail; remainder to B.'s right heirs: the two daughters suffered recoveries to the use of E., and by an act of parliament reciting the will, the recoveries, and that E. had no issue, trustees were empowered to sell the estates devised, and to lay out the purchase-money in the purchase of other estates to be settled to such of the uses in the will of B. as should be existing undetermined or capable of taking effect at the time of the sale: the trustees sold, and with the purchase-money purchased an estate which, by a conveyance reciting the will of B. and the act, was conveyed to them to such of the uses in the will of B. as were then existing undetermined and capable of taking effect: Held, that under the conveyance the trustees took a fee.

By order of the Lord Chancellor the following case was submitted for the

opinion of the Court:—

Elisha Biscoe, by will dated 7th of November, 1772, gave all his estates not settled in jointure, nor therein specifically given, unto his son Elisha for life, without impeachment of waste. Remainder to Joshua Smith and Thomas James, to preserve contingent remainders. Remainder to the first son of said Elisha in tail male. Remainder to the second, third, fourth, and other sons of his said son successively in tail male. Remainder to the daughter of his said son; and, if there should be more than one, to all the daughters of his said son. And in case of his son's death without issue, the testator gave and devised the said estates unto the first and other sons he, the testator, might thereafter have, in tail male. Remainder to his daughters as tenants in common, and the heirs of their respective bodies in tail, with divers remainders over; and ultimately to testator's own right heirs. The estates were charged with the sums of 2000l. and 3000l. in favour of testator's daughters.

The testator died in 1776, leaving one son, the said Elisha Biscoe, and two Vol. XXI.—84

daughters, Ann and Catherine Frances. Ann, in 1789, intermarried with T. H. Earle, and before 1794, Catherine Frances intermarried with E. Rolfe.

The daughters and their husbands, by indentures of *lease and release, [*565] bearing date respectively the 4th and 5th of February, 1789, and the 11th and 12th of June, 1793, conveyed their interest in the property to trustees, and their heirs and assigns for ever, to the intent that three or more common recoveries should be suffered thereof, which said recoveries it was declared should enure to the use of the said Elisha Biscoc, his heirs and assigns for ever. And recoveries of the premises were accordingly suffered in Hilary term, 1789, and

Trinity term, 1793.

By act of parliament, 34 G. 3, intituled "An act for empowering trustees to convey to Sir Joseph Banks, Bart., a part of the settled estates of Elisha Biscoe, Esq., pursuant to his contract for the purchase thereof, and to sell or exchange other parts of the said settled estates, and lay out the money arising from the sales in the purchase of other lands to be settled, as well as those taken in exchange, to the uses of the estates that shall be so sold or exchanged;" after reciting the will of the said Elisha Biscoe, and that said testator died on the 28th of January, 1776, without having revoked or altered said will; the said indentures of lease and release of 4th and 5th of February, 1789, and recovery suffered thereupon; and also the said indentures of 11th and 12th of June, 1793, and recovery suffered thereupon; that Elisha Biscoe, the son, was unmarried, and had not any issue; that the several limitations created by said will, and expectant on failure of issue of said Ann Earle and Catherine Frances Rolfe, were barred by said recoveries; and that the said Elisha Biscoe, the son, was seised of the remainder or reversion thereof in fee-simple, expectant on failure of his own issue; and also that the estates lay at inconvenient and great distances, or in separate parcels detached from each other, and intermixed with the lands of other persons,-it was enacted (amongst other things), "That it shall be lawful for Edmund Calarny and *James Wortham, trustees, to sell or exchange the estates therein mentioned" (and which were the estates devised by the residuary clause of the elder Biscoe's will), "and lay out the purchase-money in the purchase of other estates to be settled to such of the uses, upon and for such of the trusts, intents, and purposes, and with, under, and subject to such of the powers, provisoes, declarations, and agreements in and by the said in part recited will of the said Elisha Biscoe deceased, particularly or by reference limited, declared, contained, or mentioned of and concerning the messuages, lands, and hereditaments thereby respectively devised or intended so to be, and by the said act authorized to be sold or exchanged as thereinbefore mentioned, as then were, or at the time of making such sale, exchange or exchanges, assurance or assurances, as in the said act mentioned should be existing undetermined or capable of taking effect, or as near thereto as the nature and qualities of the estates so to be purchased or had in exchange would then admit of: and it was thereby further enacted, that until such sales, conveyances, exchanges, and assurances should be respectively made and executed, the said hereditaments, or so much of them as should not be sold or exchanged, should be held and enjoyed, and the rents, issues, and profits thereof received and taken by and for the benefit of such person or persons who would have been entitled to, and ought to have received the same, in case the said act had not passed. And the last clause of the said act was in the following words: "Saving always to the King's most excellent Majesty, his heirs and successors, and the said Timothy Hare Earle and Ann his wife, and their children, and the said Edmund Rolfe, and Catherine Frances his wife, and their children, in respect of the aforesaid sums of 2000l. and 3000l. only, and all and every person or persons, bodies politic or corporate, his, her, and *their respective heirs, successor, and executors and administrators, other than and except the said Elisha Biscoe, the son, and his heirs, and the heirs of the body of the said Elisha Biscoe, the son, all such estates, rights, titles, claims, and demands whatsoever, of, in, to, or out of the messuages, lands, and hereditaments hereby authorized to be sold or exchanged as aforesaid,

or any part or parts thereof as they or any of them had before the passing of this act, or could or might have had or enjoyed in case the same had not been made."

In pursuance of the act, the surviving trustee, James Wortham, sold the said devised estates, and with the purchase-money bought others. The following was an abstract of the conveyance taken by Wortham of the estates so purchased, which were estates now contracted to be sold to Mackinnon.

By indentures of lease and release, bearing date 26th and 27th of March. 1817. the release made between James Payne, of the first part, divers other persons of the second, third, fourth, fifth, sixth, seventh, and eighth parts, the said James Wortham, of the ninth part, and Elisha Biscoe, of the tenth part, -[after several recitals, deducing the title of the vendors and the contract for sale of certain estates thereinafter expressed to be thereby released to the said James Wortham; a recital of the before-mentioned will of Elisha Biscoe the elder, of the 7th of November, 1772, and that the said testator departed this life on or about the 28th of January, 1776, without having revoked or altered his said will. leaving Frances his widow, and said Elisha Biscoe (party thereto) his only son, and Ann. who had intermarried with Timothy Hare Earle, and Catherine Frances. who had intermarried with Edmund Rolfe, the younger, his only daughters; a recital of the before-mentioned indentures of lease and release of the 4th and 5th of February, 1789, and the 11th and 12th of June, 1793, and the three *recoveries suffered in pursuance thereof; of the before-mentioned act of parliament of the 34 G. 3, and also that several of the hereditaments comprised in the said recited act of parliament, and thereby directed to be sold by the said Edmund Calarny and James Wortham as aforesaid, had been accordingly sold by them; and that the several hereditaments so contracted to be sold to said James Wortham as aforesaid, were so contracted to be sold to him as surviving trustee acting by virtue of or under the said act of parliament, and at the request and with the consent and approbation of the said E. Biscoe],—the several parties conveyed their respective interests in an estate called Titcombe, in the county of Bucks, which was the same estate now contracted to be sold to the defendant Mackinnon, to the said James Wortham, as such surviving trustee, under the said act of parliament: to hold the same to the said James Wortham and his heirs for ever, nevertheless upon the uses, trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations thereinafter limited and expressed concerning the same. And it was by the then abstracted indenture agreed and declared by and between the said parties thereto, that James Wortham and his heirs should thenceforth stand and be seised of the said estate and premises, to such of the uses, upon and for such of the trusts. intents, and purposes, and with, under, and subject to such of the powers, provisces, and declarations in and by the said in part recited will of Elisha Biscoe, deceased, partly or by reference limited, declared, contained, or mentioned of and concerning the messuages, lands, and hereditaments thereby devised, and by the said in part recited act of parliament authorized to be sold or exchanged as aforesaid, as were then existing undetermined and capable of taking effect."

Elisha Biscoe, the son, is since dead, having by his *will, bearing date the 26th of May, 1824, given and devised all and singular his free-hold messuages, farms, lands, tenements, estates, hereditaments, and premises whatsoever, and including his estate in the county of Bucks, called Titcombe, unto the said James Wortham and Thomas Bramall, upon trusts therein mentioned and authorized in an event which has happened, vis.: a deficiency of the personal estate to answer the legacies, absolutely to sell and dispose of any part

or parts of his said real estate.

On the 17th of October, 1830, the defendant Mackinnon entered into an agreement with Wortham and Bramall for the purchase of the Titcombe estate.

The question for the opinion of the Court was, what estate had the said James Wortham and Thomas Bramall, in, and what power had they over, the lands,

hereditaments, and premises conveyed and assured as aforesaid, by the said

indentures of the 26th and 27th of March, 1817? Coleridge, Serjt., for the plaintiffs. The question is, what uses were existing undetermined at the time of the act. It will be contended, that these words apply only to uses determined by natural events or efflux of time; and not to those determined by the act of the parties. But, independent of the plain meaning of the words, what was the intention of the act? It must be construed lik a deed, and the recital may be looked at to show the intention of the legislatur That shows that the uses to the daughters were considered as determined. Th saving clause refers to the 2000l. and 3000l. alone: and the act was not passed for the benefit of the daughters, but for the benefit of Elisha Biscoe. The daughters have no interest in the purchase-money under the act, and if the act had never passed, they could have had no claim. But it will be said, that we must look at the words of *the conveyance of the 26th and 27th of March alone, and not at the act of parliament; and Cholmondeley v. Clinton, 2 B. & A. 625, 2 Jac. & W. 84, will be relied on; a case which, as to this point, may be considered still undetermined, and which only decided that the Court were bound to give effect to words in a deed having a distinct legal meaning, and that the meaning must be applied to the time at which the words are used. Here the question is, what meaning is to be put on words which admit of more than one meaning. To construe them, we must look to the state of the interests at the time.

Taddy, Serjt., contrd. This is a question merely on the construction of a deed, not of a will. And it is a clear principle, that the Court must give effect to the operative words of a conveyance, and that they cannot control them by a dubious expression contained in recitals: Cholmondeley v. Clinton. The operative words of the deed are, that the property is conveyed "upon and for such of the trusts, intents, and purposes, and with, under, and subject to such of the powers, provisoes, and declarations, in and by the said in part recited will of Elisha Biscoe, deceased, partly, or by reference, limited, declared, contained, or mentioned, of and concerning the messuages, lands, and hereditaments thereby devised, and by the said in part recited act of parliament authorised to be sold or exchanged as aforesaid, as were then existing undetermined and capable of taking effect." The limitations of the will of E. Biscoe were to his son for life; remainder to the issue of the son, successively in tail; remainder to the testator's after-born sons in tail; remainder to testator's daughters in tail; remainder to testator's own right heirs. If, as the act recites, the remainders, *after the estates to the daughters, are barred by the recovery, the remainders to the heirs of the testator are also barred. And though, where words are ambiguous, they may be explained by the context; here they are unambiguous. Suppose the intention had been to revive the uses of the will, could words more explicit have been used? The effect of a common recovery is to raise a new estate; but to many purposes the old uses remain. In Abbott v. Burton, 2 Salk. 590, where H., being seised of lands ex parte materna, by a deed to declare the uses of a recovery limited several estates, with remainder to the use of his right heirs, it was holden, that the heir ex parte materna should have it, being the ancient use. And that is the effect of this act of parliament. It states that the limitations are barred; but the uses are not determined. Perhaps this was a mistake; but that will not alter the effect of the words in the deed of the 26th and 27th of March. If the words are unambiguous, the parties have not used language to carry their intention into effect. The uses to the daughters are not determined, though the limitations to them have been barred.

Coleridge in reply. As to the construction of deeds, the primary rule is, to look at the intention of the parties; though with more strictness as to technical words than in the case of a will. Here, the uses to the daughters mean the estates to the daughters. The act recites that these estates are barred; if so, they are non-existing, determined, incapable of taking effect; and there is no authority for saying that uses and estates destroyed are still existing. And the

*572] and recompense; the ultimate remainder in fee is untouched, *as appears by the case cited from Salkeld. The old estate reverted to E. Biscoe.

The following certificate was afterwards sent:-

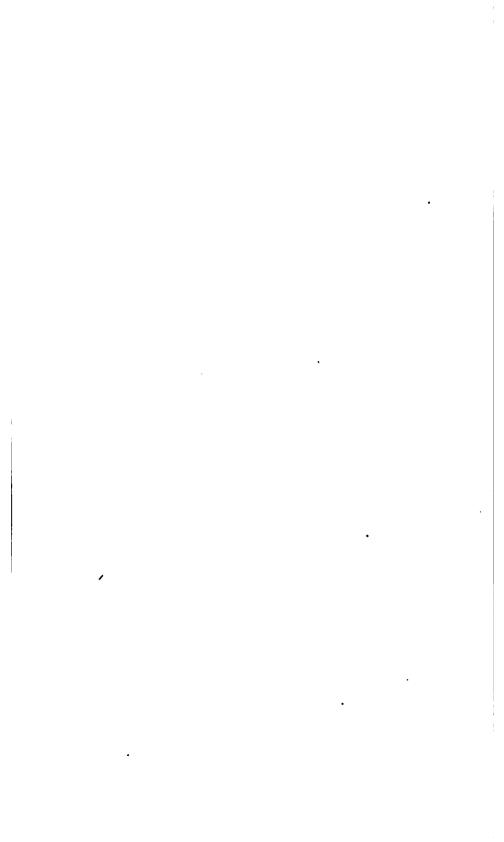
We have heard this case argued by counsel, and have considered it; and we are of opinion that the plaintiffs, James Wortham and Thomas Bramall, took an estate in fee simple in the lands, hereditaments, and premises conveyed and assured by the indentures of the 26th and 27th of March, 1817.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

E. H. ALDERSON.



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2. By agreement, T., an agent, was to have a commission on all sales effected, or orders executed by him; the principal to be responsible for bad debts, and the agent to draw his commission monthly. By the custom of the trade, commission was not allowed on sales which produced bad debts: Held, notwithstanding, that under the terms of this agreement T. was entitled to commission on bad debts. Bower v. Jones.

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mission of bankrupt, while a former commission was subsisting: Held, they could not retain them, even against a colourable title, the second commission being void. Nelson v. Cherrill and Another.

3. A trader, having been denied to a creditor who called for money, was, after a little time, seen peeping over his wife's shoulder. Upon another occasion, seeing a creditor coming, he retired behind a partition at the back of his shop, and his wife coming forward, said he was not at home:

Held, that a jury were properly directed to consider whether the trader "had kept his house; had wilfully secluded himself; that is, had withdrawn himself from a part of the house where he was likely to meet a credit-or, to a more retired part." Key, Assignee of Sherwin, a Bankrupt, v. Shaw. 320 Defendant, a leaseholder, underlet to N. and

- put him in possession under an agreement to grant a lease when N. should have paid 1200L, which he was to do by instalments in three years, in the mean time paying rent at certain days to defendant, subject to distress for non-payment. Defendant received rent from N., but omitted to pay the superior landlord, who distrained on N. for arrears due from defendant. N. having become bankrupt, Held, that the damage incurred by this distress was a cause of action on which his assignees might sue. Hancock and Another, Assigness of Nicholles, a Bankrupt, v. Cafyn.
- 5. By marriage-settlement, S. covenanted to cause 4000L to be paid to his wife's trustees within twelve months after his own decesse, in trust to pay her the interest for her life in case she survived him, and afterwards the principal to their children; but if they had no children, to the survivor of them, S. and his wife, his or her executors or administrators:

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CHARTER-PARTY.

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 Held, that a judgment for plaintiff in this Court might be set off against a judgment for defendant in K. B., although plaintiff was dead, and the judgment was assets in the hands of her administrator.

Held, that the judgment in K. B. for defendant was valid, although not entered up within two terms after death of defendant, verdict having been given during her life, and the delay occasioned by a motion touching an award. Bridges, Widow, v. Smyth, Spinster

3. Plaintiff had judgment against E. for 24971., and issued a writ of β . β ., to which the sheriff returned nulla bona, being indemnified by E.'s attorney, to whom, with other trustees, E.'s property had been conveyed in trust, to pay creditors. A verdict having been given for the sheriff, in an action against him by plaintiff for a false return, plaintiff was not allowed to set off the costs in that action against the debt due on the judgment for 24971. Hencett v. Pigott, Sheriff of So-mercet. Same v. Lord Egmont. 61

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- 5. Subsistence allowed in costs in a policy cause, to the master of a ship insured, a material witness, from the time of subposa to the time of trial, although the witness resided in England, was not examined, was a master in the royal navy, and did not show the permission of the admiralty for him to engage in the merchant service. Mount v. Larkins.
- Where in an action by the assignees of a bankrupt the bankruptcy is disputed, but the cause is referred to arbitration, the Judge before whom the cause is opened cannot certify under 6 G. 4, c. 16, s. 90, for the costs of proving the bankruptcy, although, upon referring, the defendant agrees to admit the reserving, the commission. Barthrop and Others, Assigness of Yates, a Bankrupt, v. Auderton. 268
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9. In an action of slander, although there be no justification, and no special damage alleged, the plaintiff, if he recovers, is entitled to the expense of witnesses necessary to prove an inducement explanatory of the slander, and his professional reputation.

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B. devised to his only son E. for life, remainder to his issue in tail; remainder to B.'s two daughters in tail; remainder to B.'s right heirs. The two daughters suffered recove-ries to the use of E., and by an act of parlisment reciting the will, the recoveries, and that E. had no issue, trustees were empowered to sell the estates devised, and to lay out the purchase-money in the purchase of other estates to be settled to such of the uses in the will of B. as should be existing undetermined or capable of taking effect at the time of the sale. The trustees sold, and with the purchase-money purchased an estate which, by a conveyance reciting the act, was conveyed to them to such of the uses in the will of B. as were then existing undetermined and capable of taking effect. Held, that under this conveyance the trustees took a fee. Wortham and Another v. Mackinnon.

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DEVISE.

1. "As to the rest of my estate, my two houses in S. and T. I give to my wife for life; after her decease, that in S. to my daughter, the other between my two sons. The rest of my estate, of what kind soever, one third to my wife, the rest equally among the three children." The testator had no real property but the two houses:

Held, that the daughter took a fee in the house in S. Gall v. Esdaile. 323

2. "My house in A. to such son of mine as shall first attain twenty-one years, when he shall attain such age, and his heirs; but in case I depart this life without leaving a son, or leaving such, none shall attain twenty-one, to my daughter Jane, if she shall attain twenty-one, and her heirs; but should I depart this life without leaving issue, to L. and his heirs."

8L

Testator left one child, his daughter Jane, who died without issue under the age of

Held, that L. took nothing by the devise to him. Doe dem. Rew and Others v. Lucraft.

3. J. H. devised his copyhold premises called P., &c., to the use of trustees, in trust for his wife, during her life or widowhood, or so long as she should reside upon the premises; remainder to the uses declared of his residue: he devised to the same trustees a freehold estate, charged with an annuity, in trust for his daughter for life, remainder to the use of her children in tail, and in default of issue upon the trusts declared as to his residue; he further devised to the same trustees certain freehold premises, and all the residue of his real estates, in trust for his son H. for life, charged with an annuity to testator's wife, remainder in tail male to the issue of his son; on failure of such issue, a further annuity being thereupon payable to testator's wife, to the use of his grandson G. for life, remainder to the sons of his grandson in tail male; and on failure of such issue, to the use of the sons of his daughter in tail male, remainder to his right heirs. He bequeathed all his ready money to his wife absolutely; the dividends of all his money in the funds to his wife for life; and all the personal pro-perty in and upon the copyhold premises, in trust for his wife, during such time as she should be entitled to the copyhold premises, and on the determination of her estate therein, for his son, the devisee of the residuary real estate. The testator, by his first codicil, referring to his will, and reciting the death of his son, devised to the husband of his daughter, after her death, the freehold estate devised by his will to her; charged his residuary estate with a further annuity to his wife, over and above those already limited thereout for her benefit; bequeathed two further annuities to his daughter and to her husband, and revoked the bequest of his personal property in and about his copyhold premises, giving the same and the residue of his personal property absolutely to his wife, and in the event of her death before him, to his nephew. By a second codicil the testator appointed his wife sole executrix and residuary legatee of his personal property; and by a third codicil directed the proceeds of certain shares in the County Fire Office, to be enjoyed by his wife for life; after her death, by his daughter and her husband for life; and after their decease by his heir in possession. By a fourth codicil, revoking and making void several of the dispositions theretofore made by his will and codicils, of all his freehold, copyhold, and personal estate and effects of every kind and description, instead and in place of such devise, disposition, and bequest thereof, gave, devised, and bequesthed all and every his free-hold, copyhold, and personal estate and effects of every kind and description whatsoever and wheresoever situated, to his daughter for life, remainder to his grandson and his heirs in strict entail, the rents to accumulate for his benefit till he was twenty-one; and on failure of issue, as by his will directed: he ratified and confirmed the several annuities and donations by his will and former codicils bequeathed; and gave and bequeathed to his wife a further annuity, with the like restrictions as the former were payable; in all other respects confirming his will and codicils: Held, that the devise to testator's wife of the copyhold premises called P. was not revoked by the fourth codicil.

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2. Where a party being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not, therefore, to be repudiated by the Judge. Bradley v. Ricardo.

3. Examination of witnesses by prothonotary.

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4. When the bill of particulars is appended to the record pursuant to the rule of Court, it is not necessary to prove the delivery of its defendant. Macarthy v. Smith. 145

5. Use and occupation. Defendant, who had

Surse and occupation. Defendant, who had occupied under a lease which expired at Lady-day 1829, paid a quarter's rent on Midsummer day 1829, deducting something for repairs; he was not afterwards seen on the premises, but the rent was paid at irregular intervals by L., who was in occupation for the ensuing two years: Held, that it was correctly left to a jury to find whether the lessor had accepted L. as a tenant, and the jury having found for defendant, the Court refused to set aside the verdict. Woodcast V. Nuth.

 Where a party holds land under a written agreement, parol evidence cannot be received of the fact under whom he came into possesion. Doe v. Harvey.

7. Devise of all testator's freehold and real estates in the county of L. and city of L. Testator had no estates in the county of L.; a small estate in the city of L., inadequate to meet the charges in the will; and estates in the county of C. not mentioned in the will: Held, that the devisee could not be allowed to show by parol evidence, that the estates in the county of C. were devised to him in the draft of the will; that the draft was sent to a conveyancer to make certain alterations not affecting the estates in county C.; that

by mistake he erased the words county of C,; and that testator, after keeping the altered will by him for some time, executed without adverting to the alteration as to the county of C. Miller v. Travers and Others.

 Queere, Whether pregnancy and imminent delivery be a cause for the examination of a witness by the prothonotary, under 1 W. 4, e. 22.

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- 9. From a covenant in the defendant's lease, to contribute with other occupiers of the leason's property a rateable proportion of the expense of keeping up paths used in common between them, coupled with the fact that the plaintiff had always used a path between his house and the defendant's from a period anterior to the defendant's lease, and that there was no other path to which the covenant could apply, the Court inferred, that the soil of the path, which was included in the demise to the defendant, was demised subject to a right of way in the plaintiff. Oakley v. Adamson.
- 10. A general release by a creditor to a bankrupt is not sufficient to render the bankrupt a competent witness for the creditor, where the result of his testimony would give the creditor a right to prove under the commission. The creditor ought also to give a release to the assignee of all claim on the bankrupt's estate, and the bankrupt ought to release his claim to a surplus. Perryman v. Steggall and Another.

11. In an action for criminal conversation, the letters of the wife to her husband and others are admissible in evidence to show the state of the wife's feelings, although they may also state a fact which would not strictly be evidence. Willis v. Bernard. 376

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2. A., being distrained on for rent arrear, applied to defendant, to whom he was already indebted, to advance him money; defendant refused to do so unless upon security; where upon A. assigned to him all his personal estate and effects in trust to pay defendant and other creditors: Held, not a voluntary conveyance within 7 G. 4, c. 57, s. 32. Arnell the Younger v. Bean and Another.

 It is too late to move to bring up an insolvent under the compulsory clause of the Lords' Act on the seventh day of term. Acraman v. Harrison.

4. A prisoner brought up under the compulsory clause of the Lords' Act, allowed time, on an allegation that he had petitioned the insolvent debtors' court. In the matter of Payne, a Prisoner.

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- A policy on ship at and from Bristol to London, attaches during the vessel's stay at Bristol; therefore, where the assured did not sail till three months after the execution of the policy, Held, that the delay was a material variation of the risk. Palmer v. Marshall.
- Homeward policy on freight, at and from Algoa, attaches, when the ship is at A, in a condition to begin to take in her homeward cargo. Williameon v. Innes.
- Defendant executed, 28th of February, 1824, a policy of assurance on freight from Sincapore to Europe, with liberty to sail to, touch, and stay at any places whatsoever, to load,

unload, reload, and for all necessary purposes | whatever. The ship sailed from London in September 1823, and having been detained by the captain for his own purposes at Van Dieman's Land, did not arrive at Sincapore till the 30th of March, 1825; she sailed thence on the voyage insured the 3d of May, 1825:

Held, that by so long a postponement of the risk the defendant was discharged, a jury having found the delay unreasonable. Mount

v. Larkins.

4. Plaintiff, owner and captain of a ship, agreed by charter-party to proceed to the Cape, and having delivered goods there, to proceed with all convenient speed to Bombay, where the freighter engaged to put on board a cargo of cotton for England. The plaintiff was to have the cabins and between decks for his own benefit. Plaintiff arrived at the Cape, and might have proceeded on his voyage in two days, but he remained there ten, taking in cattle for the Mauritius on his own account: he went round by the Mauritius in his way to Bombay, and arrived at the latter place six weeks later than he would have done if he had proceeded thither direct. Other ships had arrived in the mean time. The freighter refused to load; and in an action on the charter-party, the jury were directed to consider whether the deviation was such as to have deprived the freighter of the benefit of the contract; and a verdict being found for the defendant, a new trial was refused. Freeman v. Taylor.

5. The announcement in the foreign lists filed at Lloyd's of the sailing of a ship out of the port from which she is insured, does not dispense with the assured's disclosing a letter received from his captain before the policy is

6. Insurance January 28th, ou a vessel affoat,

effected, announcing the day of his intended departure. Elton v. Larkins. 198

at and from Bristol to London. The vessel sailed on the 17th of May:

Held, that the delay, unaccounted for, was unreasonable, and discharged the underwriter, although the vessel was of a species which does not usually sail in the winter.

Palmer v. Marshall.

7. Upon the ebbing of the tide, a vessel took the ground in a tide harbour, in the place where it was intended she should; but, in so doing, struck against some hard substance, by which two holes were made in her bot-tom, and the cargo damaged: Held not a stranding for which the underwriters were liable upon an insurance on corn warranted free from average, unless general, or the ship be stranded. Kingsford v. Marshall. 458

JUDGMENT.

See EVIDENCE, 1. PRACTICE, 8, 17.

JUDGMENT AS IN CASE OF NON-SUIT.

See PRACTICE, 11.

LANDLORD AND TENANT.

See EVIDENCE, 5, 6.

1. As against an execution creditor, a landlord is entitled to a full year's rent, although he has been used to remit some portion of it to his tenant. Williams v. Loussy. 28

2. "Sept. 21, 1829.
"K. agrees to let, and P. to take, a house in its unfinished state, for the term of sixty years, being the whole term that K. has the same leased to him, at the rent of 525L payable quarterly, the first payment to be made for the half quarter at Christmas next; P. to insure the premises, and to have the benefit of an insurance lately paid : a lease and counterpart to be prepared at the expense of P., and to contain all the clauses, covenants, and agreements K. entered into in the lease granted to him:"

Held, an actual demise, and not a mere greement for a lease. Doe d. Pesses v. Ries and Knapp.

MEMORANDA, 139, 467,

MONEY HAD AND RECEIVED.

The sheriff sold goods under a fi. fa., without notice of a previous act of bankruptcy by the defendant, and paid over the proceeds of the sale to the plaintiff upon an indemnity: Held, that the defendant's assignee might properly sue the sheriff in an action for money had and received. Young, Assignes of Young, a Bankrupt, v. Marshall and Poland, Sheriff of Middlesex.

NEW TRIAL

See Costs, 1.

Defendant's attorney had notice, Nov. 26th, that his cause was set down for trial; fire days afterwards it was called on and tried as an undefended cause, no one appearing for the defendant.

The defendant's attorney having on the day of trial delivered no briefs, the Court refused a new trial upon any terms. Guilt v. Crawley.

PARTICULAR.

See PRACTICE, 15, 18.

PARTNER

In July 1820, W. advanced to S. and S., then carrying on business in partnership as brewers, the sum of 24,000L, and all three executed a deed, by the express terms whered partnership stock was created, in which they had all a joint property; W. however was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, so as to get 2000L or 2400L a year, as the case might be, out of the clear profits: W.'s name never appeared to the world as a partner:

Held, that W. was a partner; and the new firm having become bankrupt in 1826, held, that the creditors of the old firm and the creditors of the new firm were both entitled to prove against the property of the new firm. Ex parte Chuck, in the matter of Starkey and Another, Bankrupte.

PLEADING.

See RENT-CHARGE, 1. TRESPASS, 1. ADVI-TERY. AMENDMENT, 2.

INDEX. 677

1. Plaintiffs declared as assignees, but assigned a breach in non-payment to them, assignees as aforesaid, instead of as assignees as aforesaid: Hold, sufficient on special demurrer. Cobbett and Others, Assigness of Baker, a Bankrupt, v. Cockrane.

2. The declaration stated that defendants A., H., and C. broke a close of the plaintiff abutting on a close of the said defendant. plaintiff's close abutted on a close of the defendant A.: Held, an ambiguity, and not variance. Walford v. Anthony and Others.

3. It is no ground for a plea in abatement, that defendant, sued as a Scotch peer, is also described as having privilege of parliament.

Cantwell v. Earl of Stirling. 174

4. Replevin. Defendant avowed that the rent

was payable at Martinmas, to wit, Nov. 23:

Held, that this must be taken to mean New Martinmas; and plaintiff having shown that the rent was in fact payable at Old Martinmas, the Court refused to set aside a verdict given for him. Smith v. Walton and 235 Another.

5. The county in the margin of the declaration held a sufficient venue, on special demurrer.

Duncan v. Passenger.

6. A plea in abatement by an Earl, of misnomer in his title of dignity, must allege positively, and not merely by inference, that he was Earl at the time of suing out the writ. Digby v. Alexander.

To debt on a judgment, the defendant pleaded a release of December 1831, destroyed by accident. Upon affidavit that the plea was false, the Court allowed the plain-tiff to sign judgment as for want of a plea. Smith v. Hardy.

PONE.

See PRACTICE, 5.

PRACTICE.

See PRIVILEGE, 1. EVIDENCE, 3, 8.

- 1. Plaintiff issued a mandate to the officer of a liberty, to arrest the defendant on a ca. sa. Defendant was afterwards discharged, under the insolvent debtors' act, from the custody of the sheriff of the county. The plaintiff having become the assignee under the discharge, Held, that he was estopped to rule the officer of the liberty to return the mandate for the capture of the defendant. Heporth v. Sanderson.
- 2. Defendant, upon certain terms favourable to plaintiff, was allowed to have a special jury after the cause had stood for trial by a common jury during a whole sittings, and had been twice postponed at the instance of the defendant. Thorne v. Marquis of London-

Mayor and Corpo-27 Practice as to elisors. ration of Norwick v. Gill.

- 4. The Court refused to discharge the rule for a special jury, on the ground that the de-fendant had obtained it in January 1831, and up to the Michaelmas term following had omitted to strike the jury, although the cause stood for trial in July. Andrews v. Thornton.
- The cause assigned at the end of a writ of ne is mere form, and cannot be traversed by the sheriff. Talbot v. Binns and Another.
- 6. By the Bath court of requests act, a plaintiff

who sues in another court for a debt he might have recovered in the Bath court, shall not, by reason of a verdict for him, be entitled to costs.

This Court refused to stay proceedings before verdict, upon payment of debt without costs, upon the ground that the action ought to have been brought in the Bath court. Meredith v. Drew.

- 7. In an action on a policy of insurance, the Court refused upon a new trial to change the venue from Dorset to London, upon the ground that both the parties lived in London, and that all the witnesses came from London on the first trial. Palmer v. Marshall.
- 8. Judgment of non pros cannot be signed for omission to deliver particulars pursuant to a Judge's order. Sutton v. Clark. 165
- 9. A petitioning creditor attending commissioners of bankrupt, is protected from arrest, eundo, morando, et redeundo.

 If he shows that he is on his way home.

it is for the party who arrests to prove a deviation. Selby v. Hills.

10. A party has, in general, four days' time to

plead after judgment of respondeat ouster.

Cantwell v. Earl of Stirling. 177

11. When the plaintiff gives notice of trial a

- term earlier than the rules of court require, if he omits to try pursuant to his notice, the defendant may move for judgment as in case of a nonsuit, the next term. Howell v. Powlett.
- 12. An undertaking for a bail-bond given to the sheriff by the defendant's attorney, being mere nullity, an application by defendant to set it aside and enter a common appearance, was discharged with costs, though defendant was a feme covert. Lewis v. Knight.

. Entitling affidavit in false judgment.

Watson v. Walker.

315

- 14. Omission in notice of bail to describe the bail as householders or freeholders, does not, under the rule of Trinity 1831, authorize the plaintiff to take an assignment of the bail-bond. The objection should be made when the bail come up. Bell and Another, Acsignees of the Sheriff of Middlesex, v. Foster and Others.
- 15. A particular of demand is not to be construed so rigidly as to nonsuit a plaintiff for inaccuracies which could not mislead. Disbursements held recoverable under an item for "cash advanced." Harrison v. Wood. 371
- 16. The payment of costs for not proceeding to trial is not a condition precedent to ulterior proceedings, unless so specified in the rule. Wilson v. Collins. 374
- 17. The defendant being in a condition to enter judgment of non proc for want of a declara-tion, the plaintiff, with a view to prevent the non pros, obtained a rule to discontinue on payment of costs; however, instead of paying costs or discontinuing, as soon as the rule had expired, he served the defendant with a declaration: Held, a fraud on the proceedings of the Court; and the defendant having entered up judgment of non pros, the Court refused to set it aside. Ariel v. Bar-
- 18. Plaintiffs, spirit merchants, inadvertently delivered a bill of particulars for goods sold to defendant in their trade of brewers. verdict having been given for plaintiffs, on proof of delivery of spirits, defendant ob-

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tained a rule niei for a nonsuit, on the ground that he had been surprised by the variance between the particular and the proof: it appearing, however, that he had been neither surprised nor misled, the Court discharged the rule. Lambirth and Another v. Roff.

19. Practice, as to protection of sheriff. Parker and Others v. Booth. 85

PRESENTATION.

An advowson belongs to a prebendary in right of his prebend: the church becomes vacant, and prebendary dies without having presented: the presentation belongs to his personal representative, according to the opinion of six Judges out of eight, delivered in the House of Lords. Mirehouse and Another, who have survived George Bishop of Lincoln, plaintiffs in error, v. Rennell Wo., defendant in error.

PRESCRIPTION.

See Tolls.

PREBEND.

See PRESENTATION.

PRIVILEGE.

Defendant having voted at the election of Scotch peers, Held, as a Scotch peer, entitled to be discharged from arrest, although his vote had been protested against, his claim to the title disputed, and never recognised by the House of Lords or at Court. Digby v. Lord Stirling.

PROOF OF DEBT. See PARTNER.

RECOVERY.

1. Recovery amended by transposing the names of demandant and tenant. Hamilton, Demandant; Farrer, Tenant; Wilson, Youchee.

2. Booty, Demandant; Cameron, Tenant; North and three Others, Vouchess. 18

REGULÆ GENERALES, 288, 466.

RENT-CHARGE.

Defendant made cognisance in replevin, under a power of distress for an annuity granted by G. T. to H. in September 1806. Plaintiff pleaded that in May 1806, G. T., for securing another annuity, and in consideration of 3000/., granted, bargained, sold, and demised the premises in which, &c., to F. for ninety-nine years:

Held, no bar, without alleging entry by F., or that F. elected that the deed should enure by way of bargain and sale.

Held, also, that standing crops cannot be taken under a power to distrain for the arrears of an annuity. Miller v. Green. 92

RELEASE.

See EVIDENCE, 10.

The plaintiff and other creditors of the defendants signed resolutions for entering into a composition deed with the defendants, upon their property being assigned to trustees for the payment of the creditors.

The defendants and their trustees having refused to allow the plaintiff to come in as a creditor under the deed, Held,

That he might sue defendants notwithstanding the execution of the resolutions. Garrard v. Woolner and Another. 258

REVOCATION.

See DEVISE, 2.

RIGHT OF WAY.

SAVINGS BANK.

Since 9 G. 4, c. 92, an action does not lie against the trustee of a savings bank. In case of disputes, the only mode of proceeding is by arbitration. Criep v. Busbury, Bart., and Others.

SET-OFF.

See Costs, 2, 3, 7.

By order of Niei Prius, a verdict having bees entered for the plaintiff, and the plaintif having therein agreed to pay the defendant 70'., the Court allowed that sum to be set of against the plaintiff's judgment. Newton.

SHAM PLEA.

See PLEADING, 7.

SHERIFF.

See MONEY HAD AND RECEIVED. PRACTICE, 19.

SPECIAL JURY. See PRACTICE, 2, 4.

STAMP.

A mortgage deed for 3000L contained a power of sale and leasing to secure the principal and all expenses, with interest; there was also a covenant to pay principal and interest and all expenses, with interest on the amount of them.

Held, not a security for an uncertain sed indefinite amount under 55 G. 3, c. 184, sed that a 94. stamp was sufficient. Dec Scruton v. Snatik.

STATUTE OF LIMITATIONS.

Defendant, by a deed reciting that he was
indebted to plaintiff and others, assigned his
property to plaintiff, in trust to pay \$6.8d. in
the pound to all such creditors as should sin
the schedule of debts annexed; provided
that if all did not sign, the deed should be
void. Plaintiff never signed, nor was the
amount of his debt stated:

Held, not a sufficient acknowledgment to take plaintiff's debt out of the statue of limitations, although it was admitted orally that he had but one debt. Kennett v. Milbank.

2. Under 9 G. 4, c. 14, payment of interest within six years by one of several joint contractors takes a debt out of the statute of limitations as against all. Wystt v. Hodeon.

STRANDING.

See Insurance, 7.

SUBMISSION.

See Arbitration.

SURETY.

Defendant guarantied the payment of porter to be delivered by plaintiff to J.: the guarantee contained no stipulation as to the credit to be given to J. The custom of the plaintiff was to give six months, and then, sometimes, to take a bill at two. The plaintiff having, without the knowledge of the defendant, given J. eleven months' credit, Held, that the defendant was discharged from his guarantee. Coombe and Others v. Woolf.

TIME.

See PLEADING, 4

TOLLS.

The corporation of T. having proved a prescriptive right to tolls, Held, that it was not destroyed by a charter of Elisabeth, granting and confirming, among other things, all the ancient rights of the corporation, but exempting the inhabitants from toll in all places except London:

Held, that this exemption applied to the tolls of all other places (except London), but not to the tolls of T. Mayor and Burgesses of Truro v. Reynalds. 275

Same v. Bastian.

TRESPASS.

Trespass for entering plaintiff's close. Plea, that certain goods of defendants' were there, and that they entered to take them, doing no unnecessary damage: Held, ill. Anthony v. Haneye and Hard-

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VENUE.

See PRACTICE. 7. PLEADING. 5.

Practice as to venue. Scruton v. Dawson.

VERDICT.

See WATERCOURSE, 1.

VOLUNTARY CONVEYANCE.

See Insolvent, 2.

WARRANTY.

1. "Received of B. 10% for a gray four year old colt, warranted sound?"

Held, that the warranty was confined to

soundness, and that, without proving fraud, it was no ground of action that the colt was only three years old. Budd v. Fairmaner. 48

2. 1. Some splints cause lameness, others do not; a splint, therefore, is not one of those patent defects against which a warranty is inoperative.

2. The defendant having warranted a horse sound at the time of the contract, and the horse having afterwards become lame from the effects of splint visible when the defendant sold him, Held, that the defendant was Margetoon liable on his warranty. Wright.

WATERCOURSE.

On indictment for nuisance to a public canal navigation established by act of parliament, it was found by a special verdict, among other things, that the canal was carried across a river and the adjoining valley by means of an aqueduct and an embankment, in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal, and that in times of flood, the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, to the above-mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed; that except for the fenders aftermentioned, the arches in the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of water; that the defendants, occupiers of lands adjoining the river and brook, had, subsequently to the making of the canal, aqueduct, and embankment, heightened certain artificial banks, called fenders, con-structed from time to time, as occasion required, on their respective properties, for the protection of their lands, so as to prevent the flood-water from escaping as above-men-tioned, and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal banks, as to endanger them and obstruct the navigation; that the fenders were not unnecessarily high, and that if they were reduced, many hundred acres of land would again be exposed to inundation: Held, that to enable the Court to come to any decision between the parties, it ought also to have been found,
—1. Whether the raising fenders was an ancient and rightful usage, or whether it had commenced since the construction of the canal; 2. Whether the course described by the special verdict to have been taken by the flood-water was, or was not, the ancient and rightful course; and, 3. Whether or not the raising of the fenders to their present height had become necessary in consequence of the construction of the aqueduct. ford v. The King.

WITNESS.

See EVIDERCE, 2.

id.



REPORTS OF CASES

DETERMINED

AT NISI PRIUS,

IN THE COURTS OF

King's Bench and Common Pleas,

AED OF THE

OXFORD AND WESTERN CIRCUITS,

FROM THE SITTINGS AFTER MICHAELMAS TERM, 4 GEO. IV. 1823, TO THE SITTINGS AFTER TRINITY TERM, 4 GEO. IV. 1826, INCLUSIVE.

BY

EDWARD RYAN, Esq.,

AND

WILLIAM MOODY, Esq.,

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS, NO. 585 CHESTNUT STREET. 1864.

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CASES

ARGUED AND DECIDED

AT NISI PRIUS, IN K. B.

AT THE SITTINGS AFTER

Michaelmas Cerm,

IN THE FOURTH YEAR OF THE REIGN OF GEORGE IV. 1828.

SAVORY v. PRICE.-p. 1.

Patent for a mode of making a medicine by a particular combination of three known substances. The specification not describing those substances by their known names, but pointing out particular methods of producing them, held bad; those methods not being essential to the combination, nor part of the invention.

ACTION on the case for the infringement of a patent.

The patent, dated 23d August, 1815, had been granted for a method of making a neutral salt or powder, possessing all the properties of the medicinal spring at Seidlitz, under the name of "Seidlitz Powder."

The specification enrolled within the time required by the patent, set out three distinct recipes, (a) and described the modes and proportions in which the results were to be mixed, in order to produce the "Seidlitz Powder."

(a) Recipe, No. 1.—Take of subcarbonate of soda twenty pounds, supertartrate of potash twenty-four pounds (avoirdupois weight); dissolve the subcarbonate of soda in twenty-five gallons of boiling water, and add the supertartrate of potash; filter the solution through paper, and evaporate it in a gentle heat until a pellicle appears on the surface, then set it by to crystallize; re-dissolve the crystals thus formed in six times their weight of boiling water; the solution must again be filtered, evaporated, and crystallized, and afterwards reduced to a fine powder.

Recipe, No. 2.—Take of subcarbonate of soda one hundred pounds, carbonate of ammonia twenty-five pounds; expose the carbonate of soda to a heat sufficiently strong to liquefy it; then add the carbonate of ammonia in powder, and with a heat of 212° dry the salt, and pass it

through a fine sieve.

Recipe, No. 3.—Take of supertartrate of potash one hundred pounds, mix it with thirty pounds of finely-powdered chalk, and add it by degrees to one hundred and sixty of boiling water; stir it for some time, and when the tartrate of lime has subsided, pour off the supernatent liquor, and wash the residuum repeatedly with cold water. To the tartrate of lime thus formed add thirty pounds of sulphuric acid, previously diluted with eight times its weight of water; stir the mixture frequently during twenty-four hours; and after having separated the acid from the sulphate of lime by means of strong pressure, evaporate it in Wedgwood's dishes over a sand heat till a pellicle appears on the surface, then set it by to crystallize; these crystals are to be dissolved in boiling water, filtered through white filtering paper, and again crystallized. Each dose of the Seidlitz Powders consists of two scruples of recipe No. 3, finely powdered and dissolved in half a pint of spring-water, to which are added two drachms of recipe No. 1, and two scruples of recipe No. 2 (previously mixed); they must be stirred together, and taken during the state of effervescence.

It was proved that the three products so mixed answered the purpose professed

in the patent, and that the combination was new and useful.

But, upon cross-examination of the plaintiff's witnesses, the following facts were established. The recipe No. 1 produced the substance called "Rochelle Salts." Rochelle salts were known to the world before 1815 under that name, and also as "Soda tartarizata."

Recipe No. 2 produced "Carbonate of Soda," which was known before 1815, and was in the Pharmacopæia of 1809; and a more expensive, but more perfect,

way of making it was also known, and it might be bought in shops.

The recipe No. 3 produced "Tartaric Acid," the method of making which was known at the time of the patent, and under that or some other name it might be bought in chemists' shops, and other methods of making it were known, all of which would be equally efficacious for the combination of Seidlitz powders.

Rochelle salts, carbonate of soda, and tartaric acid mixed in the manner pre-

scribed, produced the Seidlitz powder.

ABBOTT, Ld. C. J. It is the duty of any one, to whom a patent is granted, to point out in his specification the plainest and most easy way of producing that for which he claims a monopoly; and to make the public acquainted with the mode which he himself adopts. If a person, on reading the specification, would be led to suppose a laborious process necessary to the production of any one of the ingredients; when, in fact, he might go to a chemist's shop and buy the same thing as a separate single part of the compound, the public are misled. If the results of the recipes, or any of them, may be bought in shops, this specification, tending to make people believe an elaborate process essential to the invention, cannot be supported. The plaintiff must be called. Nonsuit.(a)

Scarlett, Gurney, Deacon, and Powell, for the plaintiff. The Solicitor-General and Campbell for the defendant.

(α) Vide Bull. N. P. 76. Turner v. Winter, 1 T. R. 602. Boulton and Another v. Bull, 2 H.
 Bla. 463. Harmar v. Playne and Another, 11 East, 101. Hill v. Thompson, 8 Taunt. 375, and B. v. Wheeler, 2 B. & A. 345.

VAN WART v. WOLLEY and Others .- p. 4.

Where a verdict had been found subject to a special case, and a new trial had been directed, held that the special case, signed by the counsel on each side, was evidence on the facts there stated.

This case had been tried before Abbott, Id. C. J., at the adjourned sittings after Hilary Term, 1822, and a verdict taken for the plaintiff, subject to the opinion of the court on a special case. Upon its being called on for argument in the court above, it appeared that a material fact was not stated in the special case, upon which the court directed a new trial, in order that all the facts necessary to raise the point of law might be found by the jury.

Scarlett, for the plaintiff, offered in evidence the special case, signed by the junior counsel of each side on the former trial, as evidence of all the facts there

stated.

The Solicitor-General objected to this, and contended that it was not admissible evidence, but that all the facts should be proved anew.

The case of Edmunds v. Newman (a) was cited by the plaintiff's counsel.

Abborr, Ld. C. J., held the evidence admissible, inasmuch as the special case

⁽a) This case having been sent down for a second trial, came on before Abbott, Ld. C. J., at the sittings after Hilary Term, 1823. The plaintiff's counsel offered in evidence the special case, signed by the counsel on each side, as an admission by the defendant of the facts thereix stated. To this the defendant's counsel objected. Abbott, Ld. C. J., thought the special case evidence of all the facts therein stated, and it was accordingly admitted.

so assigned must be considered as containing the admissions of the parties to the facts therein stated.

The facts originally omitted in the special case having been proved, the jury were directed to find a verdict for the plaintiff, subject to a case containing all the facts in the original case, together with the additional facts then proved.

Scarlett and Chitty for the plaintiff.

The Solicitor-General and Abraham for the defendant.

HAWES and Another, v. WATSON and Another.-p. 6.

A wharfinger, who, on receiving an order from A. to "transfer, weigh, and deliver or re-house" certain tallows to B., with an endorsement by B. to "transfer, weigh, and deliver" them to the plaintiffs, gives a written acknowledgment to the plaintiffs, that he holds the tallows on their account; cannot, upon B. becoming insolvent, set up as a defence for not delivering the tallows to the plaintiffs, A.'s right to stop in transitu: the plaintiffs having purchased bona fide from B., although A. sold to B. at so much per cwt., and the tallows have not been weighed.

Semble. An owner of goods lying in wharf, who, upon sale of them, gives an order on the wharfinger to "transfer, weigh, and deliver or re-house" them to his vendee, loses his right to stop in transitu against all who acquire a bona fide title by purchase from such vendee.

TROVER, for 79 casks of tallow.

The plaintiffs had, on the 25th of September, 1823, bought of Moberly and Co., merchants in the tallow trade, 300 casks of tallow, at 40s. per cwt., the amount to be settled for by the buyers' acceptance at six months' date, allowing fourteen days' discount. One hundred casks of tallow were delivered on the 26th, and plaintiffs gave their acceptances to the amount of 1440l. In order to complete the contract, Moberly and Co., on the 26th, bought of Raikes and Co. 100 casks of tallow ex Matilda, lying at Watson's Wharf, at 41s. per cwt., the amount to be paid in money, allowing 2 1-2 per cent. discount, and fourteen days for delivery. At the time of this sale, Raikes and Co. gave Moberly and Co. an order on the defendants, who were wharfingers, and then held the tallow on account of Raikes and Co., in these terms:—

"Sept. 26, 1823.

"Transfer, weigh, and deliver, or re-house, to Moberly and Co., 100 casks of tallow, ex Matilda, casks marked H. and M. Nos. from 94 to 193 (specified.)" Moberly and Co. made an endorsement on this order, directing defendants to "transfer, weigh, and deliver" the tallow to plaintiffs. On the 27th Moberly and Co. delivered the order so endorsed to the defendants, who at their request gave them the following note:—

"Watson's Wharf, Sept. 27th, 1823.

"Messrs. T. and B. Hawes,

"We have this day transferred to your account, by virtue of an order from Messrs. Moberly and Bell, 100 casks of tallow, ex Matilda, with charges from October 10th, 1823. H. and M. casks.

"For Watson and Metcalfe,
"WILLIAM BOWNESS."

This note Moberly and Bell delivered to plaintiffs, who upon the receipt of it gave their acceptances for the amount, which Moberly and Co. afterwards got discounted, and plaintiffs at maturity paid.

The defendants delivered twenty-one casks of this tallow to plaintiffs' order, but Moberly and Co. becoming insolvent on the 11th of October, Raikes and Co. gave notice to defendants to retain the remainder, insisting on their right to stop in transitu

The tallows were not weighed until after 13th or 14th of October, but Moberly and Bell paid Raikes and Co. 1300t. on the 11th of October, the original check, dated and given 10th October, having been refused payment, on account

of some alteration on the face of it.

This 1300% was at that time supposed to be about the price of the 100 casks.

The full price on weighing turned out to be

15001.; and Raikes and Co. stopped in transitu for the balance.

The usage in the tallow trade, as proved at the trial, is, to weigh at the Custom-house on landing, to ascertain the duties, but whilst in warehouse tallows are sold and re-sold in the market usually without weighing until the ultimate buyer takes them out for use; fourteen days are allowed for weighing and delivery, during which time it is at the choice of the buyer, but at the seller's expense, to weigh; on the 14th day the seller may have them weighed, and he is no longer liable for charges.

Upon these sales transfer notes of the form specified are usually given, and

considered in the market as conclusive evidence of the property.

The wharfage charges had been paid, and the plaintiffs, upon making their demand for the 79 casks of tallow, had tendered for any charges that might be due; and defendants, upon reference to their books, said there was nothing due, but that they detained the casks for Raikes and Co.

The Attorney-General insisted, that the delivery was not complete, to divest Raikes and Co. of their right to stop in transitu, until weighing, that being necessary to ascertain the price, and cited Hanson v. Meyer, 6 East, 614; Shepley v.

Davis, 5 Taunt. 617.

ABBOTT, Ld. C. J. Those cases are between vendor and vendee; whatever the question may be between buyer and seller, I am most clearly of opinion that the defendants. having acknowledged the transfer to the plaintiffs, cannot now resist this action.

Verdict for plaintiffs.

Gurney, Gaselee, and Carter, for the plaintiffs. Copley, S. G., and Scarlett, for the defendants.

In Hilary Term following the Attorney-General moved for a rule to show cause why this verdict should not be set aside, and a new trial granted, and relied on the same cases as at the trial.

The Court refused the rule, and upon giving judgment,

ABBOTT, Ld. C. J., said, I do not mean to decide any question between buyer and seller; for aught I know, the defendants may be liable both to Raikes and Co. and to the plaintiffs; but if after such an acknowledgment made by the defendants, and the price of the tallows paid by plantiffs upon the faith of it, we were to say that the defendants could resist this action, we should go far to

interrupt the whole course of mercantile dealings.

BAYLEY. J. This case appears to me to be perfectly distinct from the ordinary case of vendor and vendee. When goods are sold upon credit to a person who before the complete delivery becomes insolvent, it is consistent with equity and good faith, that the vendor should have the power to stop the delivery of goods for which he has no chance of being paid. But there are many cases which go to show that this right cannot be exercised to the prejudice of third persons; and it is not consistent with equity and justice that it should be enforced against a second bona fide vendee, who has actually paid the full price for the goods. Here Raikes and Co. have, by their order of delivery, given to Moberly and Co. the complete power over these goods, and have enabled them, according to the course and usage of trade, to go into the market and sell them again. Having given them this evidence of title to the property, they cannot as against third persons come forward and claim to stop in transitu, and the letter of the defendants is conclusive in this case against their right to resist the claim of the plaintiffs.

HOLROYD and BEST, Js., concurred.(a)

⁽a) The first case which recognised the right of stoppage in transitu was the case of Wiseman w. Vandeputt, in Chancery, 2 Vern. 209. It is now become the clear, known, and established rule in courts of law, that the vendor may seize the goods in transitu, if the vendoe become asolvent before the delivery of them.

The distinctions upon reference to which the principal case is to be determined, arise from the various circumstances of constructive delivery, which exist, where the commodities sold continue in the possession of the vendor, or a wharfinger, and have not come into the manual custody of the vendee. Where nothing remains to accertain the individuality, quantity, or price of the commodity sold, the principle of law is clearly defined, that in such a case a delivery order, given to a wharfinger who has the charge of the goods sold, even though he makes no transfer in his books to signify that he holds the property for the vendee, precludes the exercise of the right of stoppage in transitu, Harman v. Anderson, 2 Campb. 243; Lucas v. Dorrien, 7 Taunt. 278. Nor in such case would the payment of the warehouse rent, according to the custom of trade, by the vendor or the vendee, affect the right of stoppage in transitu. Hammond v. Anderson, 1 N. R. 69. Though the receipt of rent by the vendor, the goods continuing in his own possession, is held to determine the transitus. Hurry v. Mangles, 1 Campb. 452.

A class of cases which it has been usual to refer to the law of stoppage in transitu, have been decided on a ground totally independent of it. As trover can only be maintained for specific goods, unless their individuality can be ascertained, the action of trover cannot be resorted to, in respect of them, and their identity not being known, the stopping of them in transitu is not in respect of them, and their identity not being known, the scopping of them in transitu is not in the nature of things possible; this is usually occurs where, consistently with the contract, any commodities of the vendor, answering a particular description, might be supplied; and in these cases the vendee, though he were solvent, could not maintain trover. The principle of these cases is clearly developed in the judgment of the court in Austen v. Craven, 4 Taunt. 644; White v. Wilkes, 5 Taunt. 176. See also Busk v. Davis, 2 M. & S. 397; Wallace v. Breeds, 13 Kast, 522. The case of Whitehouse v. Frost, 12 East, 614, does not appear to be reconciled. able with the latter decisions upon this subject.

There is another class of cases, where a particular parcel of goods is sold, so that the identity of them is certain, but the quantity and the price remain to be ascertained; this usually occurs where weighing, or the searching of casks, or some circumstance of the like nature, is to precede the delivery. In these cases there is no objection to the action of trover, arising from the uncertainty of what the identical goods are for which the action is brought; but still they are net cases of stoppage in transitu, because the objection to an action brought for them by the vendee, is that a condition precedent must be performed, before he is entitled to them, with

which nobody but the vendor can dispense.

It is fully settled by the decisions, that an order given to a wharfinger to weigh and deliver, will not divest the vendor's right until the commodity is weighed. Withers c. Lyss, 4 Campb. 237; Shepley v. Davis, 5 Taunt. 617. Neither, if part of the goods be weighed and delivered, will it affect the right of the vendor as to the residue which is unweighed, Hanson v. Meyer, 9 East, 614. It is still to be decided, whether the introduction of the word transfer into the delivery order will vary the case. It must, however, be observed, that both the cases under this and the preceding head, are frequently considered as strictly cases of stoppage in transitu, and that the rule applicable to them is, that where anything remains to be done between the vendor and vendee, the right is preserved; and in this point of view the decision of Whitehouse v. Frost is in unison with all the other cases, because nothing remained to be done between the vendee and subvendee, and the vendor was not concerned in the action. It may here be mentioned, that the right continues, although a part of the price of the goods has been paid, Hodgson v. Loy, 7 T. R. 440, and though a bill of exchange has been accepted for the whole, and endorsed over. Feise v. Wray, 3 East, 98.

So much of the law of stoppage in transitu, as is applicable to the present case, when viewed with reference to the rights of the original vendor and vendee, having been examined, it may be next considered with reference to the rights of third parties, and the liabilities of the wharf-

inger.

In bills of lading, where nothing remains to ascertain the identity, quantity, or price of goods

Only bill of lading for a hone fide consideration, will put an end purchased, an endorsement of the bill of lading for a bona fide consideration, will put an end to the right of stoppage in transitu. See this doctrine and its qualifications, Lickbarrow v. Mason, 2 T. R. 63; Cuming v. Brown, 9 East, 506; Salomons v. Nisson, 2 T. R. 674. The application of the rule respecting bills of lading to the case of public dock warrants, the application of tale rule respecting only of lading to the case of public dock warrants, the endorsement of which, by the custom of trade, passes the property in the market, has been considered in some recent cases. Lucas v. Dorrien, 7 Taunt. 278; Zwinger v. Samuda, 7 Taunt. 265, 1 B. M. 12; Keyser v. Sase, 1 Gow, 58; Spear v. Travers, 4 Campb. 251. In which cases the leaning of the courts decidedly was, to place such dock warrants upon the same footing as bills of lading; and the case in Gow. is a decision to that effect, though in the other cases either the circumstance of fraud has occurred, or it has appeared that notice was given to the Dock Company of the transfer. No case however has gone the length of determining, that the endorsement of a dock warrant from A. to B. would put an end to the right of stoppage between A. and B. Although in Lucas v. Dorrien it was considered, that the property would no longer, after such an endorsement, be considered in the order and disposition of A., within the scope of the bankrupt laws.

It is apprehended that the endorsement of the delivery note, directed to a private wharfinger, but not delivered to him, would not prevent the right of stoppage in transitu. A fortiori, not when the order was for weighing and delivering, in which latter case it is conceived the right of the vendor would not be altered, though the note was lodged with the wharfinger, and notice was given him of the endorsement, and he had transferred the property before weighing it to the

endorsee. Shepley v. Davis, 5 Taunt. 621.

There is another class of cases, of which the principal case may now be considered a leading one, and that is, where the wharfinger is considered to have attorned to the vendee. Stonard v. Dunkin, 2 Campb. 344. This case and the principal one, clearly show, that without reference to the right of the vendor, where the wharfinger gives a document to the vendee, or subvendee, which enables him to gain credit for the goods in the world, there the wharfinger is estopped

from setting up the vendor's right. How far (a case being supposed where the vendor retains a right of stoppage, as where he gives an order to we', l. and deliver) the wharfinger, by receiving rent from the vendee or subvendee, may in considered to have attorned to him, does not appear from the authorities (free Lowever Hammond v. Anderson, 1 N. R. 69, and Hurry v. Mangles, 1 Campb. 452.) It would seem that the transfer made in his own books could not have that effect.

LATHAM and Others, v. RUTLEY and Others.—p. 13.

Held, that the following memorandum "Received of L. & Co. a paper parcel directed to Mess. H. B. & Co., 62, Lombard-Street, value 260l., which we agree to deliver to them tomorrow, fire and robbery excepted; carriage paid here," given by a carrier, on the receipt of goods, was admissible in evidence, without a stamp, as being an agreement, the subjectmatter of which did not exceed 20l.

CHADWICK v. SILLS and Others .-- p. 15.

A memorandum by a wharfinger of the receipt of goods to be shipped in a particular manner, may be given in evidence to show the terms on which they were received, without a stamp, although the value of the goods was above 20L; the wharfage being of a less amount.

MATSON and Another v. TROWER and Another.-p. 17.

Award held good though made by an umpire, the arbitrators having no authority to appoint one, and though he examined the parties separately, they having attended him, and made no objection.

Award held sufficient, though in the form of an opinion.

Assumpsit on an award.

A dispute having arisen between the plaintiffs and the defendants as to the non-performance of a contract to deliver fifty puncheons of brandy; the matter in difference was referred to two persons in the spirit trade.

The arbitrators disagreed, and appointed an umpire, who was also in the

spirit trade.

The umpire received from the arbitrators, statements of the points in which they disagreed; examined each of the parties in the absence of the other; and made a written award in these terms:

"I am of opinion that Messrs. Matson and Co. are entitled to claim of Messrs. Trower and Co. 1341. for non-performance of their contract for fifty

puncheons of brandy."

For the defendants it was objected, 1st. That the umpire had no authority. 2dly. That the award was void in consequence of the umpire having examined the parties in the absence of each other. 3dly. That this was the statement only of an opinion, and not an order or direction to pay the money, and consequently no award.

ABBOTT, Ld. C. J. The parties have recognised the authority of the umpire by submitting to be examined by him, as to the matters in dispute. It does not appear that either party desired to be present when the other was examined; legal men indeed usually examine one party in the presence of the other, but among mercantile persons a different practice prevails; the umpire here was a mercantile man, and the defendants not having expressed a desire to be present at the examination of the plaintiffs, cannot now object to its having taken place

in their absence. The words of the instrument are indeed not formal or technical, but they amount in substance to an award.

Verdict for the plaintiffs, 1341.

The Attorney-General and Parke for the plaintiffs.

Scarlett and Barnewall for the defendants.

WILLIAMS v. MUNNINGS.-p. 18.

A letter, which had been in the possession of the defendant, was filed in the Court of Chancery pursuant to an order of that court: held that secondary evidence of it was not admissible, it being in the power of either party upon application to that court, to produce it.

THE plaintiff having given notice to the defendant to produce a letter in his

possession, proposed to give secondary evidence of its contents.

To this the Attorney-General objected, and proved by the solicitor of the defendant, that the letter in question was delivered to him for the purpose of this action, and of a suit which was depending in equity between the same parties; that the letter was now filed in the Court of Chancery, pursuant to an order of that Court, for that purpose.

ABBOTT, Ld. C. J., was of opinion that the plaintiff was not entitled to give secondary evidence of the contents of the letter; that the letter was as much in the possession of one party as of the other. Either party might, on application to the Court of Chancery, have obtained permission to produce it.

SHAW and Others, Assignees, v. WILLIAMS.-p. 19.

A commission issued at the instance and request of the bankrupt good at law.

REX v. HALSE.—p. 20.

In indictments for misdemeanors at the instance of private prosecutors, when both defendant and prosecutor have brought down their records, and entered them with the marshal, the defendant's first, the prosecutor's lower in the list, trial must take place in the order of entry.

SITTINGS AFTER HILARY TERM, IN K. B.

5 GEO. IV.—1824.

RIVIERE v. BOWER .-- p. 24.

Where the owner of a house divided it into two tenements, and let one of them, held that the lessee was liable to an action on the case for obstructing windows existing in the landlord's house at the time of the demise, though of recent construction, and though no stipulation was made against the obstruction.

ACTION on the case.

The plaintiff was proprietor of a house in Oxford-street, which he divided into two tenements; one he retained in his own occupation, using it as a guasmith's shop, with a window projecting, so as to display his goods, by a side

view, to passengers going up and down the street.

In 1817, after the window had been constructed, he let the adjoining tenement to the defendant, who was a bookseller and stationer. The defendant was in the habit of fixing, by a screw to his door-post, a movable case, containing books, which came so near to the plaintiff's window, as to prevent his putting up the side shutter until the case was removed, which was usually not until a late hour. It had also the effect of obstructing entirely the view of the goods on one side of the window.

On the part of the defendant it was objected, that the action for obstructing the air and light admitted through a window was not maintainable, unless the window was ancient; and with respect to the display of the goods, 9 Co. R. 58, was cited, where it was held that no action would lie for the obstruction of a prospect; and it was contended that the same principle applied to the grievance

here complained of.

ABBOTT, Ld. C. J., held that the action was maintainable against a person holding as tenant, for an obstruction to a window existing in the landlord's house at the time of the demise, although of recent construction, and that although there should be no stipulation at the time of the demise against the obstruction.

Verdict for the plaintiff.

Scarlett for the plaintiff.

Denman, C. S., and Chitty, for the defendant.

Vide Compton v. Richards, 1 Price, 27, where it was held that the occupier of one or two houses built nearly at the same time, and purchased of the same proprietor, may maintain a special action on the case for an obstruction to his window lights, caused by the defendant's adding to his own building, however short the period of previous enjoyment of the plaintiff. See also 2 Saun. 113 a, and Palmer v. Fletcher, 1 Lev. 123.

REX v. DEACON and Others.—p. 27.

A jury sworn on an indictment, clearly had in point of law, may be discharged by the judge from giving a verdict.

This was an indictment for a forcible entry. There was no averment that the entry was made "manu forti," and no conclusion "contra formam statuti." The prosecutor had no counsel, but appeared as a witness.

The jury having been sworn.

Chitty, for the defendants, after pointing out the invalidity of the indictment, for the reasons above stated, insisted that the prosecutor should proceed with his case, in order that the defendants, who intended to institute proceedings for a malicious prosecution, might have the benefit of an acquittal by a jury.

ABBOTT, Ld. C. J. The court has an undoubted authority to use a discretion as to the propriety of proceeding in the cases that may be brought forward for trial. I think it a fit exercise of that authority to discharge the jury from trying this indictment. It is unquestionably bad in point of law, and it would be therefore altogether useless to take the opinion of the jury upon the facts. The defendants ought either to have demurred, or to have moved to quash the indictment.

The jury were accordingly discharged.(a)

Chitty for the defendants.

⁽a) Judges have frequently refused to try frivolous and idle questions, in which the parties had no interest. Brown v. Leeson, 2 H. Bl. 43. Henkin v. Gerss, 2 Camp. 408. Ditchburn v. Goldsmith, 4 Camp. 153. Questions of an illegal or immoral tendency are within the same principle. Squires v. Whisken, 3 Camp. 141. In the case of Burn v. Taylor, Sittings at Westinister, 1823, which was an action brought to recover stakes deposited with the defendants, for the purpose of an intended prize-fight between the plaintiff and a third person, Abbott, Ld. C. J., refused to

allow the trial to proceed, and discharged the jury; observing, that it would be highly injurious to society, that a court of justice should countenance public exhibitions of such immoral and permicious tendency, by discussing contracts formed with a view to them.

SIMONS v. SMITH.—p. 29.

In an action against one of several partners, the defendant cannot, by a release, make his partner a competent witness for him.

ACTION for the non-performance of a contract to repair the plaintiff's gig. Scarlett, for the defendant, called a witness, who, on the voir dire, admitted that he and the defendant were in partnership as coachmakers. Scarlett proposed that the defendant should release him.

ABBOTT, Ld. C. J., refused to allow this, and said, that one partner could not release another for the purpose of making him a competent witness in a particular action.

Verdict for the plaintiff.

The Attorney-General and S. M. Phillips for the plaintiff.

Scarlett and D. Pollock for the defendant.

Vide Young v. Bairner, 1 Esp. 103. Cheyne v. Koops, 4 Esp. 112,

CLARKE and Another, Executors, &c., v. GANNON.—p. 31.

In an action by executors, a paid legatee is a competent witness to increase the estate.

Assumpsit to recover debt due to testators.

A witness was called by the plaintiffs, who, on the voire dire, appeared to be a legatee under the will, but his legacy had been paid him by the plaintiffs.

Scarlett contended that he was inadmissible, inasmuch as he would be obliged

to refund, in case the estate should turn out to be deficient.

ABBOTT, Ld. C. J. There is nothing to show that the other funds are not sufficient. This debt has not been paid; but I cannot assume that there is not other estate sufficient.

Verdict for the plaintiffs.

Denman, C. S., and Chitty, for the plaintiffs. Scarlett and Armstrong for the defendant.

WILLIAMS v. MUNDIE and Others.—p. 34.

[S. C. 12 E. C. L. R. 101.—1 Carr. & P. 158.]

The privilege of not being examined to such points as have been communicated to an attorney while engaged in his professional capacity, extends only to those communications which relate to a cause or suit, existing at the time of the communication, or then about to be communicated.(a)

Assumpsit for goods sold and delivered.

In order to prove that the defendants were partners at the time of the sale of tne goods, the plaintiff's counsel called the defendants' attorney, who stated,

(a) The same point was ruled by Abbott, Ld. C. J., in Wardsworth v. Hamshaw and Another, Sittings after Hilary Term, 1819, 2 Bro. & Bing. 5, n., and appears to have been the epinion of Lord Kenyon, in Cobden v. Kendrick, 4 T. R. 431, and Duffin v. Smith, Peake's N. P.

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that prior to the commencement of the present action, and to the period at which the goods were supposed to have been sold, he had been consulted by some of the defendants relative to a partnership then about to be entered into by them.

Scarlett objected to his disclosing what had been communicated to him in his professional character, contending that the privilege of not being examined to such points, extended to all communications made to him with reference to his

professional character, during the relation of attorney and client.

ABBOTT, Ld. C. J. I think this evidence admissible. The rule I have invariably laid down in cases of this kind is, that what is communicated for the purpose of bringing an action or suit, or relating to a cause or suit existing at the time of the communication, is confidential and privileged; but what an attorney learns otherwise than for the purpose of a cause or suit, I think he is bound to communicate. This rule was adopted by the court of King's Bench, on a motion for a new trial, in a case that had been tried on the Midland Circuit, in which Serjeant Adair was counsel. This is not the first time this question has arisen here, and it is one to which I have given much consideration. Having formed this opinion, I think it unnecessary that the question should be further discussed here. The defendants' counsel may tender a bill of exceptions, or I will in any other way assist him in raising the point for the opinion of the court from whence this record issues.

F. Pollock and Wilde for the plaintiff.

Scarlett and J. Purke for two of the defendants.

Alderson for the other defendant.

C. 108. But in Cromack v. Heathcote, 2 Bro. & Bing. 4, the Court held that the rule was not confined to attorneys employed in a cause.

See the cases on this subject collected in Phillips's Evidence, vol. i. p. 134, 6th edit., and the conclusion there adopted is, that this privilege is not confined to those cases only where he is employed in a suit or cause, but extends to all such communications as are made to him in his professional character, and with reference to professional business. See also the cases collected in the notes to Parkhurst v. Lowten, 2 Swanst. Rep. 199, 200.

BRUTT v. PICARD.—p. 37.

A bill having been dated by mistake 1822, instead of 1823, the agent of the drawer and accepter, to whom it had been given to be delivered to the endorsee, without their knowledge or consent, corrected the mistake: Held, that such alteration did not vacate the bill.

This was an action by the endorsee against the acceptor of a bill of exchange. The bill, after it was drawn and accepted, was given to a person of the name of Bennett, who was the agent both of the drawer and acceptor, to deliver to the endorsee. Bennett discovering that the date was January 1822, instead of January 1823, without again seeing the drawer or acceptor, and before he delivered the bill to the endorsee, altered the figure 2 into a 3.

Storks, for the defendant, contended, that this bill having been altered after it was drawn, and without the knowledge of either the drawer or acceptor, not only required a new stamp, but the alteration vacated the bill, the parties not con-

senting to it.

ABBOTT, Ld. C. J. I shall leave it to the jury to decide, whether this bill was not dated by mistake 1822. If they are of opinion that it was originally the intention of the parties to the bill that it should have been dated 1823, and that the figure 2 was inserted by mistake, I am of opinion that this alteration will not vacate the bill.

Description:

Denman, C. S., and E. Lawes, for the plaintiff. Storks for the defendant.

Kershaw v. Cox, 3 Esp. N. P. C. 246. See 10 East, 437. Jacobs v. Hart, 2 Starkie, 45. Downes v. Richardson, 5 B. & A. 674. Bayley on Bills, last edition, 89; and Cowie v. Halsell.

WARING v. HOGGART.—p. 39.

A lessee of lands subject to a covenant against certain obnoxious trades, with a proviso for reentry, grants under-leases of houses erected on the land, not containing a similar covenant and proviso: Held, that a purchaser by auction of houses on the same land, and of the improved ground-rents of the bouses so underlet, might recover back his deposit money, this omission in the under-leases not having been mentioned in the conditions of sale.

ACTION against an auctioneer to recover the deposit money on the purchase of some ground-rents and leasehold property.

The sale was under an order of the Vice Chancellor.

The estate upon which houses had been erected, and out of which the groundrents issued, belonged to a person of the name of Brandon, who had demised the land for a term of years with proviso for re-entry on breach of a covenant in the lease, that the lessee and his assigns should not use or exercise certain obnoxious trades (therein enumerated) on the premises.

The original lessee had erected houses upon the land, but the under-leases which he had granted of these houses contained no covenant against the obnoxious trades provided against by the original lease. The improved ground-rents issuing out of the houses so underlet, and leases of other houses already erected, having been put to auction by the assignee of the original lessee, the plaintiff became the purchaser of the ground-rents and of two of the houses. The conditions of sale stated the covenant in the original lease against the obnoxious trades, and that such covenant, together with the usual covenants, would be inserted in the under-leases to be granted to the purchasers. No mention was made as to whether these covenants were contained in the under-leases already granted of the houses.

Scarlett, for the plaintiff, contended that the purchaser was entitled to recover back his deposit money, the title proving defective from this covenant not having been inserted in the under-leases, as the under-lessee might by his acts cause the forfeiture of the original lease, and leave the purchaser without any remedy. The conclusion which would generally be drawn from these conditions of sale would be, that the under-leases contained covenants against the obnoxious trades similar to that in the original lease, which turns out not to be the case.

ABBOTT, Ld. C. J. I am of opinion that it is the duty of every person truly and honestly to represent that which he is to sell. A careful man and a lawyer looking at these conditions of sale might ask, what were the terms of the leases which had been granted? The purchaser is informed by the statement in the conditions, that the original lessee is restrained from carrying on these obnoxious trades, and that in the leases to be granted to him a similar covenant is to be entered into; none but a very careful person would suppose that it could be doubtful whether the person to whom under-leases had already been granted, were bound in the same manner. I am, therefore, clearly of opinion that the plaintiff cannot be bound to take this title. Verdict for the plaintiff.

Scarlett and Hutchinson for the plaintiff.

Marryatt for the defendant.

MARSHALL v. GRIFFIN .-- p. 41.

Where the four first counts of a declaration were on bills of exchange, and there was a demurrer and joinder to the two first, and general issue to the rest, and unica taxatio, &c. Held, that the plaintiff having proved only two bills, was not obliged to place these to the counts demurred to, but was entitled to nominal damages on those counts, and to the amount of the bills on the rest of the declaration.

JENNINGS v. GRIFFITHS.—p. 42.

The registered owner of a ship is not liable for repairs, unless actually done upon his credit. Legal ownership is prima facie evidence of liability, which may be rebutted by proof of the beneficial interest having been parted with, and the legal owners having ceased to interfere with the management of the ship.

Action for repairs done by the plaintiff, a shipwright, on the brig Favorite. The repairs were done in June 1828, by the orders of Pellatt, the commander. The registry made in 1808, at Beaumaris in Wales, and the affidavit of the defendant, stating himself and another to be joint owners, were proved. The defendant acted as owner and commander till 1821, when he transferred the ship by bill of sale to his son John Griffiths, who became commander, and acted as such till May 1823; J. Griffiths then conveyed the ship to Kenning, who appointed Pellatt commander. No new registry was made of these transfers, but they were endorsed on the certificate of registry kept on board. It was attempted by Scarlett for the plaintiff, to show that the conveyance from the defendant to J. Griffiths, was not an absolute one of the defendant's whole in terest, but that he still continued beneficially interested in the ship. The case of Dowson v. Longford, tried before his lordship at Guildhall, in the year 1822, was mentioned.

ABBOTT, Ld. C. J., in summing up to the jury observed: The difficulty which exists in this case arises out of certain acts of parliament relating to the transfer Particular forms and regulations have been rendered necessary by those statutes, and they have even gone so far as to say that there can be no legal ownership in any person who has neglected to comply with the forms prescribed; one of these is, that the ownership must be registered at the proper The object of the legislature in passing those statutes, was clearly one of general policy: namely, to prevent foreigners from participating in the advantages which it was intended to give to British shipping only; and the use of the registry is, to enable the government officers to ascertain, at all times, that the real owners are British subjects. Soon after the passing of those acts, the leaning of courts of law in the construction of them, was, to say that the registered owners of ships should at all events be liable for the repairs. But the subject having become more accurately understood, a better and more correct principle now prevails; and the recent cases have decided that the true question in matters of this description is, "upon whose credit was the work done?" That question would, in most cases, be decided by the fact of legal ownership, the repairs being generally done for the legal owner. But it may so happen that the name of a person may be retained on the registry, after he has ceased to be beneficially interested in the ship, or to interfere with its concerns. The question was so left to the jury in the case referred to by the learned counsel for the plaintiff, and I do not consider that anything I am now saying can at all impeach the correctness of the decision of that case, the circumstances of which I well recollect. There the registered owner had parted with his interest in the ship, but with a stipulation that he should retain possession of the bill of sale, and receive part of the profits, until the bills, in consideration of which the transfer was made, should be paid. He had himself been in the habit of employing the tradesmen about the ship, and had given no notification to them that his interest in the vessel had ceased. And the jury very properly said, that the work had been done on his credit. But in the case before you, it does not appear that the defendant had the slightest knowledge of the work being done, nor that the plaintiff had any reason to suppose him connected with the vessel; and if he had consulted the register, he would have found another person to have been in joint ownership with him. The repairs were not even ordered by the son, but by the direction of a captain appointed by a stranger to the defendant, and that too whilst he was residing in a distant part of the kingdom. The question for you to consider is,

"Were or were not these repairs done upon the credit of the defendant?" The plaintiff's counsel then chose to be nonsuited.

Scarlett and Holt for the plaintiff.

Marryatt and R. V. Richards for the defendant.

Vide Abbott on Shipping, 21; Rich v. Roe, Cowp. 636; Young v. Brander, 8 East, 10; Trewhella v. Roe, 11 East, 435; Frazer v. Marsh, 13 East, 238; Frazer v. Marsh, 2 Camp. 518; Annett v. Carstairs, 3 Camp. 354; Holt on Shipping, 352.

BRANT v. ROBINSON.—p. 48.

In an action of deseit, an insolvent to whom the plaintiff has furnished goods on the representation of the defendant, is a competent witness to prove that the defendant represented him as a person fit to be trusted.

This was an action of deceit.

In order to show the insolvency of a person of the name of Gillingham, at the time the defendant had represented to the plaintiff that he was a person fit to be trusted, the wife of Gillingham was called.

Scarlett, for the defendant, objected to her competency, on the ground that if the plaintiff recovered in the present action, it would discharge the witness's husband from all liability for the goods which he had purchased of the plaintiff, as a debt could not be paid twice over.

The Attorney-General for the plaintiff contended, that this being an action to recover damages for a tort, could not, in any way, be a bar to another action by the present plaintiff for the breach of this contract with him, and cited Smith v. Harris, 2 Starkie, 47.

ABBOTT, Ld. C. J. Upon the authority of the case in Starkie, I shall admit the evidence. Verdict for the plaintiff, damages 3751.

The Attorney-General and Campbell for the plaintiff. Scarlett, Gurney, and F. Pollock, for the defendant.

FULLER and Others v. SMITH and Others.—p. 49.

[S. C. 12 E. C. L. R. 121.—1 Carr. & P. 197.]

The plaintiffs, bankers, discounted for the defendants, bill brokers, a bill of exchange which the latter did not endorse. The signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged: Held, that the defendants were liable to refund the money, and that the fact of their having paid over the amount to the endorsee for whom they were brokers, would not relieve them from their liability.(a)

(a) In the case of Jones v. Ryde, 5 Taunt. 488, it was decided that a person who discounts a forged Navy Bill for one who has no knowledge of the forgery, may recover back the money, as had and received to his use, upon failure of the consideration. And the principle is there laid down by Gibbs, C. J., that the negotiator of a bill, by declining to endorse it, is not relieved from that responsibility which attaches on him for putting off an instrument as of a certain description, which turns out not to be such as he represents it. In the subsequent case of Smith v. Mercer, 6 Taunt. 76, it was held, (Chambre, J., dissentiente) that bankers who paid a forged acceptance of one of their customers, made payable at their house, could not recover the money from the bona fide holders of the bill, to whom the payment was made, on the principle that it was the duty of the bankers to have ascertained the authenticity of the order before they obeyed it; and because by taking up the bill they had deprived the holders of the remedy which they might have had against some prior parties on the bill. Vide also Price v. Neale, 3 Burr. 1354. I Bla. 390.

In the principal case it would seem, that the fact of the defendant's having paid over the money to Simpson, would, if proved, have made no difference, inasmuch as the payment them must have been made on the oredit of their possession, and negotiation of the bill. And the case is distinguished from that of Smith v. Mercer, by the circumstance of the plaintiffs' having paid the money on their own account, and not in obedience to the forged acceptance of their castomer.

CAMBRIDGE v. ANDERSON.—p. 60.

Where a vessel has been driven on shore, and so damaged as to be unfit to proceed on her voyage without incurring an expense in repairs equal to her value: Held, that the insured may recover for a total loss, although no notice of abandonment had been given to the underwriters.

ACTION on a policy of insurance upon a ship called "The Commerce."

This vessel, of which the plaintiff was the owner, sailed on the 8th of July, 1823, from Quebec on her voyage to Bristol: having proceeded a considerable distance from Quebec down the river St. Lawrence, she stranded on a shoal, and, in consequence of a heavy sea, was rendered totally unfit to proceed on her voyage. The captain, who was ignorant that his owners had insured, consulted with an agent of Lloyd's as to the course he should adopt, who advised a survey to be made. The surveyors, after having examined the ship, gave it as their opinion that she could not be repaired under a sum which would exceed the prime cost of the vessel. Upon receiving this estimate, the captain having floated the vessel back to Quebec sold her, with her register; no notice of abandonment had been given to the underwriters. This action was brought to recover for a total loss, with benefit of salvage to the underwriter.

The Attorney-General contended that the plaintiff could only recover for an average loss; that the ship having remained in specie as a ship after the accident had happened, was capable of being repaired so as ultimately to have proceeded on her voyage, and if so, it was the captain's duty to have her completely repaired. It cannot be considered as a total loss, unless she is incapable of

repair.

ABBOTT, Ld. C. J. This is a question of considerable importance to ship owners. If the jury are of opinion that this vessel could not be repaired at all, or that she could not be repaired without incurring an expense equal to or greater than her value, then I shall hold, that although she may exist in the form of a vessel, and be afterwards sold with her register, that the plaintiff will be entitled to recover as for a total loss with benefit of salvage to the underwriters; but if the vessel might have been repaired at something less than her total value, then I think the plaintiff can only recover for an average loss.

Verdict for the plaintiff.(a)

Scarlett, Marryatt, and Platt, for the plaintiff. The Attorney-General and F. Pollock, for the defendant.

In the following term the Attorney-General moved for a new trial on two grounds:—First, That the plaintiff was only entitled to recover for an average and not a total loss, as the vessel might have been repaired so as ultimately to have proceeded on her voyage. Secondly, That the plaintiff had neglected to give a notice of abandonment to the underwriters.

The Court refused the rule.

⁽a) See Hodgson v. Blakeston, Marshall on Insurance, p. 611; Martin v. Crockatt, 14 Est, 465; Alwood v. Henckell, Park's Insurance, 280; Reid v. Darby, 10 East, 143; Bell c. Rizos, Holt's N. P. C. 423; Idle v. Royal Exchange Assurance, 8 Taunt. 755, S. C. 3 B. Moore Rep. 115; Read v. Bonham, 3 Bro. & B. 147; Robertson v. Clarke, 1 Bing. 445.

SITTINGS AFTER HILARY TERM, IN C. P.

5 Gro. IV.—1824.

RICHARDSON v. MELLISH.—p. 66.

A copy of an official paper containing the number of passengers on board a vessel made in pursuance of an act of parliament, by an officer of the customs, is admissible evidence to show the number and description of persons that were on board the vessel.

GIBSON v. MINET and Others.-p. 68.

A. gives B. an order on his bankers, directing them "to hold over from his private account 400". to the disposal of B." The bankers accept the order. Held, that such order was revocable, and might be countermanded before payment made to B., or appropriation to his credit.

Money had and received.

The plaintiff kept an account with the defendants, who were bankers in London, and on the 8th of July, 1822, there being at that time a balance of 5421. in his favour, delivered to J. Mintern, a partner in the house of J. Mintern and Co., a letter directed to the defendants, of which the following is a copy: "Gentlemen.

"I request you to hold over 400% from my private account, to the disposal of J. Mintern and Co. "Wm. Gibson."

Upon this letter being delivered to the defendants, about the 13th of July, by J. Mintern, one of the defendants wrote in pencil, on the debit side of the plaintiff's account,

"N. B. By Mr. Gibson's letter of the 8th of July, 1822, 4001. is to be held

at the disposal of Messrs. J. Mintern and Co."

On the 14th of September, 1822, the defendants sent the plaintiff his account, giving him credit for 542l.; at the same time acknowledging the receipt of the order in favour of Mintern and Co., but without debiting the plaintiff for the amount. The plaintiff having ascertained that the money was not paid out, wrote to the defendants countermanding the order, and stated that it had been given for a particular purpose, which had been satisfied. The defendants thereupon wrote to Mintern and Co., requesting their direction, who ordered them to place the 400l. to their credit, at the same time saying that "they should before that time have directed the above sum to be placed to their credit, but that they were willing the plaintiff should reap the benefit of the interest." The defendants then made the following entry in their books:

"Wm. Gibson Dr. to J. Mintern and Co.
"For transferred, per order, in an old letter of the former, dated 8th of July

last, now first desired to be acted upon by the latter. £400." and in their ledger debited the plaintiff to that amount. The defendants then informed the plaintiff that they had transferred the money to Mintern and Co. These facts were proved by admissions. On the part of the defendants one witness stated, that upon J. Mintern's delivering the order to Stride, one of the defendants, he was asked whether he would have the money then, to which he answered "No; that he wished it to be held at their disposal," and Stride

Lord GIFFORD left it to the jury to say, whether it was meant by the parties that the order should be conditional or absolute. If it was an absolute order, and accepted as such by the defendants, the plaintiff had no right to revoke it.

If, on the other hand, it was executory, and they thought that it had not been acted on, the plaintiff had a right to revoke, and his countermand was in time

Verdict for the plaintiff.

Vaughan, Serjt., and Campbell, for the plaintiff. Pell, Serjt., and F. Pollock, for the defendant.

In the following term *Pell*, Serjeant, moved for a rule to show cause why the verdict should not be set aside and a new trial granted, and cited Lord Ellenborough's judgment in Williams v. Everett, 14 East, 597.

The Court refused the rule, and, on giving judgment,

BEST, Ld. C. J., said, I perfectly accede to the case cited, but I see no pretence for disturbing this verdict. If the money had been actually transferred to the account and credit of Mintern and Co., the order would not have been revocable. But here there is no appropriation whatever. It was left at the disposal of Mintern and Co., and it has not been so disposed of. They have not dealt with the money until after the revocation. If any part of the money had been advanced, up to that advance the plaintiff would have been answerable, but no further. The account given by the witness is inconsistent with the letters.

An order on a wharfinger "to weigh and deliver goods" has been held to be revocable: Vide supra, p. 692, 693, 694, n., and cases there cited. In the case of Lyte v. Peny, Dyer, 49 a, it was held, that if a man bail money to another, to the use of a third, and to be delivered on the day of marriage, he may countermand it at any time before delivery over. And a case is there cited, in which it was ruled, that if A., being in debt to B., gives C. money to pay it, he might constermand the payment any time before actual payment. See also Taylor v. Lendey, 9 Rast, 49.

ARBOUIN and Another, Assignees of PEYTON a Bankrupt, v. WIL-LIAMS and Others.—p. 72.

A trader having goods lying in wharf, deposits blank delivery notes with a creditor to cover advances made, and becomes insolvent. The creditor, upon notice of the insolvency, fills up the blanks with his own name, and takes possession of the goods on the day before the trader commits an act of bankruptcy. In trover by the assignees against the creditor: held, that the goods so taken possession of were not within the 21 J. 1, c. 19, s. 11. Held also, that goods lying in the bankrupt's name on any part of the day of the bankruptcy were within the statute.

Held also, that goods of the bankrupt lying in wharf in the names of his agents, and for which he had given delivery orders in his own name, were not within the statute, there being no

reputed ownership.

ROBERTSON v. MONEY.—p. 75.

In an action on a policy of insurance on a voyage "at or from the port or ports of discharge and loading in India, and the East India islands," evidence admitted to prove that the Mauritius is considered in mercantile contracts as an East India island, although treated by geographers as an African island.

This was an action on a policy of insurance on the freight of the ship Neptune, "at and from the termination of her outward voyage, at New South Wales, and Van Dieman's Land, to her port or ports of discharge and loading in India and the East India Islands, during her stay and loading there, and from thence to her port or ports of discharge in Europe."

The loss claimed was upon the freight of a cargo loaded at the Mauritius; and in order to show that the Mauritius was an East India island, within the meaning of the policy, it was proposed on the part of the plaintiff to give in evidence the opinion of merchants and others, as to the Mauritius being generally so considered

in mercantile contracts, and in insurances. The case of Uhde v. Walters, 3 Camp. 16, was relied on.

This was objected to, on the ground that it ought not to be permitted, to give evidence of a usage by any class of men, to employ a term in a sense different from its ordinary and proper acceptation. India and the East India islands, it was contended, are terms of known and settled import, and although it might be admissible to show that the Mauritius was in India, or was an East India island, it does not follow that the evidence is admissible to show that these terms are used by merchants in a sense different from that in which they are usually understood.

Lord GIFFORD said, that upon the authority of the case cited, he thought the evidence admissible.

Several eminent East India merchants, and others conversant with underwriting, were then called, who stated that the Mauritius was considered amongst merchants an East India island, and that losses were usually paid on that principle.

On the part of the defendant, it was proved to be, geographically, an African island, and so reputed amongst geographers, and amongst the inhabitants of the island, and that it was totally unconnected with the East India Company's

government.

Lord GIFFORD left it to the jury, upon the whole evidence, to say whether the

Mauritius was an East India island within the meaning of the policy.

Verdict for the plaintiff.

Pell, Serjt., Campbell, and Wilde, for the plaintiff.

Vaughan and Taddy, Serjts., and Maule, for the defendant.

Vide Robertson v. Clarke, 1 Bing. 446.

EDMONDS, Administrator, &c., v. ROWE.—p. 77.

A witness who declines swearing on the New Testament although he professes Christianity, may be allowed to swear on the Old Testament, if he considers that mode binding on his conscience.

In this case a witness was called, who, on the book being put into his hand to be sworn, refused to swear on the New Testament. He stated himself to be a Christian, and a member of the society of methodists, and that he believed both the Old and New Testament to be the word of God; but as the New Testament prohibited swearing, and the Old countenanced it, he wished to be sworn on the Old, or any part of it not apocryphal, and such oath he should consider binding on his conscience.

Pell, Serjt., objected to his swearing otherwise than on the New Testament,

the truth of which he professed to believe.

Bosanquet, Serjt., said, that as the witness had scruples in swearing in that form, he ought to be allowed to use that mode which he considered binding on his conscience.

He was accordingly sworn on the Old Testament.

Adam and Carter for the plaintiff.

Pell, Serjt., and Wilde, for the defendant.

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BRISTOL GAOL DELIVERY.

Coram LORD GIFFORD, Recorder.

REX v. GEORGE HAMILTON .- p. 78.

A prisoner upon being arraigned stated that he was deaf, and when the indictment was read over to him, apparently did not hear; the judge directed a jury to be empanelled to try whether he stood mute by the act of God, or out of malice.

THE prisoner was indicted on 43 G. 3, c. 58, for maliciously cutting the prosecutor with a knife.

When called upon to plead on his arraignment, he said that he was quite deaf, but that he could read print or large writing. And officer was then directed to read over the indictment close to him with a loud voice, but the prisoner did not appear to hear; and on his not answering, a jury was sworn to try whether he stood mute by the act of God, or out of malice. (a)

The gaoler was then examined, who said, that the prisoner had always appeared quite deaf during the several months that he had been in his custody,

and that his fellow prisoners conversed with him by signs.

Lord GIFFORD, Recorder, in charging the jury, said, that he had adopted this mode of proceeding after great deliberation upon the authority of two cases (Rex v. Jones and Rex v. Steele, Leach, 451, Idem, 452, n. 6), which occurred many years ago at the Old Bailey, and which, in his opinion, governed the present case in principle, though they differed from it in several respects.

The jury found that the prisoner was mute by the act of God, and they were

then sworn to try him upon the indictment.

The evidence of each witness was taken down in a large hand, and shown to the prisoner before the witness retired. The prisoner read it, and asked some questions about words in the writing which he could not make out; but did not cross-examine the witnesses.

The jury acquitted him.

(a) Vide the form of the oath, C. C. Comp., p. 542, 9th edit.

SITTINGS IN AND AFTER EASTER TERM, IN C. P.

5 GEO. IV.—1824.

EVANS v. SWETT.—p. 83.

In an action of trespass, notice having been given to the defendant to produce a written paper which had been delivered to A. B., under whom defendant justified, and under whose directions he acted: Held, that the plaintiff was not entitled to give secondary evidence of the contents.

TRESPASS. Assault, battery, and false imprisonment, stated to have been committed in concert and contrivance with Timothy Young. Not guilty, and a justification that Timothy Young was bail for the plaintiff in a certain action and that Young and the defendant in his aid took the plaintiff and imprisoned him, in order to his surrender as by law, &c.

Replication, that the bail bond was taken fraudulently, and issue thereon.

The defendant was keeper of a lock-up house, to which Young, who had taken
the plaintiff in order to his surrender, brought him; and Young and the de-

fendant kept him there imprisoned. The defendant acted under the directions of Young, and refused to take any step in the transaction without his orders.

It was proved that a written paper had been delivered to Young, in the defendant's house, by the plaintiff's attorney, whilst the plaintiff was in the defendant's custody, and whilst a negotiation for his release was going on, but it was not traced further.

A notice to produce had been served on the defendant, and upon refusal by the defendant's counsel to produce.

Cross, Serjt., proposed to give in evidence a copy of the paper, which was

objected to.

BEST, C. J. I think you have not done enough to justify giving secondary evidence of this paper. If you had left it with a servant of the defendant's, at his dwelling-house, it might have done; but you merely trace it into the hands of a person acting in an independent character.

Nonsuit.

Cross, Serjt., and Thesiger, for the plaintiff.

Pell and Wilde, Serits., and Wightman, for the defendant.

See Baldney v. Ritchie, 1 Starkie, 338.

SPOONER v. GARDINER .-- p. 84.

Where the drawer of a bill of exchange had no effects in the hands of the acceptor from the time of drawing the bill, till it became due, but the acceptor had received from the drawer, prior to this bill on which the action was brought, acceptances of the drawer, upon which had raised money, some of which acceptances had been returned dishonoured, and others were outstanding: Held, that the drawer was entitled to notice of dishonour of the bill.

When notice of intention to dispute the consideration of a bill or notice has been given, and the

When notice of intention to dispute the consideration of a bill or notice has been given, and the plaintiff s witnesses have been cross-examined to that point, the plaintiff must give such evidence as he has to offer in proof of the consideration in the first instance, and will not be

allowed to do so in reply.

Action by endorsee against drawer of a bill of exchange.

No notice of the dishonour of the bill by the acceptor had been given to the defendant.

The acceptor, Lord Oxford, had been introduced to the defendant for the purpose of borrowing money, and had received his acceptances to a large amount. Some of these Lord Oxford had negotiated, and had been obliged to take up on their becoming due. At the time the bill in question was accepted, two of the defendant's acceptances, to a much larger amount than the bill in question, which Lord Oxford had negotiated and raised money upon, were outstanding, but no money passed in consideration of his acceptance of the bill in question.

It was insisted by the counsel for the plaintiff, that the acceptances having been given for the accommodation of the drawer, no notice of the dishonour

was necessary.

BEST, C. J. I am strongly of opinion, that this is not a case in which the plaintiff is relieved from the necessity of proving a notice of the dishonour. The principle upon which notice is dispensed with is, that a fraud has been committed in drawing on a person with whom the drawer had no effects; and on whom he had no right to draw. That is not so here. The defendant was at the time liable on acceptances given to Lord Oxford, and on which the latter had raised money, and he had a right to draw on him to a greater extent than this bill. I have looked into the case of Clegg v. Cotton, 3 B. & P. 239, (a) and the principle is so stated in that case. I have a clear opinion on this subject, but I will allow the cause to proceed, and give the defendant leave to move to enter a nonsuit.

In this case notice had been given by the defendant, that the consideration

(a) See the cases on this subject in Bayley on Bills, 5th edit. 234.

of the bill would be disputed. Evidence was given by the defendants to show that the plaintiff was not a bona fide holder of the bill; and upon the plaintiff's counsel proceeding to call witnesses in support of the plaintiff's title,

BEST, C. J., said, I wish it to be understood, as the rule I shall always act upon in future, that where notice has been given of intention to dispute the consideration of a bill or note, and the plaintiff's counsel is apprised by the cross-examination that the consideration is disputed, he must give his evidence in support of the bill in the first instance. It is by far the most convenient mode, that when the consideration is to be gone into, it should be done at first; and I will not after this allow such evidence to be given in reply.

Verdict for the defendant (a)

Laws, Serjt., for the plaintiff. Vaughan, Serjt., and Dowling, for the defendant.

(a) In Delauney v. Mitchell, 1 Starkie, 439, Lord ELLEBBOROUGH ruled, that after notice had been given that want of consideration would be insisted on as a ground of defence, it was not competent to the plaintiff to give evidence of the consideration in reply to the defendant's case. But the rule acted upon by the present Lord Chief Justice of the King's Bench, is said to be, that unless suspicion is raised on the plaintiff's case, he may be permitted to give such evidence in reply, even after notice. See Phillips on Evidence, 6th edit. vol. ii. p. 17; Chitty on Bills, 6th edit. p. 401.

DOE ex d. SCALES v. BRAGG.—p. 87.

A witness on the voir dire stated that the lessor of the plaintiff had formerly assigned to him the premises in question for a temporary purpose, that he had given up the deed to lessor of the plaintiff, and had never had any possession of the premises: Held, that the witness was incompetent by reason of interest.

This was an ejectment.

On the part of the plaintiff a witness was called, who, on his examination on the voir dire, stated, that the lessor of the plaintiff had, about twenty-four years ago, assigned the premises to him, for the purpose of protecting him against being pressed as a sailor; that he had kept the deed for several years, as long as it was wanted for the protection, and then gave it back to the lessor of the plaintiff; and that he had never seen the deed since; that he did not believe that he had now any beneficial interest in the premises, or that he had ever had.

It was objected and argued by the counsel for defendant, that the witness had a direct interest in supporting the plaintiff's action, because if the plaintiff were in possession of the premises, the witness would have a perfect title against the plaintiff, who would be estopped from denying the right conveyed by his own deed; and this right had never been reconveyed to the plaintiff.

BEST, C. J. I think this witness has such an interest as renders him incompetent, and that for the reason given. The recovery of the plaintiff in this action would perfect that title, which he has conveyed to the witness, and which, in an ejectment brought against him, this plaintiff would be estopped from denying. The witness is mistaken in imagining he has no interest. He has an interest, though he believes otherwise, and that renders him incompetent.

The cause was referred.

Pell, Serjt., and Erskine, for the plaintiff. Vaughan and Wilde, Serjts., for the defendant.

HARRINGTON v. FRY .- p. 90.

A witness who had never seen the defendant, but had corresponded with a person of the defendant's name, living at Plymouth Dock, where the defendant resided, and where, according to other evidence, there was no other person of that name, stated that the handwriting of certain letters was that of the person with whom he had corresponded. Held, that this evidence was sufficient to admit the letters to be read against the defendant.

THIS was an action for goods, supplied for the use of the ship Elizabeth.

It was proposed to give in evidence certain letters as of the handwriting of the defendant. The witness who proved the handwriting, stated that he had never seen the defendant, but had corresponded with a Samuel Fry, of Plymouth Dock; that he had so addressed his letters, and had received answers from him; that it was from these letters that he derived his knowledge of the handwriting. Another witness stated that the defendant, Samuel Fry, ship owner, lived at Plymouth Dock, and that there was no other person of that name living at Plymouth Dock within his knowledge.

It was objected by the counsel for the defendant, that there being no proof of the defendant having recognised the letters from which the witness drew his knowledge of the defendant's handwriting, the letters could not be read, inasmuch as there might be another person than the defendant of that name living at Plymouth Dock; and that notice should have been given to the defendant to produce the letters directed to Samuel Fry of which the witness spoke, before

It could be assumed that the answers were his handwriting.

BEST, C. J. I am of opinion that enough has been shown to make these letters admissible before the jury as of the handwriting of the defendant. The knowledge which the witness has of the defendant's handwriting, is drawn from a correspondence with a person of the defendant's name at Plymouth Dock; and it is shown by a person having competent knowledge on the subject, that there is no other person of that name living there. This is, at least, evidence for the jury to consider whether the letters alluded to by the witness were not written by the defendant. What was the subject of that correspondence is perfectly immaterial, and no notice to produce is necessary, the letters being used by the witness to form his opinion of Samuel Fry's handwriting, and for no other purpose.

Vaughan, Serjt., and E. Lawes, for the plaintiff. Pell and Wylde, Serjts., and Bayley, for the defendant.

Nonsuit, with leave given to the plaintiff to move to enter a verdict for a certain sum.

Upon motion made by Vaughan, Serjt., in the following term, to set aside the nonsuit, the Chief Justice inquired of Pell, Serjt., whether, in case the rule were granted, any objection would be made to the reception of the letters; when the learned Serjeant said he should certainly waive any further objection on that head.

SITTINGS IN AND AFTER EASTER TERM, IN K. B. 5 GEO. IV.—1824.

BAKER, Assignee of the Sheriff of Middlescx, v. NEWBEGIN.-p. 93.

In an action on a bail-bond. The condition set out in the record was "to answer the said plaintiff in a plea of trespass, and also to a plea to be exhibited against said defendant for 60L upon promises." The bond, when produced, did not contain the words "upon promises." variance held fatal.

This was an action on a bail-bond. Plea: non est factum.

The condition of the bond as stated in the record was "that if the said defendant, William Newbegin, should appear before our said lord the king at Westminster, on Friday, next after fifteen days of St. Martin, to answer said plaintiff in a plea of trespass, and also to a bill of said plaintiff, to be exhibited against said defendant, William Newbegin, for 60l. upon promises, according to the custom of the Court of our said lord the king, &c., then the said obligation should be void," &c.

Upon the bond being produced, and read in evidence, it appeared that the condition was in all respects the same as that set out in the record, except that

it did not contain the words "upon promises."

ABBOTT, Ld. C. J., was of opinion that this was a fatal variance.

Nonsuit.

J. Lockhart, for the plaintiff. The cause was undefended.

PAIN and Another v. WHITTAKER and Another, Sheriff of Middlesex.—p. 99.

Where goods lent on hire have been wrongfully taken in execution by the sheriff: Held, that the owner cannot maintain trover against the sheriff, he not having the right of possession as well as the right of property at the time of the sale.

Trover for a pianoforte.

A person of the name of Evans, on the 2d of February, 1824, hired of the plaintiffs, who were instrument makers, the pianoforte, for which this action was brought, at a guinea and a half per month. On the 13th of February the piano was seized by the defendants as sheriff of Middlesex, under a writ of fi. fa., at the suit of one Pike. On the 26th the plaintiffs demanded the piano of the sheriff, who was then in possession, and gave him notice not to sell, as being their property. On the 27th the defendants sold the piano.

Talfourd, for the defendants, contended, that this action could not be sustained; that, at the time of the sale, the plaintiffs had neither the possession or right of possession, the month for which the piano had been hired not having expired, and cited Gordon v. Harper, 7 T. R. 9, as an authority directly in point

Scarlett and Comyn relied on the cases of Wooderman v. Baldock, 8 Taunt. 676, and Lœschman v. Machin, 2 Stark. 311, and stated, that the case of Gordon v. Harper had been overruled at Nisi Prius.

ABBOTT, Ld. C. J. I am not aware that the case of Gordon v. Harper has been overruled; it is cited in the last edition of Selwyn's Nisi Prius, without any notice that it has been overruled. I think myself bound by that case; the principle on which it proceeds is, that the plaintiff has neither the possession or right of possession of the goods at the time they are taken, and therefore the allegation,

that "he was lawfully possessed," is not supported by the evidence. That is so here, and therefore I am of opinion that the plaintiff cannot sustain this action.

Nonsuit.(a)

Scarlett and Comyn for the plaintiffs. Talfourd for the defendant.

(a) Vide Parry v. Frame, 2 B. & P. 451, and Smith v. Plomer, 15 East, 607:

REX v. POWELL.-p. 101.

In an indictment for perjury in an answer to a bill in Chancery, the bill was described as exhibited against three persons only, A., B., and C. The bill, upon being produced, was against four, A., B., C., and D.: Held, that this was no variance.

Indictment for perjury, in an answer to a bill in Chancery.

The indictment described the bill as exhibited against three persons only, vis. A., B., and C.; the bill, upon being produced, appeared to be against four, vis. A., B., C., and D.

The Attorney-General submitted that this was a fatal variance, and that it

could not be considered as the same bill.

The counsel for the prosecution relied on Rex v. Benson, 2 Campb. 508.

ABBOTT, Ld. C. J. I think this is not a valid objection, and that the bill produced must be considered as the same described in the indictment. If the indictment had professed to set forth the title of the bill, such a variance as this would have been fatal; but the bill is substantially described, and that is sufficient.

Guilty.(a)

Scarlett, Gurney, and Broderick, for the prosecution. The Attorney-General and Tindal for the defendant.

(a) See also the cases of Rex v. Roper, 1 Starkie, 518, and Mountstephen v. Brooke, 1 B. & A. 224.

SITTINGS IN AND AFTER TRINITY TERM, IN K. B.

5 GEO. IV.—1824.

FRANCIS v. WILSON.-p. 105.

In debt on bond in the penalty of 120% conditioned for the repayment of the same sum with lawful interest: Held, that interest was recoverable beyond the penalty, to the amount of the damages laid in the declaration.

DEBT on bond.

This action was brought upon a bond in the penal sum of 120% conditioned for the repayment of the sum of 120% with lawful interest.

The damages stated in the declaration were 10l.

It appeared that the interest upon the 1201. amounted to the sum of 171.

Andrews for the plaintiff, contended, that in this case he was entitled to interest up to the extent of the damages laid in the declaration.

LITTLEDALE, J. In this bond the penalty and the debt are each for the sum of 1207.; but it is expressly provided by the bond, that it shall carry interest. Under these circumstances, therefore, I am of opinion that the plaintiff is entitled to recover interest as far as the amount of damages laid in the declaration.

This debt carrying interest, the jury are at liberty to give interest by way of damages for the detention of the debt. Verdict for the plaintiff.(a)

Andrews for the plaintiff.

Reader for the defendant.

(a) Lord Lonsdale v. Church, 2 T. R. 388; Wilde v. Clarkson, 6 T. R. 303; M'Clure v. Dankin, 1 East, 436; Hilbouse s. Davis, 1 M. & S. 169.

R. W. WEBB, by R. W. his Prochein Amy, v. SMITH.—p. 106.

The declarations of prochein amy made before action brought, are not admissible for the defendant.

Assumpsit for work and labour by an infant, who sued by his father as prochein amy.

In the course of the cause, the declarations of the father made before action brought, were given in evidence by the defendant, and cross-examined to by the counsel for the plaintiff.

During the summing up, an objection was made by Scarlett for the plaintiff,

to the admissibility of such evidence. And

LITTLEDALE, J., said, that he was clearly of the opinion, that the declarations, if objected to in time, might have been rejected; but inasmuch as the counsel for the plaintiff had not objected, but had taken the chance of the evidence turning out to his advantage, it was then too late to exclude it.

Verdict for the plaintiff.

Scarlett and Talfourd for the plaintiff. Gurney and Denman, C. S., for the defendant.

Vide Eggleston v. Speke, 3 Mod. 258; Hopkins v. Neal, 2 Str. 1026; Dennison v. Spurling, 1 Str. 506; Cowling v. Ely, 2 Starkie, N. P. C. 366; Starkie on Evidence, 2 v. 49.

BENTALL and Others, Assignees of BAKER and Others, v. BURN.—p. 107.

A delivery order for wine lying in the London Docks, given by the vendor to the vendes, held not to be a sufficient acceptance of the wine to take the case out of the statute of frauds.

REX v. DUNSTON .- p. 109.

In an answer in chancery to a bill filed against the defendant, for the specific performance of an agreement relating to the purchase of land: The defendant had relied on the statute of frauds (the agreement not being in writing), and had also denied having entered into any such agreement. Upon this denial in his answer the defendant was indicted for perjury. Held, that the denial of an agreement which by the statute of frauds was not binding on the parties was immaterial and irrelevant, and that the defendant was entitled to his acquittal.

COOKE v. HUGHES .- p. 112.

In an action for a libel, the defendant has a right to have the whole of the publication read from which the passages charged are extracts.

CASE for a libel.

The libel for which this action was brought was contained in a pamphlet, entitled "The Stafford Peerage, or the Impostor unmasked;" and the first count of the declaration stated, that the defendant published a false and scandalous libel of and concerning the plaintiff, in a certain pamphlet entitled as above, containing in divers parts thereof, amongst other things, the false, scandalous, defamatory, and libellous matters following of and concerning the plaintiff; it then set out continuously several distinct passages, selected from various parts of the pamphlet, without any separation of the different extracts. The other counts respectively contained each one of the several extracts stated in the first. The pamphlet was a professed history of the life and adventures of the plaintiff, under a fictitious and libellous name, and contained several distinct charges of crimes committed by the plaintiff, the subject-matter of criminal procedure, and opprobrious comments upon those crimes, and on the conduct of the plaintiff. There were also reports of two trials, in one of which the plaintiff was stated to have been convicted of bigamy, but afterwards pardoned in consequence of a doubt of the validity of the first marriage; the other was a report of a cause in which the plaintiff had sued for damages for a libel, charging the plaintiff with beginny and other offences, in which action the then defendant had justified; and the speech of the counsel for the defendant was stated at length, and the verdict of the jury for one farthing damages.

The only evidence was the proof of publication of the pamphlet, the applica-

tin to the plaintiff appearing from the pamphlet itself.

Upon the officer proceeding to read the passages set out in the declaration,

Scarlett for the defendant, claimed that intervening passages, which he pointed out, might be read, and insisted on the general right of the defendant to have the whole of the publication, for which he was answering, read; and stated that his object in having the parts read was to show that the plaintiff had selected in his declaration vague and general abuse and comments, including no specific allegations which the defendant could justify and prove; whereas the pamphlet itself contained distinct charges, which, if set out, the defendant would have had an opportunity of proving, and which, if true, fully justified the defendant in applying to the plaintiff the passages selected in the declaration.

This was resisted by the counsel for the plaintiff, who argued that the only legitimate excuse for a defendant's reading other passages than those set out, was to explain and mitigate. That those now required to be read were separate libels, unconnected with the passages selected; and the object of the defendant was to blacken the character of the plaintiff, by stating matter still more libellous; and they referred to a recent indictment for a blasphemous libel impugning the truth of Christianity, in which his lordship had refused to allow the defendant, who conducted his own defence, to read other passages than those

charged in the indictment.

ABBOTT, Ld. C. J. I do not recollect an instance of an action in which the defendant has been prevented from reading the whole of the publication complained of. In the trial referred to, which I now distinctly recollect, the principle upon which I restrained the defendant from reading other passages was that just stated by Mr. Gurney, (a) namely, that the defendant himself professed that his object in selecting those passages was to show that the Christian religion was false; I thought that a person on his trial for a libel on the Christian religion, should not be allowed to make his defence a vehicle for the very crime for which he was answering. But in actions, I have always understood the rule to be, that

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⁽a) Gurney, as amicus curise, had stated the circumstances of the case referred to, in which he conducted the prosecution.

the defendant has a right to have the whole of the publication read. In the present state of the cause I cannot tell what the effect of reading the passage selected may be. If the object be further to libel the plaintiff, the defendant does it at his immediate peril, and the jury, if they shall think fit, may give increased damages on that account. In the absence of any case in which such a course has been refused, I think myself bound by the general rule, but I will take a note of the objection.

The other passages were then read, containing distinct charges of indictable offences, and the reports of the two trials; and Scarlett, in his address to the jury, argued that the plaintiff having, by omitting to set out in his declarations the specific facts stated in the pamphlet, precluded the plaintiff from the opportunity of proving them, must be taken to have admitted their truth, and that a person who brought an action for the purpose of vindicating his character, and at the same time prevented the jury from trying that character, could not be entitled to any damages.

Verdict for the plaintiff, damages one farthing.(a)

Denman, C. S., and Campbell for the plaintiff. Scarlett and Patteson for the defendant.

An objection was also taken to the first count on the ground of variance, but it was not pressed, the other counts being sufficiently proved. But his lordship said, As at present advised, I think the first count not sustained, the passages on the face of it purporting to be one continued extract.

(a) Rex v. Lambert and Perry, 2 Campb. 398; 31 Hew. St. Tr. 340.

GALE v. DALRYMPLE.—p. 118.

[8. C. 12 E. C. L. R. 226.—1 Carr. & P. 381.]

The declaration in trespass contained five counts, each charging several assaults. The defendant pleaded first not guilty, secondly, that the assaults in the different counts were one and the same, and then justified. Replication, de injuria, &c., generally, and issue thereon. Held, that the plaintiff could not recover on any other assault than the one specified in the plea(s)

(a) We have been favoured by a gentleman at the bar with the following note.

In Gibson v. Hawkey, E. 55 G. 3, K. B., the first count of the declaration stated, that the defendant, on the 5th September, 1812, and on divers other days between that day and the day of exhibiting the plaintiff's bill, assaulted the plaintiff on board a ship; and, on those sevend days, with a certain rope, struck him several blows. The second count stated, that the defendant, on the 15th November, and on divers other days, &c., assaulted the plaintiff, and beat him, &c. And the third count was simply, for an assault on the 15th November. The defendant pleaded, first, not guilty; 2dly, as to the assaulting the plaintiff on board the ship mentioned in the first count, and with the said rope, giving him the said blows, and assaulting, beating, and bruising him, mentioned in the second count; and making the assault in the last count: that the first count, and with the said rope, giving him the said blows, and assaulting, beating, and bruising him, mentioned in the second count; and making the assault in the last count: that the assaulting and striking the blows in the first count, and assaulting, beating, and bruising in the second count are one and the same, and not other or different trespasses; and that the assault in the last count is a part of the trespasses in the first count, and not another or different assault; and that, before the said time when, &c., he was master of a ship, and the plaintif mariner, and that he neglected his duty, &c., and so justified, that he did, at the said time when, &c., moderately chastise him, which are the same supposed trespasses. To this the plaintif replied, that the defendant, at the said time when, &c., de injuria, absque tall causa, committed the said several trespasses in the introductory part of the plea mentioned.

At the trial of the cause, at the Sittings after Michaelmas term, 1815, a verdict passed for the defendant. And in Hilary term following, Carvocod moved for a N. T., on the ground, that the plaintiff at the trial was only allowed to go into evidence of one assault. He stated, that the plaintiff was about to prove another, but was stopped. Rule nisi granted. But it was, on argument, afterwards discharged; because the assaulting at the said time when, &c., in the singular number, in the plea confines it all to one assault.

singular number, in the plea confines it all to one assault.

SITTINGS AFTER TRINITY TERM, IN C. P.

5 GEO. IV.—1824.

BLOGG v. PINKERS, Administrator of PINKERS.—p. 125.

In an action by payee of a promissory note, expressed to be "in consideration of the payee's care and medical attendance bestowed on the maker:" Held, that evidence was admissible to show the consideration to have been medicines furnished and services performed as an apothecary; and if that was proved, that the plaintiff could not recover without bringing himself within 55 G. 3, c. 194, a. 21.

CLARKE v. SAFFERY .-- p. 126.

On a trial of an issue from the Court of Chancery, with power to the plaintiff to examine the defendant as a witness: Held, that as matter of right, plaintiff's counsel might cross-examine the defendant, although called as his witness; the defendant standing in a situation necessarily adverse.

This was an issue directed by the Vice-Chancellor to try "whether a commission of bankruptcy, in which the defendant was the petitioning creditor, had been concerted between the defendant and the bankrupt."

The Vice-Chancellor's order gave the plaintiff leave to examine on the trial

both the defendant and the bankrupt.

In the course of the trial the plaintiff's counsel called the defendant, who was also one of the assignees, as a witness, and on an objection being taken by the

defendant's counsel to the mode of examining the defendant,

BEST, C. J., said, There is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination; but if a witness called, stands in a situation which of necessity makes him adverse to the party calling him, as is the case here, the counsel may, as matter of right, cross-examine him.

Vaughan, Serjt., and Campbell for the plaintiff. Pell and Taddy, Serjts., for the defendant.

In Bastin v. Carew, Exeter, August 19th, 1824, where a similar objection was

taken, and a cross-examination of an adverse witness allowed,

ABBOTT, Ld. C. J., said, I mean to decide this, and no further. That in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice.

POCOCK v. BILLINGS.—p. 127.

The declarations of a former holder of a bill of exchange, made during his possession, are evidence against a subsequent endorsee.

Action by the endorsee against the acceptor of a bill of exchange. The defence was, that Gray, the drawer of the bill, had negotiated it after he had become bankrupt, and that neither the plaintiff, nor several other endorsers, had given any consideration for the bill. The assignees were the real defendants.

For the defence the declarations of an endorser, made whilst he was holder of the bill, were, after objection, received by Best, C. J., as being made against his own interest by showing he had no title. His lordship likened the case to that of declarations made by the owner of an estate during his possession.

Nonsuit by consent.

Pell, Serjt., and Andrews, for the plaintiff. Vaughan and Wilde, Serjts., for the defendant.

Vide Pocock v. Billings, 2 Bing. 269.

WRIGHT v. PAULIN and Another.-p. 128.

A co-defendant against whom the plaintiff has given no evidence, has no right to an acquittal to be made a witness, until all the other evidence for the defendant is finished.

CASE for an excessive distress, with a count in trover.

For the plaintiff a prima facie case in trover against one of the defendants was proved, and there was no evidence whatever against the other.

Vaughan, Serjt., then claimed an acquittal for the latter, in order to make

him a witness.

BEST, C. J. The defendant has no right to an acquittal until all the evidence, except that which he may himself have to give, is gone through, and then, if nothing appears against him, he may be acquitted to be made a witness. If you state that you do not intend to call witnesses, he may be acquitted now, but not otherwise.

Verdict for the plaintiff against one defendant.

Wilde, Serjt., and E. Lawes, for the plaintiff. Vaughan, Serjt., and Comyn, for the defendants.

See Phillips on Evidence, 6th edit. 2 vol. 304.

ROGERS v. JONES, Clerk.-p. 129.

In an action against a magistrate for false imprisonment: Held, that a conviction filed at the quarter-sessions was no justification of the defendant, where it appeared to have been framed upon a different statute from that of the commitment.

Held, that the 43 G. 3, c. 141, s. 2, only applied to cases where the conviction had been quashed, and that the guilt of the plaintiff could not be given in evidence in mitigation of damages, where the plaintiff only sought to recover the amount of a sum he had been fined, and which fine he had paid in order to be discharged from the commitment.

JOLIFF v. BENDELL.-p. 136.

Certain sheep, apparently healthy and sound in every respect, were sold warranted sound. Two months afterwards great part of them died. There was nothing to connect the disease of which they died with their previous condition; but it was, in the opinion of farmers and breeders, an hereditary disease, called the goggles, and incapable of discovery until its fatal appearance: Held, that this disease was an unsoundness existing at the time of the sale, the jury being of opinion, that "it existed in the constitution of the sheep at that time."

Assumpsit on a warranty of certain sheep sold by the defendant to the plaintiff.

The first count stated the sheep to be warranted sound. The second, free

The sheep, one hundred in number, were sold on the 12th of August, 1823. At the time of the sale they were, in appearance, perfectly sound and thriving, and continued so until the middle of October following, when one or two of them exhibited symptoms of a disease called by farmers the goggles. The sheep affected showed signs of giddiness, swelling of the eyes and hanging of the head. From the time they were first seised, they grew weaker and weaker, and for the most part died in about a week or ten days, and, on dissection, there were signs of water in the head or brain. On the whole, about fifty of the sheep had died under the same appearances, the rest continued apparently well up to the time of the trial. There was no contagion; other sheep with which they were fed and kept having continued healthy. Several farmers and others conversant with sheep were called for the plaintiff, who stated the goggles to be, in their opinion, an hereditary disease, arising from breeding "in and in, or from relations;" and that sheep so disordered would thrive, and seem to be in sound health generally until two or three years old. That there were no means of discovering by the appearance or otherwise, that sheep were so affected. That it was generally fatal, and no cure or prevention known for it, and reputed amongst farmers an unsoundness. The evidence for the defendant went to show, that the sheep were of a pedigree free from "breeding in and in," and that others of the same sort and older were perfectly sound. The warranty was proved without dispute, and the sheep were all of the same breed.

For the defendant it was contended, that the sheep having been healthy and thriving at the time of, and for two months after the sale, must be considered as sound at that time; that, inasmuch as there were no previous symptoms to connect the disease of which they died with their former state of health, there was nothing to show that the disease existed at the time of the sale; and that an hereditary liability to a particular disorder was of too uncertain a nature to be capable of proof, and could not be legally considered as an unsoundness existing

at the time stipulated for in the warranty.

ABBOTT, Ld. C. J., left it to the jury to say, "whether, at the time of the sale, the sheep had existing in their blood or constitution the disease of which they afterwards died; or, whether it had arisen from any subsequent cause?"

Verdict for the plaintiff for 120%, the value of the sheep which had died, the defendant agreeing to take back the remainder.

P. Williams and Carter for the plaintiff. Wilde, Serit., and Tancred, for the defendant.

HOLMES v. LOVE and TUCKER.-p. 138.

A. B., being insolvent, conveyed by deed all his estate to trustees for the benefit of his creditors, with a proviso, that "if all and every the creditors of the said A. B., whose debts do amount to more than 5*l*., shall refuse to execute, or otherwise consent to this deed, within six months from the date thereof, the said deed shall be void to all intents and purposes."

Held, that the lease vested in the trustees, could not be defeated under this proviso without an exercise refusal of every enditor where 5*l* to execute a require to exercise.

express refusal of every creditor above 5L to execute or consent.

Use and occupation.

The premises, for the rent of which this action was brought, had been let for a term of years to Edward Edwards, who had become insolvent, and by a composition-deed, dated April 19th, 1822, had assigned his real and personal estate and effects to Woodman, Love, and Tucker, in trust, to sell and distribute the proceeds, after payment of the expenses, amongst themselves and all other creditors who should execute the deed; with the following proviso; that "If all and every the creditors of the said Edward Edwards, whose debts do respectively amount to more than 5*l*., shall refuse to execute, or otherwise consent to this deed within six months from the date thereof, the said deed shall be null and void to all intents and purposes." Love and Tucker, the two defendants, executed the deed, and proceeded to sell the crops and stock then on the estate, Edwards still continuing in possession. The half-year's rent due at Lady-day, 1823, was paid by them; and their liability for the subsequent half-year's rent, due at Michaelmas in that year, depended on the question, whether the estate which vested in them by the assignment had determined by the non-acquiescence of the creditors, none of whom had signed the deed.

C. F. Williams for the defendants, having stated, that he was in a condition to prove a distinct refusal by several of the creditors to execute or consent to the deed, but that he could not show any application to all the creditors, contended (with E. Lawes) that the proviso must be construed to mean, if any should refuse, and being construed or; and that the not signing was a refusal within the meaning of the proviso, and therefore the estate ceased at the end of six months.

ABBOTT, Ld. C. J. (having looked through the whole deed), said, "I am of opinion, that the estate vested in the defendants by this assignment has not been defeated. And the whole case depends upon the construction of the proviso, on which two questions arise: 1st. Whether mere forbearance to sign is equivalent to a refusal. 2dly, Whether the words "all and every" must be taken to mean "all or every." Now, it must be recollected that the effect of the proviso is to defeat an estate already vested, the deed must therefore be construed strictly, and, I think, that mere forbearance to sigu does not amount to a refusal after a notification. The word refuse must be understood according to its ordinary and common acceptation, and before a person can be said to refuse, his consent to the thing required must be asked, and an actual application is therefore necessary. As to the second question, it must be shown that the construction contended for, would more consist with the declared intention of the parties than the literal one. Now, the effect of the alternative construction would be to make void the deed, in case one out of one hundred creditors refused to sign, which would go to deprive the ninety-nine who chose to sign, as well as Edwards himself, of the benefits to be derived from the deed. The trust is to satisfy all the creditors who execute, and that object would also be defeated. Not being satisfied, therefore, that another construction than the literal one would be more conformable to the intention of the parties, I think the literal one must prevail. I entertain no doubt on the subject myself, and as this case has already been discussed before my brothers, (a) I know that they are of the same opinion on both points. defendants must show that all the creditors have been applied to, and have refused.

This not being done, the jury were directed to find a verdict for the plaintiff for 120l.

Selwyn, Edwards, and Carter, for the plaintiff. C. F. Williams and E. Lawes for the defendants.

In Michaelmas Term following a new trial was moved for upon the points made at the trial; and also upon an error in the amount of the damages. The Court refused the rule nisi on the former grounds, but granted it on the latter only.

⁽a) This was a second trial: the case was argued in the sittings cut of term, before the puisne judges of the Court of King's Bench, see 3 B. & C. 242.

DOE on the Demise of TILMAN v. TARVER.—p. 141.

In questions of pedigree, declarations tending to show the person making them entitled to a remainder upon failure of issue of the then possessor of an estate; held admissible for the plaintiff claiming under that person, if made ante litem mortam. Handwriting of an ancient paper may be proved by the opinion of a witness, first comparing it with other authentic old writings at the time of the trial.

EJECTMENT to recover possession of certain lands in Arcton in the Isle of Wight.

The plaintiff claimed under the will of Catharine Lady Fairfax. The will was dated the 20th of April, 1719. Soon after which the testatrix died, and devised all her real estates to A. B. and C. D., and their heirs for ever, in trust, out of the rents and profits to pay all her debts, funeral expenses, &c., and after the payment of all debts and funeral expenses, remainder to her first and other sons for life, and their issue in tail male respectively; remainder to her daughters in tail; remainder to her right heirs.

The plaintiff claimed as devisee of Dennis Martin, grandson of one of the caughters entitled to the estate tail in remainder, and last surviving issue of the

family.

In order to establish the pedigree, the declarations of the mother of Dennis Martin, showing the extinction of the issue of persons standing in the line of the entail between her and the then possessor of the estate, were offered.

Wilde, Serjt., objected, that these declarations were those of a person interested, inasmuch as the title of the plaintiff was that which the person making them would have had now if living, and which she had in contingency and ex-

pectation at the time of making them.

ABBOTT, Ld. C. J. I think them admissible notwithstanding, having been made ante litem mortam. I remember a case of title to a peerage before the House of Lords, in which the widow was allowed to prove the declarations of her deceased husband in support of her son's title, though the husband, if living, would have had the right which the declarations went to establish; and this has been followed up since. If no controversy existed at the time, the principle acted on is, that such declarations are admissible, though subject to observation.

In order to show that Yard Farm was part of the manor of Areton, which clearly passed under the will, a paper was put in, entitled, "An account of Edward Haylis, receiver of the Isle of Wight estates of the Lady Fairfax for two years ending at Michaelmas 1727;" and containing, amongst other entries relating to the manor of Areton, the following:

"For rent, £ s. d.
"John Pike, for Yard Farm 9 6 8"

Edward Haylis appeared by the books and rolls belonging to the manor to have been steward, and this paper was handed over to the present steward, amongst other papers and books relating to the manor, by the representatives of the late steward.

It was at first offered without any proof of the handwriting, and, on this

being objected to,

ABBOTT, Ld. C. J., directed the person producing the paper to compare it with the handwriting of Edward Haylis in other papers belonging to the manor, and to say upon oath, whether he believed the writings were by the same person. His Lordship said he recollected Mr. Justice Lawrence, on a trial at Worcester, directing a Mr. Benjamin Price, then accidentally in court, to compare an ancient writing with other papers purporting to be written by the same person, and to give his opinion on the identity of the writings.

Verdict for the plaintiff.

Adam, Selwyn, and Manning, for the plaintiff. Wilde, Serjt., and Carter, for the defendant.

REX v. The INHABITANTS of the County of DEVON .- p. 144.

A bridge used only on occasion of floods, and lying out of and alongside the road commonly used, held a public bridge, and the county liable to repair.

FRYER v. BROWN.-p. 145.

The plaintiff in assumpsit gave in evidence an admission of the defendant, that he owed 147L on a bill of exchange which had been returned dishonoured; held that such acknowledge-at was admissible, though no notice to produce the bill had been given: held also that interest was not recoverable unless the bill was produced.

Where two endorsements of the same party appeared on a bill of exchange, with an intermediate one of another person; held that the first endorsement must be presumed to have been made

before the bill became due.

Assumpsit on the money counts, and a count for interest.

The plaintiff declared as the surviving partner of Fryer and —— Andrews, deceased.

The defendant, in a conversation with a clerk in the plaintiff's bank, relating to the plaintiff's demand, admitted that he owed 147*l*. on a bill of exchange drawn by Gilby and Ellis on Jones, which he had endorsed to the plaintiff, and which had been returned dishonoured; and said "I admit the debt, and you have your remedy against me, but I hope you will forego interest, and I will pay you the principal."

It was objected by Pell, Serjt., that the bill of exchange being the foundation of the plaintiff's demand, notice to produce ought to have been given, and

without the bill this conversation was inadmissible.

ABBOTT, Ld. C. J. I am of opinion, that, upon the whole evidence, the plaintiff was not bound to give notice; but, unless the bill is produced, I shall the investment to give interest the bill is produced, I shall the investment to give interest the bill is produced.

tell the jury not to give interest.

The bill was afterwards produced by the defendant, and was dated 13th February, 1813, at one month, for 147*l*.; it was endorsed by defendant in blank, by Fryer and Co. specially, to Mortimer, then by Mortimer, and again by Fryer and Co.

It appeared that one Clapcott, now living, was in partnership with Fryer and Andrews the whole of 1813; and a question being made as to the time of endorsement by defendant, to show that plaintiff, Andrews and Clapcott were in partnership when the bill was negotiated by the defendant with the bank,

ABBOTT, Ld. C. J., said, the circumstance of Fryer and Co.'s endorsement being twice on the bill was so strong to show that they had taken and negotiated it before it became due, and re-endorsed it after it was returned dishonoured, that unless proof to the contrary were offered, he should presume, that the first endorsement was in 1813.

The clerk who made the endorsement having been called, and stated he had no recollection of the time when it was made.

ABBOTT, Ld. C. J., directed a

Nonsuit.

Adam and E. Lawes for the plaintiff. Pell, Serjt., and R. Bayly, for the defendant.

See Cameron v. Smith, 2 B. & A. 305; Du Belloix v. Waterpark, 1 Dow. & Ryl. 16.

REX v. TREMEARNE.-p. 147.

A judge at Nisi Prius may refuse to try an indictment clearly bad in point of law. An indictment for perjury, not averring the matters falsely sworn to, to be material, nor showing them to be so, is within this authority.

WALTER v. HAYNES .- p. 149.

A letter directed "Mr. Haynes, Bristol," containing notice of the dishonour of a bill, was proved to have been put into the post office; held that this was not sufficient proof of a notice, the direction being too general to raise a presumption that the letter reached the particular individual intended.

This was an action of assumpsit upon a bill of exchange by an endorsee against an endorser.

In order to prove the notice of dishonour, it was shown on the part of the plaintiff, that a letter, containing such a notice, and addressed to "Mr. Haynes,

Bristol," was put into the post-office.

ABBOTT, Ld. C. J. This is not sufficient proof of notice. Where a letter, fully and particularly directed to a person at his usual place of residence, is proved to have been put into the post-office, this is equivalent to proof of a delivery into the hands of that person; because it is a safe and reasonable presumption that it reaches its destination; but where a letter is addressed generally to A. B. at a large town, as in the present case, it is not to be absolutely presumed from the fact of its having been put into the post-office, that it was ever received by the party for whom it was intended. The name may be unknown at the post-office, or if the name be known, there may be several persons to whom so general an address would apply. It is, therefore, always necessary, in the latter case, to give some further evidence to show that the letter did in fact come to the hands of the person for whom it was intended.

Other evidence was then given, tending to show that the letter had been received by the person to whom it was addressed, and the plaintiff had a verdict.

Pell, Serjt., and Manning, for the plaintiff.

Bompas, for the defendant.

Vide Saunderson v. Judge, 2 H. B. 509. Parker v. Gordon, 7 East, 385. Kufh v. Weston, 3 Esp. N. P. C. 54. Scott v. Lifford, 9 East, 347. S. C. 1 Campb. 246. Hawkins v. Rutt, Peake N. P. C. 186.

SITTINGS AFTER MICHAELMAS TERM, IN K. B.

5 GEO. IV.—1824.

REX v. LYON and Another .- p. 151.

[S. C. 12 E. C. L. R. 303.—1 Carr. & P. 527.]

An indictment for a nuisance to a highway, stated it to be a way for all the liege subjects, &c., to go, &c., with their "horses, coaches, carts, and carriages." The evidence was, that carts of a particular description, and loaded in a particular manner, could not pass along this highway: Held, that this was not a misdescription, it not being laid as a highway for all carts, carriages, &c.(a)

(a) See Allen v. Ormond, 8 East, 4. Rex v. Inhabitants of Hatfield, ibid., 6, n. a. Rex v. Inhabitants of Northampton, 2 M. & S. 262. Rex v. Inhabitants of Lancashire, Sum. Ass. 1820, Starkie's Evidence, Part 4, p. 316. Rex v. Inhabitants of Devon, supra, 720.

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ADAMS v. KELLY .- p. 157.

In order to show that a defendant had caused and procured a printed libel to be inserted in a newspaper; a reporter to a public newspaper proved that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by the defendant for the purpose of such publication, and that the newspaper then produced was exactly the same, with the exception of one or two slight alterations, not affecting the sense: Held, that what the reporter published, in consquence of what passed with the defendant, might be considered as published by the defendant; but that the newspaper could not be read in evidence, without producing the written account delivered by the witness to the editor.

CASE for slander.

There were several counts in the declaration, stating the words in different ways, and the last count stated, "that the defendant did compose and publish, and cause and procure to be composed and published and inserted in a certain public newspaper, called the Observer, of and concerning the plaintiff, &c., the following false, &c., libel," and then set out with the usual innuendoes, the paragraph inserted in the paper.

The words stated in the first count, were proved to have been spoken by the defendant, and the following evidence was offered in order to prove the last count

of the declaration.

A witness (at that time a reporter for the Observer newspaper) stated that he had met with the defendant, who communicated to him the slanderous matter set forth in the first count relating to the plaintiff, which the defendant said would make a good case for the newspaper. The reporter, desirous of obtaining information for his newspaper, attended the defendant to an adjoining tavera, and who gave him a more detailed account, for the express purpose of inserting it in the paper with which the reporter was connected. Afterwards, from the particulars communicated by the defendant, the reporter drew up an account which he left at the office of the Observer, to be inserted in that paper.

An Observer newspaper was then put into the witness's hands, and he stated that a paragraph in that paper contained exactly the same account which he sent to the editor, with the exception of some slight alterations, not affecting the

sense, made by the editor.

The counsel for the plaintiff then proposed to read the newspaper.

Gurney, for the defendant, objected to the newspaper being read; the written paper which the reporter sent to the editor, containing the account communicated to him by the defendant, must be produced; whether the printed paper is a copy of what the reporter has written, can only be seen by comparing them

together.

ABBOTT, Ld. C. J. This newspaper is proposed to be given in evidence, in order to sustain that count, which charges the defendant with publishing the printed libel set forth in the declaration. The evidence is, that the reporter put something in writing from his conversation with the defendant, and which he gave to the editor. What the reporter published in consequence of what passed with the defendant, may be considered as published by the defendant; but you must show that what was published is that which was given to the editor by the reporter, which you can only do by producing the paper itself.

Verdict for the plaintiff, damages 201

Scarlett and Talfourd for the plaintiff. Gurney and Dowling for the defendant.

THE APOTHECARIES' COMPANY v. BENTLEY.-p. 159.

Averment in a declaration on the 55 G. 3, c. 194, that defendant practised as an apotheomy "without having obtained such certificate as by the said act is required." Held that the ones probandi that the defendant had obtained his certificate lay with him and not with the plaintiffs.

REX v. PARKINS .- p. 166.

On a trial for a misdemeanor in K. B. a defendant is not entitled to the assistance of counsel to cross-examine witnesses when he reserves to himself the right of addressing the jury; but counsel may argue for him any point of law that arises, and suggest the questions to be put to the witness.

DARTNALL v. HOWARD and Another.—p. 169.

An examined copy of an answer in chancery, may be identified by a witness who has seen the handwriting of the defendant to the original, although the original document is not produced at the time that he speaks to his belief of the defendant's signature to it.

Assumpsit. Plea, general issue.

The defendants had been employed by the plaintiff to lay out the sum of 1400l. on annuity, and this action was brought to recover a compensation in damages, for their having laid out such money upon insufficient security.

In order to show the defendants' admission of the insolvency of a surety in the annuity deed, the plaintiff proposed to read an examined copy of an answer in Chancery by the defendant Howard, to a bill filed against him previous to the granting of the present annuity, by persons not parties to the present action.

In order to identify the original answer, of which this purported to be an examined copy, as the answer of this defendant, a witness was called who said he had examined this original answer, and that it was signed by the defendant, with whose handwriting he was acquainted.

Gurney, for the defendants, contended, 1st, that an examined copy of an answer was not evidence in this case, but that the original should have been produced. 2dly, that the opinion of a witness as to the handwriting of a person

to a document which was not produced, could not be received.

Scarlett. Since the case of Lady Dartmouth v. Roberts, 16 East, 334, it is clearly settled that an examined copy of an answer in Chancery is admissible in evidence, although offered in a cause between different parties. The only excepted cases are forgery and perjury. As to the second objection, he contended that Hennell v. Lyon, 1 B. & A. 182, was an implied authority for putting such a question to establish the identity of the defendant.

Gurney, in reply, admitted that he could not, since the case of Lady Dart-

mouth v. Roberts, sustain his first objection, but relied upon the second.

ABBOTT, Ld. C. J. I am of opinion that I ought to allow the question to be put to the witness, and I think the case of Hennell v. Lyon is an authority for so doing. Both my Lord Ellenborough and Mr. Justice Holroyd, in that case appear to have thought, that the original answer itself would be evidence without proving the handwriting of the defendant. The evidence here offered I think must be received, the object of which is by proof of the defendant's handwriting to identify the answer, and show that the examined copy of the answer put in, was the answer of the same defendant Howard.

The plaintiff was nonsuited.

Scarlett, Tindal, and Abraham, for the plaintiff. Gurney for the defendants

A rule nisi for a new trial has been granted on other grounds, and is now pending.

REX v. BELLAMY.-p. 171.

An indictment for perjury in setting out the record of a conviction at the Middlesex sessions, stated an adjournment to have been made by Const, Esq., and A., B., C., and D., and others their fellows, &c., justices. An examined copy of the record of conviction when produced, stated the adjournment to have been made by Const, Esq., and E., F., G., and others, &c.: Held, that this defect might be cured by parol evidence of an adjournment made by the persons named in the indictment: Held, that no such evidence being given, the variance was fatal. Samble. A minute-book in which han entry of the proceedings at sessions is made, and from which book the rell containing the record of such proceedings is subsequently made up, is not itself a record so as to be admissible in evidence as a proof of the fact there stated.

This was an indictment for perjury in giving evidence on the trial of an indictment for an assault, at the sessions for the County of Middlesex.

The indictment, in setting out the record of conviction for the assault, stated an adjournment to have been made by Const, Esq., and A., B., C., and D., and others their fellows, justices of our said lord the king, assigned, &c.

The examined copy of the record of conviction, when produced in evidence, stated the adjournment to have been made by Const, Esq., and E., F., G., and

others their fellows, justices, &c.

Denman, for the defendant, contended that this was a fatal variance.

C. F. Williams, for the prosecution, admitted the objection was fatal, unless he should be able to show that the parties stated in the record of conviction, as set forth in this indictment, were really present at the sessions; and he proposed to give evidence to that effect.

ABBOTT, Ld. C. J. But must not their presence be verified by some record? and does not the record when produced vary from the statement in the indictment? I shall not, however, stop the case here; you may proceed to prove that the justices stated in this indictment to have been present at the sessions were actually there.

In order to establish this fact, the following evidence was given.

A witness from the office of the Clerk of the Peace produced a minute book, which contained an entry, not drawn up in any formal manner, of the names of the particular justices, who were present at the day of adjournment mentioned in the indictment, and amongst whom were all the names mentioned in the indictment; these minutes were made by a clerk in the same office of the name of Richards, whose duty it appeared to be to attend at the quarter sessions, for the purpose of making these entries at the time; but Richards was not called as a witness, and there was no evidence to show whether he was present on the particular day, further than the entry itself. In the same book on the opposite page to the entry already stated, was another, drawn up by the witness who produced the book; this was in the form of a record, and was, in fact, a summary of all the names of the justices attending upon the Quarter Sessions upon each day during the sessions, but it did not distinguish who was present upon any particular day; amongst these names also were the justices mentioned in this indictment.

The witness stated that this book was the official book for all entries, and that from the minutes contained in it a roll is made up, containing the records of the

proceedings at sessions.

Denman contended, 1st, That this evidence was not admissible; that the examined copy of the record of conviction had been put in, stating by whom the adjournment was made, and no evidence could be received to prove that other persons were present at the adjournment than those mentioned in that record; and 2dly, supposing the counsel for the prosecution may produce evidence to supply the defect, and show that these persons were present, the evidence given is not sufficient for that purpose. There is no evidence that Richards made the entry in the book at the time stated, and no witness has been called to prove the justices stated by that minute to be present, were there on that day. It may be me that the records are made up from this minute book, but after the record is

made up it could not be permitted in any case that the record should be contra-

dicted or explained by these minutes.

C. F. Williams contended that this minute book was, in fact, the official record of the proceedings of sessions, and as such, admissible as proof of the facts therein stated. That it being a record of the adjournment by the Court itself, it would be better evidence of the persons then present, than any proof by witnesses

who could speak to the presence of the justices.

ABBOTT, Ld. C. J. I yield very reluctantly to the objection which has been taken by the defendant's counsel: not but that I think it the imperative duty of counsel, in prosecutions of every description, to take advantage of every formal objection that may present itself; but the reluctance I feel arises from knowing that if there is any error in my judgment, there will be no future opportunity for setting it right. Upon the fullest consideration I can give this subject here, I am of opinion that the defect has not been legitimately remedied. ment states an adjournment by Mr. Const and others; the examined copy of the record of conviction produced, states only one of the persons named in the indictment, as present at the adjournment, and states three or four other names of persons not mentioned in the indictment. It was contended that although the record omitted these names, that it might be supplied by other evidence, and I thought it might; but the question is as to the sufficiency of the evidence. I do not think the minutes entered in this book by Richards are a record, or in the Then follows on the next leaf that which is very much in nature of a record. the nature of a record, and it contains the names, amongst others, of those who are stated in this indictment to have been present at the adjournment. But the question is, admitting this book to be a record, how far the one record can be corrected by the other. Now this entry gives you the names of every person present at any day during the sessions, not the names of those present at any particular day, therefore this will not supply the defect; it does not point out the persons present at any particular day. The first entry being nothing in the nature of a record, you should have called some person who could have stated that he was present, and saw the justices named in the indictment present on the day in question. Not guilty.

C. F. Williams, Prendergast, and Langslow, for the prosecution.

Denman, C. S., and C. Phillips, for the defendant.

CHARLETON v. COTESWORTH.-p. 175.

Where there is a written agreement between the master and owners of a ship, not mentioning primage, and the owners have received payments in respect of primage from the freighters: Held, that the master, by usage of trade, is entitled to such payments.

ASSUMPSIT for work and labour, and wages, as master and commander of a certain ship; and the usual money counts.

This action was brought to recover the sum of 115l., the amount of primage due to the plaintiff as master and commander of the ship Oporto on three several

voyages from London to Pernambuco, and back again.

The plaintiff held the command of the ship under the following terms reduced into writing: "At 101. per month wages, one-third of all passage moneys, and the owners to find the cabin."

It was admitted that the defendant, as owner, had received in account the amount of freight and *primage*, the sum not being stated in the admission.

The primage claimed was calculated at the rate of 5 per cent. on the freight, and the bills of lading all contained the words "with primage and average accustomed." The plaintiff had accounted with the defendant for the two first voyages, without any charge for primage, but on being dismissed from the command of the ship he demanded primage for the three voyages.

8 **P**2

The defence was, that the special agreement between the parties excluded the plaintiff's claim. And several merchants and ship owners were called on both sides to prove the usage of trade with respect to primage; but no instance was spoken to in which primage had been paid or resisted, in the case of a specific agreement silent as to the claim of primage. The practice was stated to be, to have specific agreements for wages, &c., "in lieu of everything." If there was no special agreement, the captain would be entitled to it. The amount of primage varied in different trades, from 1 to 10 or 15 per cent. on the freight; the general amount was stated to be 5 per cent.

ABBOTT, Ld. C. J., in summing up to the jury observed: Neither party has in this case proved that which he has attempted. The plaintiff undertook to prove that primage, if not excluded by special agreement, belongs to the master; the defendant that it is never paid unless stipulated for; in other words, that it is matter of distinct agreement. In ancient times primage was a small payment made by the merchant on the delivery of his goods, for the care and attention bestowed on them by the master. It was called hat-money, sometimes pocketmoney. Originally it was of small importance; but in the progress of trade it may have become of greater magnitude, and may possibly have taken a different If any usage exists, it must bind the parties, but no distinct usage character. has been satisfactorily established.

If, applying your mercantile knowledge to a contract of this description, you think that by the usage of trade the master is entitled to primage, the plaintiff must have your verdict; if on the other hand you think that the agreement means that he is to receive that which is stipulated for, and no more, you will find for

the defendant.

The jury, which was special, found for the plaintiff, for 461., being the primage claimed on the last voyage, at 5 per cent.

Gurney and F. Pollock for the plaintiff. Scarlett and Brodrick for the defendant.

Primage and petilodmanage is due to the master and mariners for the use of his cables and ropes to discharge the goods, and to the mariners for unloading the vessel; it is commonly about 12d. per ton. Molloy, b. ii. c. 9, s. 5. See also Abbott on Shipping, p. 223. Holt on Shipping, p. 420. Lawes on Charter-Parties, p. 188.

KILBY and Another v. WILSON.—p. 178.

The plaintiffs purchased by the order of T. and Co. of Ryder, to whom they were known as brokers, 110 bales of cotton. The contract was regularly entered in the plaintiff's books at a purchase and sale by brokers, and brokerage obarged to both parties. Bought and sold notes were delivered, not disclosing the names of principals, but charging brokerage to both. T. and Co. and Ryder were not known to each other as concerned in the dealings. The plaintiffs paid Ryder for the cottons, and handed them over to T. and Co. with a bill of parcels in their own names: Held, that the plaintiffs were principals in the purchase of Ryder, and sale to T. and Co. to T. and Co.

A partnership cannot acquire property in goods obtained by the fraud of one of the partners, to which the rest are not privy.

TROVER for divers bales of cotton.

The plaintiffs were brokers of the city of London, and in November, 1823, were employed by Tenbruggenhate and Co., London, merchants, to purchase for them a large quantity of cotton. The plaintiffs accordingly on the 13th of that month applied to Ryder, a merchant in the cotton trade, and agreed for the purchase of 110 bales of Surat cotton. The contract was regularly entered in their books thus:

"London, 13th November, 1823. "Bought by order, and for account of Messrs. Tenbruggenhate and Payne, of Mr. A. Ryder, T. S., 1822, 110 bales Surat cotton, 3 piles, P. Swallow, at 6s. 8d. per pound. Prompt one month Brokerage 11 per cent.

(Signed,) "KILBY and CARROL." And the sale mutatis mutandis, and brokerage charged both parties.

The plaintiffs were known by Ryder to be brokers, but the names of Tenbruggenhate and Co. were not disclosed at the time of the purchase. The custom of the trade is not to deliver the cottons until paid for, and the plaintiffs had been in the habit of dealing with Ryder without disclosing the names of their principals. Bought and sold notes signed Kilby and Carrol were delivered to Ryder and to Tenbruggenhate and Co. respectively, charging brokerage to both, but not naming any principals to either; the words "by order and on account of T. and Co., and R." respectively being omitted; in other respects the notes were copies of the entries in the books. On the 28th of November, Mr. Tenbruggenhate applied to the plaintiffs for the cottons, who paid Ryder for the amount, and received the East India Company's warrants for the cottons which The plaintiffs on the next day, being were then in the company's warehouses. Saturday, delivered the warrants to Tenbruggenhate and Co. and received their check for 1027l. 19s. 3d., the amount, with the charges. At the same time they delivered a bill of parcels as follows:

"London, 13th November, 1823.

"Messrs. Tenbruggenhate and Payne,

Bought of Kilby and Carrol,

110 bales of Surat Cotton, 3d. per Swallow,

Lots, Marks, &c., and charged brokerage 51. Ss. 8d."

The names of Ryder and Tenbruggenhate and Co. were not communicated to each other as connected with the transaction. Tenbruggenhate took the warrants to the defendant, and deposited them as a security to cover his acceptances

for two bills of 500l. each, given to Tenbruggenhate and Co.

In fact, Tenbruggenhate's only object in the whole transaction was to raise money and abscond, and on the evening of the 29th of November, being Saturday, he left this country for Paris, carrying with him the proceeds of large quantities of goods, obtained from other persons, and for which payment had been made on that day in checks on Tenbruggenhate and Co.'s bankers. These checks, and amongst them that given to the plaintiffs, were dishonoured. Payne, who drew the checks, was altogether unconcerned in the frauds of his partner, and had been persuaded by him that there was money in their bankers' hands to the amount of 5000l. Tenbruggenhate and Co. were declared bankrupts, and the solicitor to the commission pursued Tenbruggenhate to Paris, and recovered from him, with other property, the defendant's acceptances. These were afterwards given up to the defendant by the assignees, of whom the plaintiff Kilby was one.

The defendant had sold the cottons before any demand was made by the plaintiffs, to secure himself for another advance made to Tenbruggenhate before the

deposit of the warrants.

The action was resisted on the grounds that the plaintiffs had no property in the cottons, they having bought and sold as brokers; and it was contended that the sale to Tenbruggenhate and Co. if valid, vested the property in the assignees; and if it was invalid through fraud, the property remained in Ryder.

ABBOTT, Ld. C. J., in summing up to the jury said, I am of opinion that upon this evidence the plaintiffs must be considered to have dealt with both parties as principals; however improper it may have been in them as sworn brokers, I think that they are buyers of Ryder, and sellers to Tenbruggenhate and Co. on their own account; and the only question I think fit to leave to you is, whether or no Tenbruggenhate obtained the warrants from the plaintiffs with a pre-conceived design to raise money upon them and then abscond, without ever paying the plaintiffs. If you are of that opinion your verdict must be for the plaintiffs; in that case the partnership ought not to prevent the plaintiffs from recovering, for although the partner was himself deceived, and had no participation in the fraud, still no property could be vested in the partnership by such a transaction. If you think that Tenbruggenhate conceived the design of defraud-

ing the plaintiffs after he had obtained possession of the warrants, then your Verdict for the plaintiffs 1015L verdict must be for the defendant.

Scarlett and R. V. Richards for the plaintiffs.

Marryatt and Chitty for the defendant.

In Hilary Term following, Marryatt moved for a new trial, but the Court refused the rule.

See Kemble v. Atkins, 7 Tannt. 260; 1 B. Moore, 6 C. S. Holt, N. P. C. 427, S. C.; Ex parts Dyster, I Merivale's Rep. 155; 2 Rose, B. C. 346, S. C.; Hayman v. Neale, 2 Campb. 337; Cumming v. Roebuck, Holt, N. P. C. 172.

As to transactions vacated by fraud, see Rapp v. Latham, 2 B. & A. 795; Earl of Bristel a.

Wilsmore, 1 B. & C. 514; Noble v. Adams, 7 Taunt. 59.

TANNER v. BENNETT.—p. 182.

Where a ship received damage by striking on a rock, which rendered her unsafe for another voyage unless repaired; and she was twice surveyed and condemned by the authorities of the place to which she was insured; and the captain, bonk fide, sold her for fire-wood; but she might have been repaired but for the negligence of the resident agents of the owners: Held, that the underwriters are not liable for a total loss. The jury find, "that the ship has sutained a partial loss, but to what amount there is no evidence." Held, that the plaintiff is entitled to a verdict, with nominal damages only.

Assumpsit on a policy of insurance on the ship Margaretta Elizabeth, from London to St. Thomas's.

The ship had arrived within two miles of St. Thomas's, and was proceeding with a favourable wind towards the harbour, when about eight in the evening the wind shifted and drove her on some sunk rocks. She remained swinging on a rock for two hours; but being lightened by throwing part of her cargo overboard, she was, with the assistance of people from the shore, got off, and brought into the harbour. She was then moored, and the remainder of her cargo discharged in the course of a fortnight. The captain gave immediate information to the resident agents of the owners, and demanded a survey. At this time the island of St. Thomas's was in a state of great confusion, having been very recently given up to the Danes. She was never hove down, and the captain stated that he was unable to procure carpenters to repair her, or conveniences for heaving her down. She was, however, condemned, and the captain offered her for sale, but could get no bidder. He then, suspecting dishonesty in the local authorities, demanded a second survey, upon which she was again condemned, and he was ordered to tow her out of the harbour, and ultimately he sold her piecemeal, for the purpose of fire-wood.

The witnesses stated that she must of necessity have received considerable damage from the straining whilst she swung on the rock, that they would not have trusted themselves in her for another voyage, unless she had been repaired or hove down, although she made no water whilst on the rock, nor afterwards in the harbour. It was impossible to estimate the amount of the damage without heaving her down. It was doubtful whether she might not have been hove down and repaired, but for the misconduct of the local authorities, and of the persons concerned in her management. There was contradictory evidence as to the con-

veniences for repairing ships at St. Thomas's.

ABBOTT, Ld. C. J., after desiring the jury to find specially in case they thought the ship might have been repaired, but for the situation of the place; or the want of good faith in the local authorities; said, that provided they were satisfied the accident had not occurred from the want of skill and ignorance of the captain, and that the ship had not at all events received her death wound, the were to consider whether the damage sustained might have been repaired, but the negligence of the captain and the agents. If that were so the plaintiff

could not recover for a total loss; and it would then be for them to find for a partial loss, if they thought that some damage had been sustained, and they had any means of estimating the extent of it.

The jury found "that the plaintiff had sustained a partial loss, but to what extent there was no evidence. And that the ship might have been repaired but for the

negligence of the resident agents."

Upon this finding, Scarlett contended that the verdict must be entered for the defendant, that it was incumbent on the plaintiff to establish the damage actually sustained, and that not having done so he had failed in completing his case. He cited Parkins v. Tunno, 2 Campb. 59.

ABBOTT, Ld. C. J. I think I ought to direct the jury to find for the plaintiff, with nominal damages.

Verdict for the plaintiff, damages 1s.

Marryatt, F. Pollock, and Abraham, for the plaintiff. Scarlett, Campbell, and J. Parke, for the defendant.

HARVEY and Another, Assignees of BAULK and JOSEPH, Bankrupts, v. ARCHBOLD and Others.—p. 184.

Merchants in London agree with the defendants, British merchants residing at Gibraltar, to consign goods to them for sale upon a del credere commission; that the London correspondents of the defendants, on the consignment of the goods to the order of the defendants, shall on their account accept bills at ninety days, drawn by the consignors, for two-thirds the invoice price; that the defendants shall charge the amount of the bills in Gibraltar currency, with the exchange, and 6 per cent. interest from the dates. The consignors to be allowed 6 per cent. interest on balances in the hands of the defendants, that being legal interest at Gibraltar, and the usual mode of remitting from Gibraltar being by bills on London at ninety days: Held, that such agreement is not usurious.

DETINET for goods, with money counts in debt.

This action was brought to recover the proceeds of certain goods consigned for sale to the defendants by the bankrupts, under the following circumstances.

The defendants were English subjects, carrying on business at Gibraltar, and having no mercantile establishment in this country. The bankrupts were merchants in London, and were in the habit of consigning goods to the defendants. As soon as the goods were shipped, the bills of lading were handed over to Reid and Co., the London agents of the defendants, who had instructions to advance to the bankrupts to the amount of two-thirds of the invoice price. were made by bills of 90 days, drawn by the bankrupts on Reid and Co., who. instead of accepting, discounted the bills at 5 per cent. and paid the difference The defendants in their accounts with the bankrupts, all of which were kept in Gibraltar currency, debited them with the amount of the bills converted into Gibraltar currency, together with the exchange on the days of the dates; in other words, with the price at Gibraltar of such bills on London, and charged interest at 6 per cent. from the dates. The consignments were insured by Reid and Co., to cover these advances, and the expense charged by the defendants to the bankrupts. The defendants were allowed 71 per cent., del credere commission on the sales. The bankrupts were to have been allowed interest at 6 per cent. on balances in the hands of the defendants, had their speculations turned out successful, but, in fact, none of the consignments produced a profit.

Reid and Co. kept no accounts with the bankrupts, and the funds from which they made the advances consisted of remittances made by the defendants from Gibraltar The terms on which these transactions were conducted had been agreed upon in London, between the bankrupts and Johnson, one of the defendants, and the advances were not made by Reid and Co. until authorized by Archbold, who resided in England, but in other respects, took no active part in the business of the firm.

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The usual mode of dealing between Gibraltar merchants and their London correspondents, is to remit by bills on London, at 90 days, and to charge these in Gibraltar currency, with the exchange, and 6 per cent. interest from the dates, that being legal interest at Gibraltar; 7½ per cent. is the usual del credere commission.

It was doubtful on the evidence, whether it was part of the agreement between Johnson and the bankrupts, that Reid and Co. should discount the bills, as it

was a rule of that house not to accept bills drawn on them in London.

The defendants had accounted for the proceeds of all the sales, provided they were allowed to retain for the advances so made, and interest. It was insisted for the plaintiff that such advances were usurious loans, and that the defendants

had no right to deduct for them.

ABBOTT, Ld. C. J. The material question to be ascertained in the first place is, whether or no there be any usury in this case; and the point upon which I wish you to give me your opinion is, whether or no it was part of the agreement between Johnson and the bankrupts, that Reid and Co. should not accept and redeliver the bills, but should advance the amount in cash, minus the discount at 5 per cent. If you think so, I am of opinion that the transaction was unlawful; if that was no part of the bargain, then I think there was no usury, and that your verdict must be for the defendants.

Verdict for the defendants.

The Attorney-General, Wilde, Scrit., and Platt, for the plaintiffs. Scarlett, Campbell, and Crowder, for the defendants.

In Hilary Term following, the Attorney-General moved for a new triat, but the Court refused a rule nisi, on the ground that the advances were anticipated payments and not loans; and that the whole must be taken as Gibraltar transactions. The Court gave no opinion on the right to retain from the proceeds, in case the agreement had been usurious.

See Auriol v. Thomas, 2 T. R. 52. Bodily v. Bellamy, 2 Burr. 1094. Ekins v. E. I. Company, 1 P. Wms. 395. Dewar v. Span, 3 T. R. 425. Stapleton v. Conway, 1 Ves. sen. 427, 3 Atk. 727.

SALMON v. BENSLEY.—p. 189.

In case for a nuisance, notice to remove the nuisance left at the premises is evidence against a subsequent occupier.

ACTION on the case for a nuisance in erecting and continuing a steam engine,

near to plaintiff's dwelling-house.

The plaintiff's counsel proposed to read a letter from the plaintiff to the person who had immediately preceded the defendant in the occupation of the premises, upon which the steam engine was erected, requiring him to remove the nuisance, and containing a notice of an intention to bring an action if it was continued. It was proved that this letter was delivered at the premises, and it was admitted that the defendant did not then reside there, and that he was not a partner of the previous occupier.

The Attorney-General objected to reading the letter, as the notice could not

bind the defendant.

ABBOTT, Ld. C. J. I am of opinion that a notice of this nature, delivered at the premises, to which it relates, to the occupier for the time being, will bind a subsequent occupier, and that a person who takes premises upon which a nuisance exists, and continues it, takes them subject to all the restrictions imposed upon his predecessors by the receipt of such a notice.

Verdict for the plaintiff.

Gurney, Tindal, and J. Parke, for the plaintiff.
The Attorney General Secondst Property and E. P. Harl. Society

The Attorney-General, Scarlett, Brougham, and F. Pollock, for the defendant

SITTINGS AFTER MICHAELMAS TERM, IN C. P.

5 GEO. IV.-1824.

WALLACE v. WOODGATE.—p. 193.

[S. C. 12 E. C. L. R. 328-1 Carr. & P. 575.]

A livery stable keeper may, by express agreement, have a lien for the keep of horses; where the owner of horses in the possession of a livery stable keeper who had such lien, fraudulently took them out of his possession: Held, that the livery stable keeper might, without force, retake the horses, and that the lien would revive.(a)

(a) See Yorke v. Greenaugh, 2 Ld. Raymond, 866. Kirkman v. Shawcross, 6 T. R. 14.

SEAMAN v. PRICE.—p. 195.

The plaintiff had verbally agreed with J. E. for the purchase of certain houses; the defendant in writing, agreed to give the plaintiff 40l. for his bargain, the houses were afterwards at plaintiff's request conveyed to the nominee of the defendant: Held, that the transfer of the parol bargain was a sufficient consideration for the promise of the defendant.

Semble, Conveyance to the defendant's nominee, supports an averment that "the defendant became the purchaser."

ASSUMPSIT. The first count stated that plaintiff had bargained and agreed with one J. E. for the purchase of three freehold houses, to be conveyed to him, the said plaintiff, at the price of 600l., and that in consideration the plaintiff would sell and give up to the said defendant, the said bargain, and would suffer and permit the said defendant to become the purchaser of the said houses from the said J. E. instead of him the said plaintiff; he, the said defendant, undertook, &c., to pay the said plaintiff for the said bargain the sum of 40l. That the plaintiff did sell and give up the said bargain to the said defendant, and dis suffer and permit the said defendant to become the purchaser of the said houses from the said J. E., and the said defendant did accordingly become such purchaser, and did take the said bargain, and did obtain a conveyance to him of the said houses on the terms aforesaid, &c.

The second count stated the consideration that the plaintiff would suffer, permit, and procure the defendant to become the purchaser, and averred that the plaintiff did suffer, &c., and that defendant was accepted, and became the purchaser, &c.

The third count was substantially the same.

The last count stated the consideration that plaintiff would relinquish and give up the said bargain to the said defendant, and would give and afford to the defendant the opportunity of becoming the purchaser, and averred that the plain-

tiff did relinquish, and give up, and did give and afford, &c.

It appeared in evidence that the plaintiff had verbally agreed with Joel Emmanuel, the owner of the houses, for the purchase of them at 600l.; and that the plaintiff had, in writing, agreed with the defendant to sell him the bargain for 40l. Upon the request of the plaintiff, J. E. conveyed the premises, under the direction of the defendant, to a Mrs. Price. This conveyance was not in trust for the defendant. J. E. stated that he would not have conveyed to the person named by the defendant, but for the request of the plaintiff, to whom he held himself bound by his contract.

Upon this evidence it was objected by *Pell*, Serjt., that the action was not sustained, on two grounds; 1st, that the bargain between plaintiff and J. E.

not being in writing, was void under the statute of frauds, and therefore the transfer of it to the defendant, could form no good consideration for the defendant's promise, inasmuch as it could not be legally enforced against J. E.

2dly. That the averment of defendant's having become the purchaser was not proved, the legal conveyance being to Mrs. Price, who was not even a trustee

for the defendant.

BEST, C. J. I think that all the counts are substantially supported. Upon the first objection the plaintiff, as against the defendant, has brought himself within the statute of frauds, the agreement on which he founds his action being in writing. If, indeed, Emmanuel had refused to convey, there might have been a valid defence to this action. But having derived all the advantage intended, the defendant cannot now be permitted to say that what he agreed for with the plaintiff was of no value. As to the second objection, the defendant has, in substance, become the purchaser of the premises. He has had the entire benefit of the bargain by the conveyance to his nominee procured for him through the means of the plaintiff. But I will give leave to move to enter a nonsuit.

Verdict accordingly.

Vaughan, Serjt., and Talfourd, for the plaintiff. Pell, Serjt., and Barstow, for the defendant.

In Hilary Term following, Pell, Serjt., moved for a rule to show cause why a nonsuit should not be entered on the grounds urged at the trial, but the Court

refused the rule; and in giving judgment,

BEST, C. J., said, The inclination of my opinion at the trial was, as it is now, that all the counts of this declaration are supported; but it is unnecessary to decide that now, as the last count is clearly proved. Beyond all question the defendant has had the opportunity of becoming the purchaser, the premises having been conveyed to his nominee; and though there was no legal obligation on Emmanuel to convey, yet the defendant has in fact, enjoyed all the advantages of this agreement, and that forms a moral obligation sufficient to support the promise.

The other judges concurred.

DOKER, Executor of DOKER, v. HASLER, Sheriff of Sussex.-p. 198.

A widow cannot be asked to disclose conversations between herself and her late husband.

ACTION for a false return to a fi. fa.

The defence was that the execution was fraudulently taken out in order to protect the goods of the debtor against his assignees, under a commission of bankrupt. In order to prove this, the widow of the testator was called and asked to state a conversation between herself and the testator. This was objected to on the authority of Munroe v. Twisleton. Peake on Evidence, Appendix, 44.

BEST, C. J. I remember that in that case, in which I was counsel, Lord Alvanley refused to allow a woman, after a divorce, to speak to conversations which had passed between herself and her husband, during the existence of the marriage. I am satisfied with the propriety of that decision, and I think that the happiness of the marriage state requires that the confidence between man and wife should be kept for ever inviolable. The point is of very great importance, and I will reject the evidence, in order that the question may receive a solemn discussion in case my present opinion should be thought unfounded.

Verdict for the defendant.

Vaughan, Serjt., and Comyn, for the plaintiff. Pell and Wilde, Serjts., for the defendant.

COX and Others v. REID and Another.-p. 199.

[S, C. 12 E. C. L. R. 342.—1 Carr. & P. 602.]

Registered ownership is prima facie evidence of liability for the repairs of a ship; but may be rebutted by showing the credit not to have been given to the owners. A deed of defeasance, making void an absolute bill of sale, upon payment of a certain sum of money, is admissible for the defendants to show the purposes of their ownership; the bill of sale being duly entered on the registry, without mention of the defeasance.(a)

(a) The case of Fletcher and Another v. Reid and Another, was tried at the London sittings

after Hilary term, 1824.

The plaintiffs rested their case on the admissions of the defendants, which stated that the plaintiffs had done certain secessary repairs to the ship Asia, to the amount of 540L, and had made out their bill for the same to the captain and owners, and sent it to Bulmer; that during the time of doing these repairs the defendants were registered owners, that is to say, from November 1817 to October 1818.

Lord Gifforn, C. J., after objection by *Taddy*, Serjt., decided that the admission of necessary repairs having been done to a ship, of which the defendants were legal owners, was suffi-

cient to call on them for an answer.

Taddy, Serjt., then went into his case and showed, that Bulmer had conducted the affairs of the ship, and had given the orders, but failed in proving that the defendants were merely mortgagees, and the question was left to the jury, whether the plaintiffs had dealt with Bulmer as the agent of the owners, or had given him credit on his own account, and the jury found for the plaintiffs.

Vaughan and Besanquet, Serjts., and D. F. Jones, for the plaintiffs.

Taddy, Serjt., and Tindal, for the defendants.

By 4 Geo. 4, c. 41, the former registry acts are repealed, and the law consolidated in that act, and s. 43 provides, that all transfers of ships, or shares by way of mortgage, or in trust for sale for the payment of debts, shall be registered as such, and that such mortgagees or trus tees "shall not be deemed to be the owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred available by sale or otherwise, for the payment of the debt or debts, for securing the payment of which such transfer shall have been made."

SITTINGS IN AND AFTER HILARY TERM, IN K. B.

5 & 6 GEO. IV.-1825.

CLARK v. HUME.—p. 207.

The assignee of a bankrupt, lessee of certain premises, chosen on 15th Nov. 1823, kept the bankrupt in the premises, carrying on the business for the benefit of the creditors until April following, and himself occasionally superintended. But on the 22d Dec. 1823, disclaimed the lease by letter to the landlord: Held, that the assignee, notwithstanding such disclaimer, had elected to accept the lease by using the premises for the benefit of the creditor.

COVENANT by the assignee of lessor against the assignee of lessee.

Plea, that the estate, right, title, &c., of the lessee did not vest in the defend-

ant by assignment in manner and form, &c. Issue thereon.

The premises in question were demised by indenture of lease dated 30th March, 1818, for the term of 67 years, at the rent of 681. a year, to William Hassen, who covenanted for himself, his executors, administrators, and assigns, for the payment of the rent, at the four usual feasts, &c.

Hassen took possession of the premises under the lease, and carried on the business of a brass founder thereon. In November 1828 he became a bankrupt, and on the 15th of that month the defendant was chosen assignee. At the time of the bankruptcy there was a considerable portion of rent in arrear, and the plaintiff having threatened the bankrupt with a distress, he applied to the defend-

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ant, who, on the 8th of December, 1823, wrote to the plaintiff the following letter:—

"Sir,—I beg you will stay taking any distress out against the tools and effects belonging to the estate of William Hassen, of No. 2, Norfolk Street, your tenant. I will now engage with you that your situation shall not be worse than it has been, with respect to your demand for rent, until I have the pleasure of seeing

you, to come to an arrangement."

At this time the bankrupt continued in possession, conducting the business in the same mode as before the bankruptcy, finishing old orders, and taking new ones. The defendant came to inspect the business generally twice a week, and furnished the bankrupt with money, for the purposes of the business; the bankrupt kept the accounts, and transmitted the books every week to the defendant. This continued up to the month of April 1823. On the 22d December, 1823, the defendant wrote to the plaintiff, announcing his intention, as assignee of the bankrupt, not to accept the lease of the premises, and on the 25th of March delivered the lease to the plaintiff, who received it, but after consulting his attorney, returned it to the defendant.

ABBOTT, Ld. C J., in summing up said, The single question for you to decide is whether or no the estate in these premises vested in the defendant. Now by the assignment of all the estate and effects of the bankrupt to the defendant, the term in question would, by operation of law, vest also, provided the assignee acquiesces in the vesting of the estate. But in order that the creditors of a bankrupt may not be burthened with a lease which so far from being valuable would be a charge to the creditors, the law has provided that the assignee may dissent Now although an assignee in words or in writing declares his intention to refuse the estate, yet if, in fact, he takes advantage of it, he is not relieved from the charges incident to it. A mere nominal dissent is not sufficient, it must be one in fact and in substance. If you think that the defendant did take to these premises and carry on the trade there for the benefit of the creditors, he has done more than the law allows an assignee to do before he exercises his right of declaring off. A reasonable time is permitted for that purpose, but no case has gone so far as to say that an assignee may continue the trade for the benefit of the creditors, and after that refuse. If you think the defendant has carried on the trade for the benefit of the estate, you will find for the plaintiff; if you think it was done in friendship for the bankrupt merely, your verdict must be for the defendant.

Verdict for the plaintiff for 34l., being one half a year's rent. Scarlett and R. V. Richards for the plaintiff. Marryatt and Comyn for the defendant.

An express assent to the assignment, as far as regards leases belonging to the bankrupt, it necessary to vest such leases in the assignees of the bankrupt. Copeland v. Stephena, I.B. & A. 593. The mere putting up the premises to auction by the assignees for the purpose of accertaining their value, without describing themselves as owners, does not fix the assignees, Turner v. Richardson, 7 East, 335. And where the sesignees kept the bankrupt's effects on the premises for nearly a year, and paid rent to protect the effects from a distress, under a protest against accepting the lease, and afterwards sold the effects on the premises and removed them; at the same time they, with the assent of the landlord, put up the lease for sale, but there were no birders, and they afterwards kept the keys for three months, not being asked for them by the landlord, and making no other use of the premises; it was held that they were not liable as assignees of the lease. Wheeler v. Bramsh, 3 Campb. 340. The assignees of a bankrupt released the bankrupt's under-tenant of part of the premises, and afterwards being asked by the landlord to elect, refused the original lease: Held that they were not liable as assignees of the term. Hill v. Dobie, 8 Taunt. 325. But intermeddling with and assuming the management of a farm has been decided to be an election to take. Thomas v. Pemberton, 7 Tamt. 306. And the entering and taking possession was held to bind the assignees, though the bankrupt's effects were on the premises, and the keys were given up immediately after the effects were sold. Hanson v. Stevenson, 1 B. & A. 303. See also Hastings v. Wilson, 1 Holt, N. P. C. 290; and Broome v. Robinson, cited 7 East, 339.

SMITH and Another v. DE WRUITZ .- p. 212.

The declarations of a holder of a bill of exchange made whilst the bill is current, are not admissible against a subsequent holder under an endorsement made before the bill became due.

Assumpsit by the endorsees against the acceptor of a bill of exchange.

The defence was, that Crozaz, the drawer of the bill, to whose order it was payable, had originally received it from the defendant, to raise money for the defendant. That an agent of the defendant had by his desire procured the bill from Crozaz, in order to return it to the defendant, and that Crozaz fraudulently got the bill out of the agent's hands, and endorsed it to the plaintiffs, after he had committed an act of bankruptcy, by absconding within their knowledge, and upon which he had subsequently been declared a bankrupt. The bill was not due at the time of the endorsement. The assignees had got possession of the bill from the plaintiffs, but finding they had no title on it against the defendant, had returned it.

For the defence Marryatt offered to prove the declarations of Crozaz, made

whilst he was in possession of the bill.

Scarlett objected, and said that it was needless to argue the point, as it had recently been decided by the Court of King's Bench in Shaw v. Broome, in which case a new trial had been granted, because such declarations had been received on the ground that such evidence was not admissible against a holder who acquired the bill before it became due.

ABBOTT, Ld. C. J., assented to this and rejected the evidence.

Verdict for the defendant.

Scarlett and F. Pollock for the plaintiffs. Marryatt and Comyn for the defendant.

In Shaw v. Broome, Trinity Term, 1824, ex relatione Barnewall, and 4 Dow. & Ry. 731, it was decided that the declarations of one who had been holder of a bill made after he had negotiated it, were not admissible against a subsequent holder, to whom the bill was transferred whilst current, on the ground that such subsequent holder did not sue as the trustee of the preceding one, nor stand on his title, but on that acquired by the bona fide taking of the bill. In Poccet v. Billings, supra, 715, 2 Bingh. 269, it was held, that in order to make such declarations evidence, they must, at all events, be made by a then holder of the bill. It would seem that where the plaintiff is trustee, or stands on the title of the previous holder of the bill or note, whose declarations are offered, such declarations are admissible, though made after parting with the bill or note, being equally against the interests of the person making them, and such seems to have been the opinion of the Court in delivering judgment in Shaw v. Broome.

EGERTON v. FURZMAN.—p. 218.

[S. C. 12 E. C. L. R. 848.—1 Carr. & P. 613.]

A wager was deposited with a stakeholder on the event of a dog-fight, to be paid over to the winner after the event was determined. The money was not demanded of the stakeholder until after the event was determined. The Judge discharged the jury from giving any verdict.(a)

(a) It has been established by a series of cases, that money deposited in the hands of a stakeholder, on a wager illegal in its nature, may be recovered back from the stakeholder, after the event is decided, if demanded before it has been paid over, see Cotton v. Thurland, 5 T. R. 495; Smith v. Bickmore, 4 Taunt. 474; Bate v. Cartwright, 7 Price, 540. And at all events, whether the wager is illegal or not, either party demanding his deposit before the wager is won, is entitled to have it returned to him, and on refusal may maintain an action against the stakeholder. Eltham v. Kingsman. 1 B. & A. 683; Taylor v. Lendev. 9 East. 49.

LIC wager is liegal or not, cluser party demanding his deposit before the wager is won, is entitled to have it returned to him, and on refusal may maintain an action against the stakeholder. Bitham v. Kingsman, I.B. & A. 683; Taylor v. Lendey, 9 East, 49.

In Robinson v. Mears, Easter term, 1825, ex relatione Cresswell, Abbott, Ld. C. J., said, "The case of Egerton v. Fursman was presented to me at the trial, as a case in which I was to be called upon to decide the question of which dog won, and onthat ground alone, I refused to try the cause." That a judge is justified in striking causes out of the paper, where the attention of the Court would be occupied in deciding upon foolish wagers, to the prejudice of more important business; see Brown v. Leeson, 2 H. Bla. 43; Squires v. Whisken, 3 Campb. 140; Ditchburn v.

Goldsmith, 4 Campb. 152; Eltham v. Kingsman, 1 B. & A. 683; Rex v. Deacon, supra, 696, n. a. But it should seem, after the case of Cotton v. Thurland, above cited, that it is not in the discretion of a judge to refuse to try an action brought to recover a deposit from a stakeholder, however frivolous or illegal the wager may be. The Court of Exchequer, in Bate v. Cartwright, set aside a nonsuit, in an action against the stakeholder, where the Judge had nonsuited, on the ground of an action of that nature being a waste of time and a hindrance of the business of other suitors.

TURNEY v. HADEN and Others.-p. 215.

Held, that the acceptors of bills of exchange, payable at a banker's in London, were not discharged from their liability, although the holder neglected to present them for payment at the banker's before they failed, which was several weeks after the bills became due; and although the acceptors at all times, up to the failure of the bankers, had a balance in their hands sufficient to cover the acceptances.

This was an action by the plaintiff as endorsee against the defendants as acceptors of two bills of exchange; one for the sum of 36*l*., dated 4th June, 1824, the other for 60*l*. 4s. 6d., dated 14th June, 1824.

Both bills were accepted payable at Messrs. Marsh and Co., Berners Street. The first-mentioned bill became due on the 21st August, 1824, the other on the

31st of the same month.

It appeared that the defendants, who kept an account with Messrs. Marsh and Co., had always a larger balance in the hands of Marsh and Co. from the time of drawing the bills to the time Marsh and Co. stopped payment, viz. on the 13th September in the same year, than the amount of both these bills.

Scarlett for the defendants, contended they were discharged from all liability upon these bills by the laches of the holder in not presenting them for payment within a reasonable time. That although since the 1 & 2 G. 4, c. 78, an acceptance like the present does not oblige the holder to present the bill for payment at the place named, still the acceptor will be exonerated where he proves an actual loss sustained by him in consequence of an omission to present the bill at such a place within a reasonable time. Rhodes v. Gent, 5 B. & A. 244, though before the statute 1 & 2 Geo. 4, c. 78, recognises the principle contended for

Parke for the plaintiff relied on the case of Sabag v. Abitbol, 4 M. & S. 462.

Abbott, Ld. C. J., directed the jury to find a verdict for the plaintiff, giving the defendants liberty to move.

Verdict for the plaintiff.

J. Parke and Cameron for the plaintiff. Scarlett and Hutchinson for the defendants.

In the following Easter Term, Scarlett moved to set aside this verdict on the ground of laches in the holder in not presenting the bill for payment at Marsh and Co. in a reasonable time. The Court refused the rule.(a)

(a) See Bayley on Bills, 178, 4th edit,

TODD and Others v. ROBINSON.-p. 217.

The defendant, a linen-draper in Yorkshire, had in several instances employed A. B., as his agent, to purchase on credit goods of the plaintiffs, linen-drapers in London. A. B., without the authority of the defendant, orders goods in his name to be sent by the usual conveyance, and intercepts them to his own use: Held, that the defendant is liable for such goods, he having by the previous dealings authorized the plaintiffs to treat A. B. as his agent.

Assumpsit for goods sold and delivered.

The plaintiffs were wholesale linen-dealers in London, the defendant a shopeper at Driffield at Yorkshire.

The defendant had employed one Womac, who resided in London, to order goods to be sent to him by the plaintiffs on credit. Six parcels, so ordered, were received and paid for by the defendant. The first of these dealings took place on 1st March, 1823, and in November following it was discovered that Womac had ordered goods in the defendant's name to be sent by the usual conveyance without the defendant's authority, and had himself intercepted and appropriated them to his own use, and afterwards absconded.

This action was brought to recover the sum of 45l.; and it was proved that the defendant had in fact authorized Womac to order goods to the whole amount with the exception of 14l. The payment of this sum was resisted, on the ground that the plaintiffs trusted Womac at their own peril, and that the defendant was not liable beyond what he had actually authorized Womac to order. The plaintiffs and the defendant never met until the discovery of Womac's frauds.

ABBOTT, Ld. C. J. The liability of the defendant to the only disputed part of this demand depends on the question, whether the defendant has by his own acts and conduct constituted Womac his general agent to order goods. The authority actually given in each particular instance to Womac can only be known to the defendant himself; the plaintiffs can only look to the appearances held out by him; and it is for you to say whether the defendant by his own act and conduct had induced the plaintiffs to believe that Womac was his agent for the purpose of ordering these goods. If you think he has so authorized the plaintiffs to treat Womac as his agent, then the defendant is answerable notwithstanding he may in this particular instance have given Womac no such instructions.

Verdict for the plaintiffs for the whole demand.

Scarlett and F. Pollock for the plaintiffs.

Denman, C. S., and J. Parke, for the defendant.

See Hazard v. Treadwell, 1 Str. 506; Boulton v. Hillersden, 1 Ld. Raym. 224; Whitehead v. Tuckett, 15 East, 400; Lord Ellenborough's judgment in Pickering v. Busk, 15 East, 43; Neal v. Irving, 1 Esp. N. P. C. 61. Where there have been no previous dealings from which an authority to buy on credit can be implied, a master is not liable for goods furnished to the servant in his name. 1 Show. 95; Boulton v. Arlsden, 3 Salk. 234; Stubbing v. Heintz, Peake's N. P. C. 66; Pearce v. Rogers, 3 Esp. N. P. C. 214; Rusby v. Scarlett, 5 Esp. N. P. C. 76.

STIERNELD v. HOLDEN and Another.-p. 219.

A factor places goods in the hands of a broker as security for an advance to himself, and with directions to sell. The goods are sold before any revocation of these directions: the principal cannot maintain trover against the broker.

TROVER for a quantity of coffee.

This action was brought in the name of Baron Stierneld to recover the value

of 80 bags of coffee consigned to him from Demarara.

The coffee was the produce of certain estates in Demarara, which formerly belonged to a person of the name of Fileen. Upon the death of Fileen, the Swedish government appointed certain curators to take the management of the estates for the benefit of those who were interested in them: the Swedish ambassador, the present plaintiff, was the agent of the curators in this country.

For some time before the arrival of the coffee, which was the subject of the present action, a Mr. Stewart had been employed by the plaintiff and also by the curators to receive and sell the produce of these estates. The consignments were generally made to the plaintiff but sometimes to Stewart; when made to the plaintiff he endorsed the bills of lading to Stewart, who disposed of the goods, and accounted for the proceeds to the curators of Fileen's estates.

In 1823 the plaintiff went to France, and on his departure left with Mr Stewart a written authority to open all letters that might come for him from Demarara during his absence, and to endorse in his name any bills of lading

which they might contain.

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About the 25th November, 1823, the plaintiff being in France, the bills of lading of the goods in question came in a letter addressed to the plaintiff from Demarara, and Mr. Stewart opened the letter and took out the bills of lading. On the 26th November, Stewart delivered these bills of lading to the defendants with the following endorsement on each of them: "deliver the within mentioned coffee to Messrs. Holden and Vanhouse, or their order p. proc. of Baron Stierneld. Mr. Stewart."

When Stewart delivered the bills of lading to the defendants he directed them to sell the coffee, and at the same time requested them to advance a sum of money to which he conceived the proceeds of the sale would amount at the current prices at that time; the defendants accordingly accepted a bill for 1500l. at three months; this bill Stewart discounted immediately, and applied the money to satisfy his own engagements. It appeared that the defendants would not have made this advance to Stewart had he not endorsed to them the bills of lading. Stewart was at this time considerably in advance to the Fileen estate. The bill of the defendants became due on the 29th of February, 1824, and was duly honoured.

It appeared that Stewart had on former occasions placed bills of lading of the proceeds of the Fileen estate in the hands of the defendants for the purposes of sale, and that the defendants knew that Stewart was not the owner of the coffee

in question but only the agent for the Fileen estate.

Before the defendants sold the goods in question they consulted Stewart, who agreed with them that on account of the state of the markets an immediate sale was desirable. Stewart stopped payment on the 28th November. On the 3d December the goods were sold by auction at the prompt of a month or one per cent. discount on previous payment, the net proceeds of which sale were 1508l. 7s. 9d. No countermand of the authority to sell was given to the defendants by the plaintiff, or any person on his behalf, until the 6th December, after the sale had taken place; nor did it appear that the defendants were informed of Stewart's having stopped payment until that day.

The Attorney-General for the defendants submitted that upon this evidence, the plaintiff could not recover in this form of action; had the goods been demanded before the defendants had contracted to sell, then indeed a subsequent sale might have amounted to a conversion; but in the present case the plaintiff

is clearly not entitled to recover.

Marryatt for the plaintiff. Stewart, in placing the goods in the hands of the defendants, and obtaining an advance to himself on their security, was guilty of a breach of his duty as a factor; the defendants, who knew that he was exceeding his authority, were parties to the wrong which he did to his principal, and in assuming any dominion over goods which thus wrongfully came into their hands, were guilty of a conversion, and were therefore liable to this action even before the sale. But the sale itself was without authority, and was a new act of conversion. Stewart had the power to put the goods into the defendant's hands to sell them for his principal; he had no power to put them into their hands to sell for the purpose of securing an advance made to himself. It is in this latter manner that he has assumed to deal with the goods, and the sale which was made under a power thus usurped by the factor, is without lawful authority, and amounts to a conversion. The direction to sell given by Stewart to the defendants, is accessary to the pledge which he made to them, and is tainted by its illegality. It would be highly inconvenient that a sale should be held lawful under such circumstances, as the person employed is under a temptation to sell at a price which would cover his advance, although it might not be the highest he could procure. And it is no answer to this that no such loss has The argument is drawn from the general impolicy of allowing a man to have an interest contrary to his duty, not from a particular inconvenience having arisen in an individual case.

ABBOTT, Ld. C. J. It appears to me that as there was a clear authority to sell, and no revocation by the plaintiff of that authority prior to the sale, this

action cannot be maintained. If there is an actual sale under the authority of the proprietor of the goods, trover cannot be maintained; whether an action for money had and received will lie, is another question; but in the present form of action, I am of opinion that the plaintiff cannot recover.

Nonsuit, with liberty to move to enter a verdict for 1508l. 7s. 9d.

Marryatt, Gurney, and Maule, for the plaintiff.

The Attorney-General and F. Pollock for the defendants.

In the following Easter Term Marryatt moved to set aside this nonsuit, and enter a verdict for the plaintiff, and cited the cases M'Combie v. Davies, 6 East, 538; Truettel v. Barandon, 1 B. Moore, 548; Featherstonhaugh v. Johnston, 8 Taunt. 237; but the Court refused the rule, being of opinion that the action should have been money had and received, and not trover. The Court observed, that Stewart had clearly an authority from the plaintiff to endorse the bills of lading, and in pursuance of that authority he authorized the defendants to sell; there was no pretence for saying, that the defendants acted otherwise than bons fide, in the sale of these goods, there being no evidence of their having made any sacrifice for the purpose of reimbursing themselves the advance they had made to Stewart, the circumstance even of his failure not in fact being known to them at the time of the sale. If the sale had not been warranted, then, certainly, the plaintiff would not be bound to accept the proceeds of the goods, but might recover in the present form of action. Stewart authorized the defendants to sell, and also authorized them to apply the proceeds of such sale to the defendants' own use in liquidation of the advance they had made to him. He was justified in authorizing them to sell, and the sale, therefore, cannot be impeached. The defendants are not authorized in retaining for their own use the produce of this sale; but for the misapplication of such produce, this is not the proper form of action.

. SITTINGS AFTER HILARY TERM, IN C. P.

6 GEO. IV.—1825.

BROMLEY, Assignee of HORNE, a Bankrupt, v. KING .-- p. 228.

The declarations of a bankrupt made before the bankruptcy, are not admissible to prove the trading, in an action by the assignees.

NORTON v. HERRON.—p. 229.

[S. C. 12 E. C. L. R. 366.—Carr. & P. 648.]

The defendant by a written agreement expressed to be made by himself on behalf of A. B. of the one part, and the plaintiff of the other part, stipulated to execute a lease of certain premises to the plaintiff. These premises were proved to belong to A. B.: Held, that the defendant was personally liable.(a)

(a) See Cass v. Ruddle, 2 Vern. M. Ca. 280; Clayhill v. Fitzgerald, 1 Wils. 28, 58.

ROWLAND v. ASHBY and Another .- p. 231.

Parol evidence is admissible to prove matters deposed by a party on his examination before commissioners of bankrupt, material to the inquiry, such matters not being contained in the written examination taken by the commissioner.

Assumpsit for goods sold and delivered.

The defence was, the plaintiff was a partner in the transaction in question with his son, who had been made a bankrupt, and that the defendants had settled the claim with the son.

To prove the partnership, the attorney to the commission against the son, who produced the examination of the plaintiff taken before the commissioner, was asked whether the plaintiff had not at the examination, admitted that he was in partnership with his son. There was no such admission in the written examination produced. It was objected by the counsel for the plaintiff that the written examination was the only evidence of what passed before the commissioners material to the inquiry, that the matters sought to be given in evidence were material, and the plaintiff had been questioned to them. That it must be presumed the commissioners had done their duty, and made a faithful account of the plaintiff's evidence. That the case was the same as the examination of a prisoner before a magistrate under the statutes of Philip and Mary, where the examination taken by the magistrate was the only proof, and nothing could be

added by parol.

BEST, C. J. I think I ought to receive the evidence if it should appear that the matter to be added was material to the examination, but that very strong proof ought to be adduced of the plaintiff's having said that which is alleged. The statute of Philip and Mary has been used for a different purpose than was intended; and my opinion is, that upon clear and satisfactory evidence, it would be admissible to prove something said by a prisoner beyond what was taken Verdict for the plaintiff.

down by the committing magistrate.(a) Verd Vaughan, Serjt., and R. V. Richards, for the plaintiff.

Wilde, Scrit., and Chitty, for the defendant.

(a) See the elaborate judgment of Grose, J., in Lambe's case, 2 Leach, C. C. 554, 4th edit, where it was held, that a voluntary confession by a prisoner on his examination before a magistrate, reduced into writing, was admissible, though the magistrate had neglected to sign it, and the prisoner had refused. The object of the acts of Philip and Mary is there said to be, to enable the index and investment to be included and investment to the acts of Philip and Mary is there said to be. the prisoner has relused. In a object of the acts of rump and many is that of selections to enable the judge and jury to see, whether the witnesses are consistent or contradictory in the evidence they give.

Parol evidence is admissible of a prisoner's declarations before a magistrate, when no written

Parol evidence is admissible of a prisoner's declarations before a magistrate, when no written examination was taken down. Rex v. Hall, cited in Rex v. Lambe, 2 Leach, C. C. 559. A written examination before a magistrate will not exclude a previous parol declaration made to a third person, and not reduced into writing. Mac Nally on Evidence, 45; Starkie on Evidence, The object of the examinations taken by commissioners of bankrupts is to perpetuate testimony, 5 Geo. 2, c. 30, s. 41. The examination of a party taken by the commissioners is evidence against him, though part only of his depositions were taken down, if read over to him and signed by him. Milward v. Forbes, 4 Esp. 172.

WILLIAMS and Others v. RAWLINSON .- p. 233.

[S. C. 11 E. C. L. R.-3 Bingh. 71.]

A bond conditioned to indemnify, and save harmless the obligees, for "such sums as they, in their banking business, should within ten years advance or pay, or be liable to advance or pay for or on account of their accepting, discounting, &c., any bill of exchange, notes, &c., which A. B. should from time to time draw upon or make payable, &c., at their house; and also other sums which they within the paried afragaid should otherwise law out, pay, &c., which A. B. should from time to time draw upon or make pavable, &c., at their house; and also other sums which they, within the period aforesaid, should otherwise lay out, pay, &c., on the credit of the said A. B., or on his account; and also all such wages and allowances for advancing, paying, &c., such bills, &c., advances, payments, engagements, and accommodations, not exceeding the sum of 5000l. in the whole, together with interest on such advances, &c.: Held to guaranty running accounts and not satisfied by the first payment of 5000l. Held also, that such bond ought to be stamped with a 9l. stamp under 55 G. 3, c. 184, Schedule, Part I. title Bond.(a)

(a) See Mason v. Pritchard, 12 East, 227. S. C. 2 Campb. 436. Kirby v. The Duke of Marlborough, 2 M. & S. 18.

DOE on the demise of KERBY v. CARTER.-p. 237.

The incumbent of a living may sustain ejectment against parties in possession of the glebe lands, though the current year of a tenancy from year to year, created by his predecessor, is unexpired.

The institution of a party to a living, reciting the cession of his predecessor, followed by induction, is sufficient evidence to support an ejectment; though the predecessor is shown to

have been in possession; and no other evidence of his cession is given.

EJECTMENT by Dr. Kerby as the vicar of Brampton to recover possession of

glebe land in the defendant's possession.

The counsel for the plaintiff proved that the defendant had been tenant to Dr. Richards who preceded the lessor of the plaintiff in the enjoyment of the living; and gave in evidence a notice to quit by Dr. Richards to the defendant which expired previous to the demise. The counsel for the defendant cross-examined the witnesses with a view to show that the defendant's tenancy did not expire at the time to which the notice had relation.

LITTLEDALE, J., was of opinion that this was immaterial, as the new vicar had a right to immediate possession notwithstanding the tenancy recognised by

his predecessor.

The counsel for the plaintiff then proved the institution and induction of the

lessor of the plaintiff to the living previous to the date of the demise.

Talfourd for the defendant, submitted that as the plaintiff's counsel had shown Dr. Richards in possession of the living, they were bound to prove his resignation, otherwise the institution and induction of his successor would be void.

Taunton, for the lessor of the plaintiff, replied that as the institution purported to be "on the cession of Dr. Richards," this was sufficient prima facie evidence

to sustain the induction.

Talfourd, on the other hand, contended that this recital was not the best evidence of the resignation, which must have been accomplished in a more formal manner, and consequently it could not be received.

LITTLEDALE, J. I think that as the letters of institution recite the cession, that is sufficient prima facie evidence of the eession being duly made, especially as it is acted on; and that the plaintiff is entitled to recover.

The plaintiff accordingly obtained a verdict.

Taunton for the plaintiff.

Talfourd for the defendant.

Talfourd in the following Easter Term moved for a new trial, on the ground of misdirection; but the Court refused to grant a rule.

EVANS v. VERITY.—p. 239.

Held that a qualified acknowledgment of a sum due to the plaintiff, would not entitle him to recover upon a count on an account stated.

Assumpsit for lands bargained and sold, with the usual money counts.

The only evidence to sustain the action, applied to the "account stated," and was as follows:

The plaintiff in a conversation with the defendant said, "pay me the 10t. you owe me;" the defendant said he would, provided the plaintiff had not moved the grates, which he considered as fixtures; the plaintiff in reply denied that they were fixtures, and told the defendant that if he would not pay him he would ane him.

Maule for the defendant contended, that this was not an unqualified admission

of any sum due, and consequently the plaintiff must be nonsuited.

Ludlow for the plaintiff. The defendant is asked to pay that which he owes: in his answer he does not deny that he owes the sum named, but insists that he is not liable to pay it, on a ground which would not afford any defence to as action for the money. The non-delivery of fixtures might be the matter of a cross action, but it is not a matter of set-off. Here an item of 101. is admitted to be due on one side of the account, and no item of account on the other side is insisted on or stated.

LITTLEDALE, J. The plaintiff here does not prove any consideration on which the defendant became indebted to him, but insists on his right to recover upon an admission of liability, made by the defendant on a statement of account between them. If the whole of the conversation be taken together, it appears to me there is no admission of liability.

Ludlow and Cross for the plaintiff.

Maule for the defendant.

In the following Easter Term, Ludlow moved to set aside this nonsuit, and contended that the defendant's admission of the debt was in no wise weakened, because the defendant at the same time chose to set up a claim which might have been a fit subject for an action of trespass.

The Court in refusing the rule stated, that the defendant might, by what passed, have meant that he would have paid the 10% if he had had all he bargained for; and if so, it is no acknowledgment of 101. being due. It is not as unqualified acknowledgment, but only an admission that 10% would have been due if something else had not happened. Rule refused.

Knowles v. Michel, 13 East, 249. Highmore v. Primrose, 5 M. & S. 65.

REX v. BEAVAN and Others.—p. 242.

On an indictment for a forcible entry and detainer under the statutes of R. 2 and Jac. 1, the party grieved is not a competent witness.(a)

(a) The law of evidence, as it relates to the competency of witnesses interested in the event

(a) The law of evidence, as it relates to the competency of withdraws in the consistent with itself.

On the one hand, the cases in which an informer entitled to a part of the penalty on a conviction before a justice of the peace, has been held incompetent; those in which the party injured is said to be competent in support of an indictment for perjury, because he cannot avail himself of the conviction obtained by his own testimony; and those in which a party who would be liable on an instrument, supposing it genuine, has been held incompetent to show it forged, because he was supposed to have an interest in the conviction; all go to show that interest, in the cause he was supposed to have an interest in the conviction; all go to show that interest, in the event of a criminal proceeding, disqualifies a witness.

On the other hand, there are cases in which the most direct interest does not render the witness incompetent. A prosecutor, entitled to a reward on conviction, has always been admitted as a witness. With respect to the owners of goods which have been stolen, and who are competent witnesses, though entitled to the restitution of the stolen goods: it seems that where he goods have not been stolen. goods have not been sold in market overt, and the property therefore still remains in the owners, the conviction only gives them a writ of restitution under the statute of 21 Hen. 8, c. 11. In addition to the proceedings by action of trespass, trover, or detinue, at common law, by which they might recover the manufacture of the example proceed. which they might recover the property or its value; and, as in support of the statutable proceeding it is necessary to show all the facts which would support an action at common law, and the conviction also: it does not common law, and the conviction also; it does not appear that the owner has any substantial interest in the event of

the cause. (a) Where the goods have been sold in market overt, the case is very different; the plaintiff has a direct interest in the conviction, which makes an essential part of his title to recover, whether in a proceeding by writ of restitution or otherwise. The competency, however, of a party robbed, in either case follows, necessarily from the words of the statute of 21 Hen. 8, c. 11, which directs, that justices "afore whom any felon or felons who have robbed or taken away any money, goods, or chattels, from any of the king's subjects, from their person or otherwise, shall be found guilty or otherwise attainted, by reason of evidence given by the party so robbed, or owner, or by any other by their procurement, have power by the said act to award from time to time, writs of restitution for the said money, goods, and chattels, in like manner as though any such felon or felons were attainted at the suit of the party in appeal."

(e) For the pleadings in an action commenced by writ of restitution, see Tremaine's Pleas of the Crown, p. 315.

SITTINGS IN EASTER TERM, IN K. B. _

6 GEO. IV.-1825.

AMFIELD v. WHITE.—p. 246.

A tenant verbally agreed "to pay all taxes:" Held, that under this agreement he was bound to pay the land-tax although it was not specifically mentioned.

SITTINGS AFTER EASTER TERM, IN K. B.

6 Gmo. IV.-1825.

MANN v. MOORS.—p. 249.

In an action against the drawer of a bill of exchange dated "Manchester:" Held, that it was sufficient evidence of his having had notice of its dishonour, to prove that a letter containing such notice, had been put into the post-office in London, directed to him "Manchester."

Action, on a bill of exchange, by the endorsee against the drawer.

The bill, as drawn, was dated Manchester, and upon being presented for payment at the acceptor's in London, was dishonoured. The only evidence given, of notice to the defendant, of the bill having been dishonoured, was, that a letter, containing such a notice, had been put into the post-office in London, directed to "Mr. Moors, Manchester."

Wightman for the defendant, contended, that this was not a sufficient notice of the dishonour of the bill; that it was the duty of the plaintiff to have inquired of the prior holders of the bill the particular address of the defendant in the town of Manchester; that it was most likely a letter so directed, to so large a town as

Manchester, would not reach the defendant.

ABBOTT, Ld. C. J. I am of opinion, that this was sufficient notice of the dishonour of the bill. If the drawer of a bill of exchange dates his bill London, I think a notice of dishonour by letter addressed to him London, will be sufficient. Verdict for the plaintiff.(a)

Gurney and Hutchinson for the plaintiff. Wightman for the defendant.

(a) In Walter v. Haynes, supra, 721, Abbott, Ld. C. J., held, that "Mr. Haynes, Bristol," was too general a direction to raise a presumption that the letter reached the particular individual intended; but that case is very distinguishable from the present; that was an action by an endorsee against the endorser; here the action is against the drawer, who designates on the face of the bill itself the place where it is drawn, furnishing thereby presumptive evidence that notice of the dishonour of the bill will reach him at that place.

JENNINGS v. THROGMORTON.—p. 251.

In an action for use and occupation of a lodging under a weekly tenancy, where it did not appear that the lodging was originally let for the purposes of prostitution: Held, that the plantiff could not recover the weekly rent, which accrued after he was fully informed, that the defendant occupied the lodgings for the purposes of prostitution.

Assumpsit for use and occupation of certain rooms, belonging to the plaintiff. The defence set up was, that the rooms were let to the defendant for the purposes of prostitution, and with a knowledge on the part of the plaintiff of that fact.

It did not appear, from the evidence produced in support of the defence, that the plaintiff, at the time of letting the rooms to the defendant, was aware of her mode of life; but it was proved, that after the defendant had occupied the rooms for about two months, the plaintiff was fully informed of the defendant's receiving male visiters there, and that she supported herself by prostitution. It was

shown that the defendant was a weekly tenant.

ABBOTT, Ld. C. J. There are two questions for your consideration, First, you are to consider, whether the plainiiff originally let these lodgings to the defendant for the purposes of prostitution; and if you should be of opinion that he did, then your verdict should be for the defendant. Secondly, if you should be of opinion that the plaintiff was not originally aware of the defendant's course of life, and the purpose to which these lodgings were to be applied, you are to consider whether he allowed her to remain as his weekly tenant, after he had become acquainted with her mode of life.

I am of opinion, that if the plaintiff, after he became acquainted with her mode of living, suffered her to occupy the premises for the express purpose of continuing a life of prostitution, and the present demand accrued after he had acquired this knowledge of her character, that he is not entitled to recover, and

that your verdict should be for the defendant.

Verdict for the defendant.(a)

Thesiger for the plaintiff. Denman, C. S., for the defendant.

(c) See Crisp v Churchill, cited in Llovd v. Johnson, 1 B. & P. 340; Girardy v. Richardson, 1 Esp. N. P. C. 13.

REX v. SOLOMON.—p. 252.

On an indictment for perjury alleged to have been committed by the defendant as a witness in a civil action, it appeared that the evidence given on that trial by the defendant, contained all the matter than the evidence given on that trial by the defendant, contained all the matter than the evidence given on that trial by the defendant as a witness interested. all the matter charged as perjury, but other statements, not varying the sense, interrened between the matters set out: Held to be no variance, although in the indictment the evidence appeared to have been given continuously.

THIS was an indictment for perjury, alleged to have been committed by Solomon, as a witness for the defence, in a case of Cohen v. Davies, tried in the Court of Common Pleas. That was an action of assault and battery, with a plea of son assault demesne.

The indictment charged Solomon with having sworn that Cohen spit in Davies's face before Davies struck him, and that he, Solomon, had not said to Davies, "Give it him, give it him, it will go in one account,"—and assigned perjury on both statements.

The evidence given by the defendant on the former trial, contained all the matter charged as perjury: but other matter intervened between the statement as to the spitting, and that as to the words.

Denman, C. S., and Platt, objected that this was a fatal variance; as the evi-

dence charged as perjury in the indictment appeared to have been given conti-

nuously.

ABBOTT, Ld. C. J. It is immaterial: what intervenes does not vary the effect of what is stated. This is not like the case of a libel, where something of the kind suggested has been held, but whether rightly or not it is not necessary for me at present to determine. The defendant was acquitted.(a)

Gurney and Chitty for the prosecution.

Denman, C. S., and Platt, for the defendant.

(a) Tabart v. Tipper, 1 Campb. 350; Bell v. Byrne, 13 East, 554; Rex. v. Taylor, 1 Campb. 404; Cartwright v. Wright, 5 B. & A. 615; Cooke v. Hughes, supra 713; 1 Stark. Crim. Plea. 117, 1st edit.

BROWNE v. MURRAY.—p. 254.

In an action for a libel, where the general issue is pleaded, and also special pleas in justification, the plaintiff may, in the outset, give all the evidence he intends to offer to rebut such justification, or he may do so in reply to evidence produced by the defendant, but he is not entitled to give part of such evidence in the first instance, and to reserve the remainder for reply to the defendant's case.

This was an action for a libel. The defendant pleaded the general issue, and

several pleas of justification.

The plaintiff, after proving the publication of the libel by the defendant, called a witness to disprove certain facts alleged in the justification. The defendant then proceeded with evidence in support of his pleas. After the defendant had closed his case, the plaintiff proposed to call another witness to disprove other facts stated in the justification.

The Attorney-General, on the part of the defendant, objected to such evidence

being received.

ABBOTT, Ld. C. J. In actions of this nature, the plaintiff may, if he thinks fit, content himself with proof of the libel, and leave it to the defendant to make out his justification; and then the plaintiff may, in reply, rebut the evidence produced by the defendant. But if the plaintiff, in the outset, thinks fit to call any evidence to repel the justification, then I am of opinion, that he should go through all the evidence he proposes to give for that purpose, and that he shall not be permitted to give further evidence in reply. It is much more convenient for the due administration of justice that this course should be adopted, otherwise there will be no end to evidence on either side, as the defendant would be entitled to call witnesses to answer those last produced by the plaintiff to rebute the justification.

Denman, C. S., F. Pollock, and Brougham, for the plaintiff.

The Attorney-General and J. Parke for the defendant.

In Sylvester v. Hall, Middlesex Sittings after Trinity Term, 7th July, 1825, which was an action of trespass and false imprisonment, with the general issue, and pleas in justification, Abbott, Ld. C. J., laid down the same rule as in the principal case.

In Rees v. Smith, 2 Stark. N. P. C. 31, which was an action of trespass, for breaking and applications of the start of the star

entering a dwelling house, and seizing goods, with the general issue, and pleas in justification, Lord Ellenborough states that the general rule was, that "when by pleading, or by means of notice, the defence was known, the counsel for the plaintiff was bound to open the whole case in chief, and could not proceed in parts; that when it is known what the question in issue is, it must be met at once." And the practice before his Lordship in cases of bills of exchange, where notice of intention to dispute the consideration had been given, accorded with this rule. where notice of intention to dispute the consideration had been given, accorded with this rule. Delauney v. Mitchell, 1 Stark N. P. C. 439. But a different practice in actions of this nature, has prevailed under the present Lord Chief Justice, who has always allowed evidence to be given in reply to that of the defendant, impeaching the consideration, provided no suspicion has been cast on the plaintiff's title by cross-examination of his witnesses. Chitty on Bills, 6th edit. 401; Phillips on Evidence, 6th edit. vol. ii. p. 17; Starkie on Evidence, pt. iii. p. 383, n. (a) And the present practice in the Common Pleas agrees with that of the King's Bench, though it was otherwise ruled in Spooner v. Gardiner, supra 707. It would seem that the option given in the principal case, would only apply where the plaintiff's case consisted of one transaction, and the defendant's justification of another distinct one, as in libel; but where Vol. XXI.—94

there is only one transaction in question between the parties, as in assault and battery, with plea of son assault demesne, it would not be allowed a plaintiff to give in reply any evidence applicable to that transaction.

SITTINGS AFTER EASTER TERM, IN C. P.

6 GEO. IV.—1825.

SMITH v. BLANDY and Another.—p. 257.

Where by the cross-examination of the plaintiff's witnesses, who had proved a primâ facie case of the sale of goods, it appeared that the plaintiff had said that the goods were sold under a written contract, which he produced to the witness: Held, that the written contract spoken of was evidence for the plaintiff, without calling the broker, by whom it purported to have been made and signed.

The assertion of a party, in a conversation given in evidence against him, of facts in his favour, is evidence for him of those facts.

Where goods were sold under a written contract at so much per load, "to be taken by the dock account, and paid for in cash, sllowing 21 per cent. discount within 14 days from the date; the goods to be taken on board, and the duty deducted;" and the duty was payable by the buyer: Held, that the discount was to be calculated on the sum to be received by the seller only, exclusive of the duty.

The construction of a mercantile contract is matter for the jury.

Assumpsit for goods sold and delivered.

A prima facie case having been made out for the plaintiff, by proof of the

delivery of a large quantity of timber, and of the value thereof,

Wilde, Serjt., for the defendants, cross-examined one of the plaintiff's witnesses, who proved that he had heard the plaintiff say, that the timber was sold under a written contract, which the plaintiff at the same time showed the witness.

Pell, Serjt., then produced a broker's note, which the witness said was the

paper spoken of by the plaintiff.

Wilde, Scrit., objected to the paper being received as evidence of the contract, unless the broker was called to prove it. That what the paintiff said was proof against him that the goods were sold under a written contract; but that his assertion in his own favour, though made at the same time, could not be taken as true, so as to relieve him from the necessity of proving the written instru-And he cited Remmie v. Hall, Manning's Index, 2d edit. p. 376.

For the plaintiff it was answered, that the whole conversation was evidence to go to to the jury; and a case tried at Winchester (a) before Abbott, Ld. C. J., was mentioned, in which a party's declarations had been given in evidence against him, and his lordship left the whole conversation to the jury to consider, whether the facts asserted by the party in his own favour were not true, as well as those against him.

Best, C. J. I agree with the case just stated, which seems perfectly consistent with the account given of Remmie v. Hall. The whole of what a party says at the same time, must be given in evidence, and what he says in his favour must not be taken as true, but must be left, under all the circumstances, for the jury to say whether they believe it or not. I think this paper must be left to the jury without further proof.(b)

(a) Cray v. Halls, Summer Assizes 1824, ex relatione Moody, (b) In Eq. Cas. Abr. 10, it is laid down, that "where a man is charged only by an oath, or a book, the same should be his discharge." But in Thompson v. Lambe, 7 Ves. 588, the rule is thus qualified by the Lord Chancellor:—"A person charged by his answer, cannot by his answer discharge himself; nor even by his examination, unless it is in this way: if the answer or examination states that there are a controlled to the cont or examination states, that upon a particular day, he received a sum of money, and paid it over, that may discharge him; but if he says, that on a particular day, he received a sum of money, and paid it over, and upon a subsequent day he paid it over, that cannot be used in his discharge; for it is a different transaction." See Ridgway v. Darwin, 7 Ves. 404.

The following contract was put in:

"London, 28d June, 1824.

"Sold, for account of Mr. John Smith, to Messrs. Blandy and Palmer, of Reading, ex Elizabeth, a Memel, Commercial Docks, all the yellow plank at 181. per standard hundred; all the timber at 51. 2s. 6d. per load, say 5 floats. To be taken by the dock account, and paid for in cash, allowing 2½ per cent. discount, within fourteen days from this date.

"The above goods will be taken on board and the duty deducted.

"J. MARSH, broker."

It appeared by the evidence of the broker who was called for the defendants, that the price of the whole timber, calculated on the terms stated, which included the duty, was 1301l. 3s. 3d. The duty on the whole was 555l. 10s. 8d., and must be paid at the docks before the timber is taken out for use. The whole of it was paid by the defendants, and no part had ever been advanced, or paid by the plaintiff. The contest in the cause was, whether under the contract stated, the discount must be calculated on the whole sum, including the duty, viz. 1301l. 8s. 3d., or on the sum to be received by the plaintiff as purchase-money only, viz. 745l. 12s. 7d. The defendants had paid the purchase-money, deducting discount on the whole sum, the difference being 15l. No usage was proved on either side. Brokerage on the whole sum was charged and paid.

BEST, C. J., in summing up to the jury, said: The defence reduces itself to the construction of this instrument independent of usage; and the question upon it is, whether the plaintiff is to be charged discount on the money to be paid to government, as well as on that to be received by himself. The plaintiff himself could never receive more than 745l. 12s. 7d., and it is for you to say whether this discount is chargeable on that sum only, or on the additional sum which the plaintiff never received.

Verdict for the plaintiff 15l.

Pell, Serjt., and Campbell, for the plaintiff.
Wilde, Serjt., and Tulfourd, for the defendants.

In Trinity term following, Wilde, Serjt., moved for a new trial, on the ground that the contract, on the face of it, imported that the discount should be calculated on the whole sum, and that the jury ought to have been so directed; and he cited Johnson v. Sheddon, 2 East, 584, where Lawrence, J., in giving judgment, says: "The price of a thing is what it costs a man; and if, in addition to a sum to be paid before the mast, other charges are to be borne, that sum, and the charges, constitute the cost. It is not necessary that the whole price should be paid to one person."

But the Court refused the rule, and, per Curiam, the contract being a mercantile instrument, was properly left to the jury, and they have put the right

construction on it.

SITTINGS AFTER TRINITY TERM, IN K. B.

6 GEO. IV.-1825.

FENTON, Gent., one, &c., v. CORREA.—p. 262.

In an action on an attorney's bill: Held, that searching at the judgment office to ascertain whether satisfaction had been entered on the roll in an action between A. and B., and also whether issue had been entered in such action; also whether issue had been docketed in such action, were not taxable items within the 2 G. 2, c. 23, s. 23.

BARNES v. LUCAS and Another -p. 264.

In an action against the sheriff for taking insufficient sureties in replevin, if the sheriff has assigned the replevin bond to the plaintiff, it is unnecessary to prove the execution of the sureties, though averred in the declaration.

ACTION against the sheriff for taking insufficient sureties in replevin.

The declaration averred the execution of the replevin bond by the sureties. No evidence was given by the plaintiff, of the execution of the replevin bond by the sureties, but it was proved that the bond had been assigned by the sheriff to the plaintiff.

Holt for the defendant, submitted that it was incumbent in this case, on the plaintiff to prove the execution of the bond by the sureties, as that fact was

averred in the declaration.

Scarlett for the plaintiff, contended that proof of the assignment by the sheriff

to the plaintiff was sufficient, and admitted the execution of the sureties.

Abbott, Ld. C. J. I am of opinion, that it is not necessary for the plaintiff to prove the execution of the sureties in this replevin bond. I think that, as against the sheriff, proof of the assignment by him to the plaintiff is sufficient. Verdict for the plaintiff.(a)

Scarlett and Comyn for the plaintiff.

Holt for the defendant.

(a) And see Scott v. Waithman, 3 Stark. N. P. C. 168, cited Starkie's Evidence, part IV. p. 1351; 2 Phillips' Evidence, 273, 6th edit.

BOLTON and Another, Assignees, &c., v. JAGER and Another.-p. 265.

Payment by weekly instalments in discharge of a debt for goods sold to the bankrupt, is not a payment "in the usual and ordinary course of trade and dealing," so as to be protected by the 19 G. 2, c. 32, s. 1.

SHELDON v. WHITAKER and Another.-p. 266.

In an action against the sheriff on the 8 Ann. c. 14, for taking goods off the premises without paying rent, the declaration stated, that the sheriff, "by virtue of, and under pretence of a certain writ of our said lord the king before the king himself, before that time sued forth, &c., took the goods," &c. The writ under which the goods were seized issued from the Common Pleas: Hald a first account. mon Pleas: Held, a fatal variance.

EDWARDS v. ETHERINGTON.—p. 268.

A tenant of a house from year to year, not under any agreement to repair, may quit, without previous notice to his landlord, on the premises becoming unsafe and useless from want of repairs; and such tenant is not liable in an action for use and occupation, for any rent after the occupation has ceased to be beneficial.

Assumpsit for use and occupation.

The defendant was tenant, from year to year, of a dwelling-house in Wilmot Street, at the rent of 65% a year, under the plaintiff, who held under a lease from Sutton, at the same rent. The lease was not produced at the trial.

It appeared that the walls of the house were in such a dilapidated state, that it became unsafe to reside in it, and the lodgers all quitted for that reason. Workmen were sent by Sutton to repair the party-wall, which was taken partly down on the basement story, and repaired. The defendant quitted a few days after the Midsummer-day (the rent being payable at the usual quarter days), and after the workmen had quitted the premises. He sent the key to the plaintiff's house immediately. The plaintiff was at that time absent from London, but returned about three weeks afterwards, and soon after Michaelmas following endeavoured to let the house, and sent persons with the key to show the premises. It was let from the following Christmas, the new tenant paying no rent for the first half year, on condition of putting the premises in repair. No notice to quit before Christmas had been given, and the plaintiff's demand was for rent from Midsummer to Christmas, 1824. The plaintiff had paid rent to Sutton for that half year.

The defence was, that the plaintiff had accepted the surrender of the defendant, by taking and using the key, and if not, that the plaintiff could not claim com-

pensation for premises utterly useless to the defendant.

ABBOTT, Ld. C. J., in summing up observed: The general rule of law undoubtedly is, that a yearly tenant cannot quit in the middle of a quarter or half year, without giving proper notice to his landlord; if he does so quit, he remains liable for rent, in this form of action; but that rule is not so peremptory, as not to bend to particular circumstances. Slight circumstances will not suffice, but such serious reasons may exist, as will justify a tenant in quitting at any time, and it is for you to say whether in this case any such exist. If the acceptance of the surrender had been made out, by clear evidence, the case would have been free from difficulty, but it does not appear that the plaintiff either acquiesced, or refused, until after Michaelmas. It is for you to say whether such serious reasons for quitting existed in this case, as will exempt the defendant from this demand, on the ground of his having had no beneficial use and occupation of these premises; and that, through no default of his own, but through the fault of a person (the plaintiff) who ought to have taken care that the premises should have been in such a state as to continue useful to the defendant. If you think there was not, your verdict must be for one quarter only; the plaintiff might by his lease have been bound to repair, the defendant was under no such obligation. Verdict for the defendant.(a)

Thesiger for the plaintiff. Platt for the defendant.

In the following term *Thesiger* moved for a new trial, but the Court refused the rule on the ground that the defendant had not had any beneficial occupation of the premises after Midsummer.

(a) See Baker v. Holtpzaffel, 4 Taunt, 45.

REX v. GRANT and Others.—p. 270.

Keeping a public gaming-house is not an infamous crime, so as to render a person convicted thereof incompetent as a witness.

BOLLAND and Others, Assignees, &c., v. BYGRAVE .-- p. 271.

A banker who has discounted bills for a customer, or accepted bills for his accommodation, has, while such bills remain unpaid, a lien on any negotiable securities of that customer, which may come to his hands, and may put the same in suit.

And even where taking into account the bills on both sides, the customer has a balance in his favour of a sum not equal to the amount of any one of them, this surplus cannot be appropriated to any one of the bills, in reduction of the claim of the banker suing any of the parties

the bill.

This was an action by the assignees of Marsh, Stracey, and Co., bankrupts, on a bill of exchange for 337l. 18s. drawn by a person named Hale, payable three months after date to his own order, upon and accepted by the defendant. The bail, which was accepted for the accommodation of Hale, was endorsed by him, and also by Mr. Dejeam, as the agent of Tauernier, a gentleman residing in France, and was found in the possession of the bankrupts (who were bankers),

at the time of their stoppage.

The counsel for the plaintiffs, after proving the handwriting of the acceptor and endorsers, gave evidence, in the first instance, of the circumstances under which the bankrupts became possessed of the bill. For this purpose they produced a ledger containing an entry in the handwriting of Mr. Fauntleroy, one of the bankrupts, since dead, purporting to be made on the 9th of September, 1824, the day before Mr. Fauntleroy was taken up on a charge of felony. By that entry, this bill and several others, amounting in the whole to 4420l. 14s. 1d., were stated to be discounted by the firm on behalf of Mr. Tauernier, and the proceeds taken to his credit. It was further proved that Tauernier was a customer of the bankrupts, and was in the habit of procuring bills to be discounted by them through his agent, Mr. Dejeam, though he sometimes deposited bills with them merely for safe custody. The bankrupts had before this time discounted bills for Tauernier, which were then unpaid, and for the proceeds of which he was a debtor at the time, some of the bills remaining in their hands, and others having been paid away. They had also accepted a bill for his accommodation of 1879l. 16s., which was then unpaid. Taking out all these bills on the one side, and the bills so taken to account by Fauntleroy the other, upon the 9th of September, there would be a balance of about 100% in favour of Tauernier, who had since set off the proceeds of the bills, against the claims of the assignees upon him.

Gurney, for the defendant, submitted that upon the facts disclosed, the plaintiffs must be nonsuited. At present it was quite uncertain, as Mr. Dejeam had not been called, for what purpose this bill was deposited in the hands of the bankers; and the mere voluntary act of Mr. Fauntleroy in taking the bill to account as discounted, and crediting the customer with the proceeds, could vest

no property in the bankrupts, nor, consequently, in their assignees.

ABBOTT, Ld. C. J. If the right of the plaintiffs to recover depended on the question whether authority was given, on the part of Tauernier, to the bankrupts to discount this bill, I should think, as the case now stands, that I ought to direct the jury to find, as a question of fact, whether this bill was delivered at the bank to be discounted, or to be kept for safe custody. But I am of opinion that the right of the plaintiffs to recover, rests on other and independent grounds. It appears that, at this time, the bankrupts had discounted bills for Tauernier to a large amount, which were still unpaid; that they had also accepted a bill for his accommodation to a large amount not then due; and I think that a banker, who stands in this relation to a customer, has a lien upon any securities of that customer which may, for any purpose, be placed in his hands; and he has a right to retain them to countervail the liabilities he has so incurred on this behalf, till those liabilities have ceased. It is true that taking out the bills on both sides there will remain a balance of about 100% in Tauernier's favour; but I cannot say that any one acceptance in particular shall have the benefit of this surplus. With whatever view, therefore, this bill was delivered to Mr. Fauntleroy, I am of opinion that, in the subsisting state of the accounts, the bankrupts had a right to retain it, and that their assignees are entitled to recover.

Gurney, in order to raise the question upon this ruling, called Mr. Dejeam, the agent of Tauernier, to prove that the bills were deposited merely for safe custody; but the witness proved, on the contrary, that they were delivered to him, in the ordinary course of his employment at the bank, to be discounted.

The jury accordingly returned a verdict for the plaintiffs.(a)

Scarlett and Comyn for the plaintiffs.

Gurney and J. Parke for the defendant.

(a) Jourdaine v. Lefevre, 1 Esp. N. P. C. 66; Davies v. Bowsher 5 T. R. 488; Scott v. Franklin, 15 East, 428; Bosanquet v. Dudman, 1 Stark. N. P. C. 1.

ROBINSON v. WARD.—p. 274.

[S. C. 12 E. C. L. R. 449.-2 Carr. & P. 59.]

If an attorney pays into his bankers, money of his clients, mixing it with his own, and the bankers fail, the attorney is liable to make good the loss.(a)

(a) An attorney, who receives the money or goods of his client, would be answerable for any loss happening through his negligence or want of ordinary diligence. Generally speaking, a loss by stealth would be evidence of want of ordinary diligence. Jones on Bailment, 44, 76. Whereas a loss by robbery, unless occasioned by the bailee's needlessly risking the property, would furnish no such inference. Jones on Bailment, 44, 66, 68, 76. Abbott on Shipping, 234, n. 1, and the authorities there cited from the civil law; 12 Ves. 240, and per Lord Holt in Coggs v. Bernard, 2 Ld. Raym. 918. "And though a bailee is to have a reward for his management, yet he is only to do the best he can; and if he be robbed, &c., it is a good account." See Finucane v. Small, 1 Esp. N. P. C. 315.

CROOK v. WRIGHT and Another.-p. 278.

The conduct of a cause, by an attorney, in the name of A. B., does not make A. B. liable in trespass for acts done under a fi. fa. in such cause, without some evidence of a retainer.

A retainer to commence a suit, which suit is afterwards abated by plea for non-joinder, is suffi-cient evidence of a retainer to commence another action against the parties named in the plea in abatement.

TRESPASS quare clausum fregit, and for seizing goods.

An action had been brought by the defendants against the plaintiff and several other persons, in which the defendants obtained a verdict and judgment; a fi. fa. was executed on the goods of the plaintiff, but the writ was afterwards set aside by the Court of King's Bench for irregularity. The trespasses complained of in the present action, were committed in the execution of that writ.

The plaintiff proved that one Jenkyns was the attorney for the defendants in the former action; that he had issued the writ of fieri facias, and delivered it to the sheriff's officer. It was contended, on the part of plaintiff, that the defendants were made liable by the acts of Jenkyns, without proving that he had been

retained by them to bring the action.

ABBOTT, Ld. C. J., was of opinion that some evidence must be given of a

retainer in order to make the defendants trespassers.

The plaintiff then called the clerk of Jenkyns, who, on being examined, produced a letter from one of the defendants, desiring Jenkyns to commence an action against the plaintiff and two other persons. It was further proved that the plaintiff had pleaded, in abatement of this action, that other parties who were liable were not joined, and that thereupon such action was discontinued. Jenkyns, without further authority from the defendants, commenced against the

plaintiff, and all who were jointly liable with him, the action in which the ft. fa.

was sued out, and the alleged trespass committed.

ABBOTT, Ld. C. J., was of opinion that the authority to commence the first action against the plaintiff, and the two other defendants, was also an authority when that action was discontinued, to commence the second action against the plaintiff, and all those whose non-joinder had been pleaded in abatement, and that the defendants were made trespassers by the acts of their attorney.

Verdict for the plaintiff, damages one shilling.(a)

Scarlett and R. V. Richards for the plaintiff.

Gurney and — for the defendants.

(a) See Barker v. Braham, 3 Wils. 368.

DREW and Others v. CLIFFORD.—p. 280.

In an action on an attorney's bill: Held, although the plaintiff could not recover a particular item, because "the fees, charges, and disbursements," included in it were not specified pursuant to the statute 2 G. 2, c. 23, that he might nevertheless recover the residue of the bill, as to which the provisions of the statute had been complied with.

HOLT v. SQUIRE.—p. 282.

In an action against the acceptor of a bill of exchange, where defendant's attorney had given notice to the plaintiff to produce all papers relating to a bill described, as the bill in question and said to be "accepted by the said defendant:" Held, that such notice was prima facie evidence of the defendant's acceptance.

This was an action on a bill of exchange by the endorsee against the acceptor. A notice, signed by the defendant's attorney, had been served on the plaintiff, requiring him to produce and show forth upon the trial of this cause all papers, letters, memorandums, &c., which had been received by him from one J. S., relating to a certain bill of exchange, draft, or order drawn by the said J. S. (describing the bill), "and which said bill of exchange, draft, or order was accepted by the said defendant, payable at Messrs. Butler's, 4, Cheapside,

The description of the bill of exchange, in this notice, agreed in every respect

with the bill set forth in the declaration.

Scarlett put in the notice, and proved the handwriting of the defendant's attorney, and then proposed to read the bill, without further proof of the accept-

Gurney for the defendant, objected to this being sufficient evidence of the

acceptance, and contended that some further proof should be given.

ABBOTT, Ld. C. J. The defendant in his notice has described the bill now produced, and has stated that such bill was accepted by the defendant; and this, I conceive, is prima facie evidence of his acceptance. Nonsuit.

Scarlett and R. V. Richards for the plaintiff.

Gurney and Reader for the defendant.

SITTINGS IN AND AFTER TRINITY TERM, IN C. P.

6 GEO. IV.-1825.

WATT, Gent., one, &c., v. COLLINS .- p. 284.

"Attending A. and B., the proposed bail of the defendant, and examining them as to their competency to justify." "Attending the plaintiff in several actions commenced against the defendant, and arranging with him to take cognovite therein," are taxable items in an attorney's bill within the 2 G. 2, c. 23, s. 23.

DUNNE v. ANDERSON.—p. 287.

It is not libellous fairly to comment on a petition relating to matters of general interest, which has been presented to parliament, and published. The petitioner cannot maintain an action of libel for such comments, unless his private character be vilified; although the publication of the petition be not shown to be his act.

CASE for a libel.

The declaration(a) stated, that the plaintiff was a surgeon, and proprietor of a certain profitable establishment called the "Athenee, or Royal Institute." That he had before the committing of the grievances, &c., presented a petition to the House of Commons, praying for certain alterations in the law, in order to suppress empiricism, and to advance real professional merit. That the defendant published, &c., the libel, &c., which was set out, and professed to be a comment upon the petition of the plaintiff.

There were other counts merely setting out the libels complained of.

The publication of the libel was proved by the production of a number of the "Cottage Physician and Family Adviser," of which the defendant was proprietor; and the defendant's refusal to disclose the author of the article complained of was also shown. The number contained several extracts verbatim from the petition, and comments thereon; but it did not appear in what manner the petition had got before the public, or how it had come to the hands of the defendant, or of the author of the libel. An attempt, on the part of the defendant, to show that the plaintiff had published it, failed.

The plaintiff was proved to be a surgeon by a diploma, the date of which was

twenty years back, and no one instance of actual practice was shown.

The nature and object of the plaintiff's establishment, called the "Athenee," were not precisely explained; the plaintiff's case being, that it was an institution for useful purposes of a medical and surgical nature; the defendant's, that it was a mere piece of quackery and absurdity.

The defence was, as at the former trial, that the publication charged was a justifiable comment on a matter fairly before the public, and relating to objects

of public interest.

BEST, C. J., in summing up to the jury, after disposing of the formal parts of the case, observed: It appears that the petition, on which the publication complained of professes to be a comment, has, by some means or other, found its way to the public; how it was published, or by whose means, does not distinctly appear. With respect to literary publications, the law is clearly and ably laid down by Lord Ellenborough, in the case of Carr v. Hood, 1 Campb. 355, n., of which you have heard; such publications challenge criticism, and any one of the public has a right to make such animadversions on them, as the intrinsic merits of the works may warrant. However severe those animadver-

⁽a) This was a second trial; the pleadings and petition are fully set out in 3 Bing. 88, where the proceedings on the application for a new trial, and the opinion of the Judges, are reported. Vol. XXI.—95

sions may be, the author has no right to complain, unless his private character be maliciously vilified. But you are not to infer that a petition presented to either branch of the legislature, and not published, stands on the same footing; the right to petition and to offer suggestions to the legislature is highly valuable, and belongs to every subject of this kingdom; but it behoves a person exercising such right, to take care that he is competent to the task he undertakes, for if he offers a petition on a public measure, and that petition gets before the public, any one of the public has a right to comment on it, and to show that the measures proposed are absurd and impolitic. The mischief would be great and extensive, to hold that a person likely to be affected by those measures, could not be allowed to show them to be inexpedient and injurious. It would be inconsistent with free discussion to say, that comments made with such a view are But the person making such comments, has no right to attack the private character of the petitioner; he must confine himself to the consideration of the public measures, and not maliciously vilify an individual. If his observations are intended and calculated to inform the public, and not to attack the After commenting on parts of the paper which individual, they are justifiable. alluded to the private character of the plaintiff as a surgeon and individual, his Lordship left it to the jury to say, whether or no the publication was a fair and proper comment on the petition, or whether its object was to injure the private character of the plaintiff.

Verdict for the plaintiff, damages one farthing. Vaughan, Pell, Wilde, Serjts., and Platt, for the plaintiff. Spankie, Serjt., and Carter, for the defendant.

COUSINS and Another, Gentlemen, two, &c., v. BROWN and Another, Sheriffs of London.—p. 291

In case against the sheriff for an escape, the declaration stated that the plaintiffs sued out an attachment of privilege, "by which said writ our lord the king commanded the defendant, &c., to attach A. B., &c., to answer the said plaintiffs of a plea of trespass on the case, to the damage of the said plaintiffs of thirty pounds," &c. The writ produced did not contain the words, "to the damage," &c. Held no variance.

CASE for an escape, and for not assigning the bail bond.

The declaration stated, that the plaintiffs sued out a certain writ of our said lord the king, called an attachment of privilege, "by which said writ our said lord the king commanded the said defendants, as sheriffs of the city of London, to attach the said Samuel Fletcher, so that they might have him before the justices of our said lord the king, on Monday next after eight days of Saint Hilary, to answer the said plaintiffs of a plea of trespass on the case, to the damage of the said plaintiffs of thirty pounds, and have there that writ;" it was then averred that the writ was endorsed for bail for thirty pounds, &c.

The writ produced was endorsed for bail for thirty pounds, but did not contain

the words "to the damage of the said plaintiffs of thirty pounds."

It was objected by Wilde, Serjt., that this was a fatal variance; that the declaration professed to describe the writ, and any omission was therefore fatal, however immaterial the words omitted might be; and he cited Baker v. Newbiggen, 1 Ry. & M. N. P. C. 93; Brown v. Jacobs, 2 Esp. N. P. C. 727; Stiles v. Rawlins, 5 Esp. N. P. C. 138.

BEST, C. J. I am of opinion that the declaration does not profess to describe the writ, but merely to state the substance and effect of what the sheriffs were commanded by it to do. It is proved that the writ was endorsed for bail for thirty pounds; Fletcher was, therefore, called upon to answer the plaintiffs in damages to that amount. In the first two cases cited, the declaration professed describe the instruments, and in a recent case in this Court, Stiles v. Rawlins

is shaken, if not overruled. I think the variance immaterial. I do not think I ought to give leave to move to enter a nonsuit.

Verdict for the plaintiffs.

Vaughan, Serjt., and F. Pollock, for the plaintiffs. Wilde, Serjt., for the defendants.

BEDELL v. RUSSELL.-p. 293.

In an action of assault and battery, and a plea of justification only, and issue thereon, the defendant's counsel has a right to begin at the affirmative of the issue being on him. The onus of proving damages does not give the plaintiff's counsel a right to begin.

TRESPASS. The declaration contained several counts, for assaulting, beating,

and shooting at the plaintiff, on divers occasions.

Pleas (without the general issue), that plaintiff was a mariner on board a certain ship of which the defendant was commander, that the plaintiff at the said times when, &c., was engaged in mutiny, to suppress which, the defendant committed the trespasses complained of.

Replication de injuria, &c., generally to all the pleas and issues thereon.

The pleadings having been opened, it was insisted by Wilde, Serjt., for the defendant, that he had a right to begin, inasmuch as the affirmative of the issues lay upon him, namely, to prove the facts alleged in justification. And he cited Hodges v. Holder, 3 Campb. 366; Jackson v. Hesketh, 2 Stark. N. P. C. 518. In the latter case Bayley, J. says, "The question of damages never arose until the issue had been tried."

Vaughan, Serjt., for the plaintiff insisted, that the claim of damages gave the plaintiff a right to begin, the affirmative of their amount being upon him. That the cases cited were cases of trespass quare clausum fregit, where certain rights only were in question; that in this case the essence of the inquiry was the plain-

tiff's claim of damages.

BEST, C. J. But for the authorities cited, I should certainly have thought that the onus of proving the damages sustained gave the plaintiff a right to begin; but as it is of the utmost consequence that the practice should be uniform, I shall consider myself bound by those cases, until the matter shall be settled in full court.

The defendant's case was accordingly first gone into, and the plaintiff's evidence, which consisted of depositions, given in answer; and the defendant's

counsel had the general reply.

Verdict for the plaintiff, damages 50l. for an assault on an occasion not justified in proof; and for the defendant on the justifications as to the residue.

Vaughan, Serjt., and E. Laues, for the plaintiff. Wilde, Serjt., and F. Pollock, for the defendant.

REX v. SMITH and JEFFERIES.—p. 295.

Two prisoners indicted for horse-stealing in county A., were found in joint possession of two horses in that county, which they had jointly taken at different times and places in county B. Held, that evidence could be given of one only of the takings in county B., each taking being a separate felony, and that the prosecutor's counsel must elect on which to proceed.

REX v. SARAH HURRELL.-p. 296.

In an indictment on 3 & 4 W. & M. c. 9, s. 5, against a married woman, it is sufficient, where the husband does not cohabit with her, to state that the lodging was let to the wife; for the atatement may be either according to the fact, or the legal operation.

DOE d. NORTHEY v. HARVEY .-- p. 297.

To prove a pedigree, the declarations of the husband of one of the family are admissible, though he was not otherwise related to the family.

EJECTMENT. The lessor of the plaintiff claimed as heir at law ex parte

materna of Mary Rowe, who died seised of the premises, and intestate.

The defence was, that persons of the paternal line of Mary Rowe were still living, and in order to prove the pedigree set up by the defendant, the declarations of John Rowe, the late husband of Mary Rowe, but not otherwise related to her family, were offered; and the case of Vowels v. Young, 13 Ves. 140, was relied on.

It was objected, that these declarations were inadmissible, not being made by one of the family, and being at best but information collected from the hearsay declarations of persons of the family.

LITTLEDALE, J. I think upon principle they are admissible; the husband

must for this purpose be considered as one of the family.

Pell, Wilde, Serjts., and Merewether, for the plaintiff. Selwyn, R. Bayly, and Carter, for the defendant.

REX v. HAYNES.—p. 298.

A Judge at Nisi Prius has no jurisdiction to try an indictment for perjury at common !aw found at the quarter sessions, and removed by certiorari into the King's Bench; an indictment so found being woid.

REX v. ROWLEY.—p. 299.

In an indictment for perjury committed on the trial of a cause, it is sufficient for the prosecutor to prove all the evidence given by the defendant, referable to the fact on which perjury is assigned. Proof of the evidence set out, by a witness who speaks from memory, but will not swear that he has given the whole of the defendant's former testimony, but asys that has stated to the best of his recollection all that was material to the present inquiry and relating to the transaction in question, and is positive nothing was said qualifying the evidence proved, is sufficient to go to the jury.

This was an indictment for perjury, alleged to have been committed by the prisoner as a witness for the defendant, on the trial of an action of assault and

battery, at the Summer assizes for Somersetshire, 1824.

The evidence, on which perjury was assigned, was proved, as set out, by the clerk of the attorney for the plaintiff in the action. The witness stated that he took no note of the evidence, but from his duty as the attorney's clerk, he paid particular attention to the evidence given by the prisoner; that he would not undertake to say that he had given the whole of the prisoner's testimony, but that he would swear that nothing else was said which qualified what he had

stated, and that to the best of his recollection he had given all that was material to this inquiry and relating to the transaction in question.

For the prisoner it was contended, that the whole of the evidence given by the prisoner on the former trial ought to be proved; that the jury should be enabled to judge, whether anything qualifying or explaining that set out had been stated by the prisoner; and that for this purpose the opinion of the witness, as to the immateriality of what was omitted, was inadmissible. The authorities relied on were, 2 Chitty Crim. Law, 312, 2 Edit.; Rex v. Jones, Peake's N. P. C. 38; Rex v. Dowling, ib. 170. And a case tried before Lord Gifford, as Recorder of Bristol, was stated ex relatione Jardine, in which his Lordship had ruled to the same effect.

For the prosecution it was answered, that the general rule in criminal cases, of proving a sufficient case to call for an answer, had been satisfied; that prims facie evidence of the whole evidence given by the prisoner, at the former trial, had been offered, and that it lay upon him to prove any omission that qualified what had been proved against him; that it was impossible in any case to prove the evidence given, without in some measure relying on the opinion of the witness reporting it; and that in this case the opinion given was that of a person well qualified to form it.

LITTLEDALE, J. The allegation in this indictment is, that the prisoner swore to the substance and effect alleged therein; in ordinary cases of plea or indictment, the evidence given would be unquestionably sufficient to support such an averment; but it is said, upon the authority of the cases cited, that a different principle prevails in indictments for perjury, and that it is necessary to prove the whole of the testimony given by the person charged. I think that proposition too large: suppose that there had been several issues on the former trial, and that the prisoner had given evidence on all of them, but that perjury was assigned on one only, can it be contended that it would be necessary to prove all the testimony given on the other issues? I take the true rule to be this, that all the evidence referable to the fact on which perjury is assigned must be proved; and I am of opinion that there is reasonable evidence to go to the jury, that what the witness has stated, was all the evidence given by the prisoner referable to the perjury here assigned. The objection, that the opinion of the witness is inadmissible as to the materiality of what he might have omitted, does not appear to me to be well founded. He is competent to form such an opinion; his attention was particularly directed to what was passing on the former occasion, and he gives that opinion at his peril, as he is liable to an indictment for perjury for the wilful falsehood of it. I think the prisoner must be called upon to show that something was said by him which qualifies the evidence already proved.

No evidence was given for the defence, and the prisoner was convicted and sentenced.(a)

The allegation in the indictment was, that the prisoner "was duly sworn, and took his corporal oath on the Holy Gospel of God."

The proof was, that the witness saw the prisoner sworn and examined.

It was objected, that the particular mode of swearing must be proved, as the evidence given would apply to the oath of a Jew, or person of any other religion than the Christian.

LITTLEDALE, J. I think it sufficient, the ordinary mode of swearing is the one specified.(b)

C. F. Williams and Moody for the prosecution.

Erskine and W. D. Bayley for the prisoner.

 ⁽a) His Lordship's decision has been since confirmed by the opinion of the twelve Judges.
 (b) Rex v. M'Carthur, Peake's N. P. C. 155.

SITTINGS AFTER MICHAELMAS TERM, IN K. B.

6 GEO. IV.—1825.

PEARSON v. WHEELER.—p. 303.

In case against the vendor of a public-house, for fraudulent misrepresentations of the business of the house; evidence of the actual value of the premises, is admissible in reduction of damages, but not as a bar to the action.

This was an action on the case to recover damages sustained by the plaintif, in consequence of his having been induced to buy a public-house of the defendant, for 1600l. by means of fraudulent misrepresentations by the defendant, of the amount of the business done in the house.

Brougham for the defendant, offered the evidence of surveyors and others, to prove that the public-house was really worth as much as the plaintiff had given for it.

Scarlett for the plaintiff, objected to the admission of this evidence, on the ground that, in this action, the value of the premises was irrelevant. The purchaser here relies upon the defendant's representation of facts, which the former considers to affect the value of the property, and if this representation is proved to be false and fraudulent, he is entitled to recover, without reference to what may have been the actual value.

ABBOTT, Ld. C. J. I am clearly of opinion, that evidence of the value of the public-house will not go to bar the action, but I think it admissible in reduction of damages: the measure of damages in this case, being the difference between the real value of the property, and the sum which the plaintiff was induced to give for it.

Verdict for the plaintiff for 250%(a)

Scarlett and Jardine for the plaintiff.

Brougham and R. V. Richards for the defendant.

The same point was decided by Best, C. J., in Compton v. Henshaw, tried at the London sittings after Michaelmas term, 1825.

(a) Dobell v. Stevens, 3 B. & C. 623.

CORNWALL v. RICHARDSON.—p. 305.

In an action of slander for imputing felony, with a count for maliciously charging the plaintiff with theft before a justice, to which the defendant pleaded the general issue, and also pless in justification of the slander, averring that the charge of felony was true: Held, that evidence of general good character was not admissible for the plaintiff.

THE first six counts of the declaration, were for slandering the plaintiff, in imputing to him that he had stolen money from the defendant. The seventh count was, for maliciously charging the plaintiff with felony before a justice of peace, and causing him to be arrested and imprisoned until he was discharged by the justice. The eighth count was, for openly imposing the crime of felony on the plaintiff, and for injuring him in his credit, &c. The defendant pleaded the general issue to the whole declaration, and to the first six counts several pleas of justification, alleging therein that the plaintiff had stolen money from him, the defendant.

Scarlett, who was for the plaintiff, previous to closing his case, proposed to call witnesses, to give evidence of the general good character of the plaintiff for honesty.

ABBOTT, Ld. C. J. interposed, and stated, that he was not aware that in any case like the present, the plaintiff had been allowed to go into evidence of his general character for honesty. That if such evidence was to be admitted on the part of the plaintiff, then the defendant must be allowed to go into evidence to prove that the plaintiff was a man of bad character. It made no difference whatever as to the admissibility of such evidence, that there was a special justification.

Verdict for the plaintiff.

Scarlett and Wightman for the plaintiff. Denman, C. S., and Thesiger, for the defendant.

See Rodriguez v. Tadmire, 2 Esq. N. P. C. 721; Rex v. Waring, 5 Esp. N. P. C. 13; Bamfield v. Massey, 1 Campb. 460; Dodd v. Norris, 3 Campb. 519; Newsam v. Carr, 2 Stark. N. P. C. 69; Stark. Evid. pt. iv. pp. 367, 917.

CHADWICK v. BUNNING .- p. 306.

The statute 6 G. 4, c. 133, s. 7, enacting that the common seal of the society of apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate, to which such seal is affixed, does not make such certificate evidence, without proof that the seal affixed is the genuine seal of the society.

A general certificate of qualifications to practise, without limitation as to time or place, is sufficient under the 55 G. 3, c. 194, to enable an apothecary to sue on a bill for medicines, &cc., furnished to patients in London, though on the back of such certificate is endorsed a receipt for four guineas proved to have been paid after the commencement of the action; which sum the 19th section directs to be paid, and the receipt endorsed, where persons originally qualified by their certificate, to practise in the country, obtain the privilege of practising in London.

EASTWOOD v. BROWN and Another, Sheriff of Middlesex.-p. 312.

A sale to a creditor of personal property, by a person in embarrassed circumstances, without any change of possession; is valid unless made with a fraudulent intention to defeat other creditors. The continuance of possession is not conclusive evidence of fraud.

This was an action of trover against the sheriff of Middlesex for goods belonging to the plaintiff, taken under a writ of fieri facias against one Pope.

It appeared in evidence, that Pope, previous to the issuing of the execution, had sold and assigned his interest in a leasehold house, in which he resided, and also the whole of his furniture and household effects to the plaintiff, who was a creditor. Out of this purchase-money Pope paid the debts of several of his other creditors. There was no direct evidence of fraud in the transaction; and it did not appear that the plaintiff gave less than the full value for the property so assigned to him, but Pope continued in the occupation of the house and furniture after the assignment, precisely in the same manner as before.

Scarlett, in addressing the jury for the defendants, contended, upon the authority of Lord Ellenborough in the case of Wardall v. Smith, 1 Campb. 333, that an assignment of property without a complete and entire change of possession,

is fraudulent and void as against creditors.

ABBOTT, Ld. C. J. I shall leave it to the jury to say, whether, under all the circumstances of this case, they are satisfied that the assignment was made with the design of delaying or defeating creditors in the recovery of their debts. I cannot agree to the doctrine laid down in the case cited by Mr. Scarlett. The circumstance of an assignor who is under pecuniary embarrassments, remaining in possession of the property assigned, is always suspicious; but if it does not appear, from other facts in the case, that this takes place under a fraudulent arrangement between the parties, for the purpose of delaying creditors, I am of

opinion that it is not of itself a conclusive badge of fraud. I have no doubt that a purchase of a house and furniture, with an immediate demise of that house and furniture to the vendor, may be good, if there be no intention to defeat or delay oreditors by the transaction, and it is material that in this case it does not appear that any actions by other creditors had been brought.

Verdict for the plaintiff.(a)

Gurney and Comyn for the plaintiff.
Scarlett and F. Pollock for the defendant.

(a) In Edwards v. Harben, 2 T. R. 697, Buller, J., in giving judgment says, "This has been argued by the defendant's counsel, as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance per se, as makes the transaction fraudulent in point of law; that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent." In Kidd v. Rawlinson, 2 B. & P. 59, Lord Eldon confines this principle to cases "where the parties stand in the relation of debtor and creditor, and where their object was to defeat other creditors;" and at the trial of that cause his Lordship so left the question to the jury. In Hoffmann v. Pitt, 5 Esp. N. P. C. 25, Lord Ellenborough says, "the not taking possession is not conclusive evidence of fraud to make the deed absolutely void, there must be something to show the deed fraudulent in the concoction." The case relied on by Scartst was an assignment to a creditor. See also Prec. in Chan. 287, and the cases collected in note to 1 Campb. 334. Latimer v. Batson, 4 B. & C. 652.

TOWNSHEND v. CARPENTER, Gent., One, &c.-p. 314.

A sheriff's officer employed by an attorney to make arrests on meane process, issued at the suit of his clients, may sue the attorney for the fees usually allowed for such arrests, on the taxation of costs by the Master, though such fees exceed the sum allowed to the aheriff and bailiff by the 23 H. 6, c. 10.

MONTRIOU v. JEFFERYS.—p. 317.

[S. C. 12 E. C. L. R. 479.-2 Carr. & P. 113.]

- It is a good defence to an action on an attorney's bill, that the costs sought to be recovered were incurred through inadvertence and want of proper caution on the part of the attorney.(e)
- (a) Farnsworth v. Garrard, 1 Campb. 38; Templer v. M'Lachlan, 2 N. R. 136; Havelock v. Geddes, 10 East, 555; Denew v. Daverell, 3 Campb. 451; Duncan v. Blundell, 3 Stark. N. P. C. 6. See 2 Stark. Evid. 133.

POCOCK v. MOORE.—p. 321.

constante directed by the defendant to take the plaintiff on a charge of felony, told the latter, "You must go with me," upon which the plaintiff without further compulsion attended the constable: Held, that this was a sufficient imprisonment to support an action, and that the plaintiff failing in proving the imprisonment as laid, might recover on the count for a common assault.

TRESPASS for an assault and false imprisonment, with a count for a common assault.

The defendant had sent for a constable, and directed him to take the plaintiff on a charge of felony. The constable said, "You must go with me," on which the plaintiff said, "he was ready to go," and actually went with the constable towards a police-office, without being seized or touched by the constable. On his way he attempted to escape, on which the constable seized him, the defendant not being present.

The first count of the declaration was not proved as laid.

Scarlett for the defendant, objected that in point of law, the defendant had committed no assault by charging the plaintiff with felony in the presence of the constable; that the plaintiff had himself expressed his readiness to go, and actually went without violence towards the police-office, and that the seizure on the way to the police-office was no assault by the defendant unless he were present, and directing it, which was not the case.

Abbott, Ld. C. J. I am of opinion, that if a person send for a constable,

and give another in charge for felony, and the constable tell the party charged that he must go with him, on which the other, in order to prevent the necessity of actual force being used, expresses his readiness to go, and does actually go, this is an imprisonment, and gives the party thus consenting to go, an action of Then, as every imprisonment includes an assault, the false imprisonment. plaintiff may recover on the count for a common assault.

Verdict for the plaintiff, damages one farthing.

Brougham and Abraham for the plaintiff.

Scarlett and Nicholls for the defendant.

Vide Russen v. Lucas, 1 Ry. & M. 27; Emmett v. Lyne, 1 N. R. 255; Stark. Evid. pt. iv. p. 1449, Dalt. c. 170; Arrowsmith v. Le Mesurier, 2 N. R. 211; 3 Coleridge's Black. Comm. 288.

BRYAN v. WAGSTAFF.—p. 327.

Notice to produce a letter relating to the matters in dispute, served on the attorney of the party, on the evening next but one before the trial; held sufficient to let in secondary evidence of the

contents, though the party was out of England.

On a writ of error to reverse an outlawry, because the defendant was beyond seas (if it be any answer that he went there for the purpose of avoiding the outlawry); it is enough that he went to avoid outlawry in the action; it need not appear that he went in contemplation of the particular proceedings which did actually terminate in the outlawry.

KOSTER v. INNES.—p. 333.

In an action on a policy of insurance, where a loss is to be inferred from the want of intelligence, the plaintiff must distinctly prove that when the vessel left the port of outfit, she was bound upon the voyage insured.

Quære, Whether the non-arrival of a ship at her port of destination is evidence of her loss, when the great here here here the proventies and of the port of destination.

where the crew have been heard of after the vessel sailed, and after she is said to have been

This was an action on a policy of insurance on goods on board La Virgine de la Solitudine, at and from Leghorn to Lisbon. The first count was for a loss by perils of the sea, the second count stated a loss by barratry.

The plaintiff sought to recover for a total loss. The evidence to show that the vessel sailed for her port of destination, and that she was lost, was as

A packer resident at Leghorn was called, who proved that he was acquainted with one Louis Taurel, who resided there, and on whose account this policy was effected by the plaintiff. In March 1821, this witness, by the desire of Taurel, packed at his warehouse certain goods, consisting of silks, &c., to go by La Virgine de la Solitudine. There was no address on the packages, but the witness was desired to deliver them to one Antonio, a boatman at Leghorn, which directions he complied with. The witness stated that he knew the ship La Virgine de la Solitudine had arrived at Leghorn, and he had heard she was to sail for Lisbon. Antonio, the boatman, was then called, and stated that he received the packages from the first witness, and that he took them and delivered them Vol XXI.—96 8 s 2

by the direction of Taurel on board La Virgine de la Solitudine. This was on the 11th or 12th of March, 1821. This witness said he was acquainted with the captain of the vessel, and that he gave him a receipt for the goods (which was not produced). He stated that he had heard from Taurel and the captain, that the vessel was bound to Lisbon. On the 9th or 10th of April the witness saw the ship sail, and he heard a few days afterwards that the vessel was lost, but that the captain and crew were saved, but he had not seen any of them since the time they sailed. He stated that there were no other goods on board the La Virgine de la Solitudine, but those shipped by Taurel.

Murryatt and Barnewall for the defendant, contended that upon this evidence the action could not be sustained. First, that there was no sufficient proof of the averment in the declaration that the ship had sailed on the voyage insured. Secondly, that the loss of the ship had not been proved by the best evidence the case would admit of. Where a vessel is proved to have sailed on the voyage intended, and after a length of time does not arrive at her port of destination, and has never been heard of since, the presumption is that she has foundered at sea, and that the crew have perished, and no other evidence can be given of her loss; but there is no case that has gone the length of saying that, the non-arrival of the ship at her port of destination is evidence of her loss, where it appears that the crew have been heard of after the vessel sailed, and after she is said to have been lost.

Scarlett, for the plaintiff, submitted that it was a question for the jury, whether they would not presume from the evidence that had been given, that the vessel was lost.

ABBOTT, Ld. C. J. Yes, but the question is, how lost?

Scarlett. There is a count in this case for barratry, a declaration cannot be framed to meet every possible case of loss; the plaintiff cannot make the protest evidence, and it is impossible to compel the attendance of witnesses resident abroad.

ABBOTT, Ld. C. J. I will leave the case to the jury if you wish it, but I have a very strong opinion upon it. The proof offered in support of the plaintiff's case, is less than I can remember or have ever read of. It is necessary that he should establish two things. First, that the vessel sailed from the port of Leg-horn on the voyage insured. Secondly, that she was lost, and lost by the particular perils insured against, which the plaintiff has alleged in his declaration to be the cause of the loss. Now, as to the first point, there is no evidence that any bill of lading ever existed, or of any order to send these goods to Lisbon. I think that you have not made out this part of your case, and that it would be very dangerous indeed to allow a party to recover on such evidence. As to the second point, it may perhaps be assumed that there is evidence of the loss, but making such an assumption will be going further than has ever yet been doze in cases of this description; but I rely less upon this than on the first point, namely, that there is no evidence that the ship ever sailed for the port of destination. Nonsuit.(a)

Scarlett and F. Pollock for the plaintiff. Marryatt and Barnewall for the defendant.

⁽a) As to what is presumptive evidence of a total loss, see Green v. Brown, 2 Strå. 1199; Newby v. Reed, Park on Insurance, p. 106, 7th edit.; Twemlow v. Oswin, 2 Campb. 85; That it must be proved (where a loss is to be inferred from the ship not being heard of that when she left the port of outfit she was bound upon the voyage insured. See Cohen v. Hinck-

SITTINGS AFTER MICHAELMAS TERM, IN C. P.

6 GEO. IV.—1825.

ANNE and ELIZABETH JENKINS v. BIDDULPH, Esquire.-p. 339.

The enrolment of a lease under 1 and 2 G. 4, c. 52, s. 8, which enacts, that a deed so enrolled "shall be as good and available in law, and of the like force and effect in all respects, as if the same had been enrolled in any of His Majesty's courts of record at Westminster, or as if a memorial of any such deed had been entered or registered in the office or offices appointed for registering deeds and other conveyances of lands and tenements in the counties in which the same are situate," is not admissible as evidence of the deed, without proof of the execution.

FRANCE v. LUCY.—p. 341.

In order to let in secondary evidence of a letter, the notice to produce must specify the letter intended; notice to produce "all letters, papers, and documents touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered,' general.

Action on a bill of exchange by the payee against the drawer.

In order to prove notice of the dishonour of the bill by the drawee, upon presentment for payment, the plaintiff's counsel called for a letter, the date of which he specified, and which he said contained such notice; and upon the non-production thereof, offered to give parol evidence of its contents, no copy having

This was objected to by Campbell for the defendant, on the ground that the notice to produce was too general, and did not specify the particular letter called for.

The following was the part of the notice to produce, which applied to the

present question.

"And also to produce all letters, papers, and documents, touching or concerning the bill of exchange mentioned in the declaration in this cause, and the debt sought to be recovered by the said plaintiff by this action."

BEST, C. J., was of the opinion that the notice was too vague; that it ought

to have pointed out the particular letter required.

It was afterwards proved, that from the state of the defendant's dealings with the drawees of the bill, who were the defendant's bankers, he could have no reasonable expectation that the bill would be paid by them; when his Lordship said, that if the jury were of that opinion, the defendant was not entitled to notice of the non-payment.(a) Verdict for the plaintiff.

Vaughan, Serjt., and Tyrwhitt, for the plaintiff.

Campbell and Godson for the defendant.

(a) Claridge v. Dalton, 4 M. & S. 256,

SITTINGS AFTER HILARY TERM, IN K. B.

7 GEO. IV.—1826.

REX v. SERJEANT and Others.-p. 352.

Indictment against the wife of W. S. and others, for a conspiracy in procuring W. S. to marry:
Held, that W. S. was not a competent witness in support of the prosecution. Held, that
in all cases where husband and wife are admissible witnesses against each other, they are also admissible for each other.

INDICTMENT for a conspiracy. The first count stated in substance as follows: That before and at the time of the conspiracy, &c., hereinafter next mentioned, Mary Anne Wrench, then of, &c., spinster, and now called Mary Anne Serjeant, wife of W. B. Serjeant, of, &c., was a person of bad character and ill fame, and was a common prostitute, and the said W. B. Serjeant was an infant within the age of twenty-one years, to wit, of the age of seventeen years, to wit, at, &c. And the jurors, &c., do further present, that Mary Anne Serjeant and P. D. and S. J. well knowing the premises, unlawfully, &c., intending to injure the said W. B. Serjeant, and to defraud him of his property, and to bring him into public scandal, &c., on, &c., with force and arms, &c., at, &c., unlawfully and wickedly did conspire, &c., for the wicked intent and purpose aforesaid, to cause and procure a marriage to be had and solemnized between the said W. B. Serjeant and the said Mary Anne, by means of a false oath to be taken by the said Mary Anne, and by divers false pretences, &c., and without the license, consent, or knowledge of Anne Serjeant, then and there being the mother of the said W. B. Serjeant, his father then and there being dead; and against the form of the statute, &c. And the jurors, &c., do further present, that the said Mary Anne, P. D., and S. J., in pursuance of the conspiracy, &c., between them had as aforesaid, did afterwards to wit, on, &c., at, &c., persuade and prevail on the said W. B. Serjeant to consent to marry her the said Mary Anne, and did afterwards, to wit, on, &c., at, &c., by means of such persuasion, and by means of a false oath then and there taken by the said Mary Anne for the purpose of obtaining, and in order to obtain a license for the solemnization of marriage between the said W. B. Serjeant and the said Mary Anne, and by divers other false pretences, &c., cause and procure the said W. B. Serjeant to marry the said Mary Anne, and a marriage by such license was then and there accordingly solemnized between them without the leave or license or knowledge of the said Anne Serjeant, then and still being the mother of the said W. B. Serjeant, who then was such infant as aforesaid, contrary to the form of the statute, &c. There were other counts in the indictment varying from the above in setting forth the overt acts of conspiracy.

The marriage between the defendant Mary Anne Wrench and W. B. Serjeant,

was subsequent to the passing of the marriage act of the 4 G. 4, c. 76.

Gurney proposed to call W. B. Serjeant as a witness in support of the prosecution, and cited Lord Audley's case, 3 Howell's St. Tr. 402; Haagen Swendsen's case, 14 Howell's St. Tr. 559; Perry's case, Bristol, 1794, 1 Hawk. c. 41,

s. 13, edit. 1795, as in point.

Adolphus and Thesiger for the defendants objected, and contended that the husband was not a competent witness; that in the cases cited the wife had been allowed to be a witness against her husband, because there was a charge against the husband of violence committed on her person, but that the exceptions from the general rule were confined to cases of this description. Rex v. Locker, 5 Rex v. Locker, 5° Esp. 107, is an express authority to show that a wife is not a competent witness for a co-defendant in a case of conspiracy, where the acquittal of the co-defendant would enure to the acquittal of the husband.

BOTT, Ld. C. J. There is no doubt but the wife was a competent witness

in the cases which have been cited from the State Trials; and in the King v. Perry, a case of abduction tried before the late Chief Justice Gibbs, when Recorder of Bristol, the evidence of the wife was received. But these cases are very distinguishable from the present. The King v. Locker has decided, that in an indictment for a conspiracy in procuring a lady, then a ward of chancery, to marry, the wife was not a competent witness for one of the co-defendants, if her evidence might enure to the acquittal of her husband. I think, therefore, upon the whole, it is the safest course in the present case not to receive the evidence of the husband. In the case tried before Lord Chief Justice Gibbs, to which I have alluded, the wife was called as a witness for her husband, and that learned Judge stated, that he could see no distinction between admitting a wife for or against her husband, that the principle was exactly the same, and I entirely concur in his opinion. The King v. Perry was much talked about at the time, and Chief Justice Gibbs expressed his surprise that any doubt should have been entertained, that a wife was in all cases a competent witness for her husband when admissible against him. Verdict of guilty.

Gurney, Andrews, and Chitty, for the prosecution. Adolphus and Thesiger for the defendants.

MANN v. LOVEJOY.—p. 355.

Where the occupier under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, on the terms of the agreement, and the landlord may

Where the plaintiff in replevin does not appear, the defendant cannot take a verdict, though the record be brought down by his writ of Nisi Prius, but a nonsuit must be entered.

REPLEVIN. Cognisance by defendant, as bailiff of Page, for rent due, under a demise theretofore made. Pleas in bar, non tenuit, and riens in arrear.

There were other cognisances and pleas in bar, but these only became material; and there was no plea in bar by the defendant.

The plaintiff came into possession of the premises in November 1812, under an agreement for a lease, at the rent of 150l. a year, to be granted to him by one Bartholomews, who then had a term in the premises. Bartholomews afterwards, in June 1814, assigned his term to Page. It was proved that the plaintiffs had paid rent at the rate mentioned in the agreement to Bartholomews, before the assignment.

Marryatt and Chitty for the plaintiff, contended, that there was in this case The possession was taken under an instrument, amounting only to an agreement for a lease; and the occupation being under that express contract, no contract inconsistent with it, as a tenancy from year to year, evidenced by payment of rent, can be implied. Then if the holding is under a mere agreement for a lease, there can be no distress; and they cited Hegan v. Johnson, 2

Taunt. 148; Dunk v. Hunter, 5 B. & A. 322.

ABBOTT, Ld. C. J. In Dunk v. Hunter, the judgment proceeded on the ground that, looking to the whole instrument, there was no fixed rent; and in neither of the cases cited had there been any payment of rent. In this case, certainly, the instrument of November 1812 does not amount to a demise; but the question is, whether, when there is a continued occupation, and payment of rent under such an agreement, this does not constitute a tenancy from year to year, on the terms of that agreement. Neither of the cases cited affect that question. In this case there has been a continued occupation, and a payment of the rent mentioned in the agreement; and these facts are not inconsistent with the agreement, but rather in affirmance of it. I am of opinion, that taking the agreement, and connecting it with the facts proved, there is a tenancy from year to year, at the rent mentioned in the agreement, which tenancy the defendant could not determine without giving notice, and on which he may distrain for

The counsel for the plaintiff then applied to be nonsuited, but ABBOTT, Ld. C. J., was of opinion, that as it was the defendant's record, he had a right to a Verdict for defendant on the first cognisance. verdict.

Marryatt and Chitty for the plaintiff. Scarlett and Campbell for the defendant.

In Easter Term following Chitty applied for a rule to show cause why there should not be a new trial, on the ground that no tenancy was proved, or why the verdict should not be set aside, or a nonsuit entered, as was contended for by the plaintiff's counsel at the trial.

The Court refused the rule on the first point, being of opinion that the tenancy was proved, but granted the rule for entering a nonsuit, which has since been

made absolute.(b)

(a) See the judgment of Littledale, J., in Hamerton v. Stead, 3 B. & C. 483.
(b) As to this point, see 2 Barn. & Cress. Rep.

PIZEY v. ROGERS.—p. 357.

A tenant under covenant to repair, cannot maintain an action on the 14 G. 3, c. 78 (the London building act), against his landlord, for a moiety of the expense of rebuilding a party-wall, which being out of repair, the tenant pulled down and rebuilt at the joint expense of himself and the occupier of the adjoining house, to whom he had given the notice required by the statute, in his landlord's name, but without his authority.

EDWARDS v. YEATES.—p. 360.

Elemble, that a letter demanding payment of a debt, sent by the plaintiff's attorney, and received by the defendant, is not sufficient evidence of a demand, on the issue of a prior demand and refusal to a plea of tender. Semble, that the demand should be personal, that the plaintiff may have an opportunity at the time, of paying the money demanded.

Assumpsit. Plea, as to all but the sum of 7l. 19s. 8d., non assumpsit, and as to that a tender. Replication to the plea of tender, a prior demand and refu-Rejoinder, taking issue on the demand. The plaintiff, in order to prove that a demand was made of the precise sum before it was tendered, gave in evidence a letter written by his attorney, and received by the defendant, requesting him to pay to the plaintiff the sum of 7l. 19s. 8d.

Brougham for the defendant, contended, that the demand ought to be made personally, and not by letter; that the person to whom the application was made might have the opportunity at the time of paying the money demanded. Coles

v. Bell, 1 Campb. 478, n.

Scotland for the plaintiff. The issue, on this evidence, ought to be found for the plaintiff. It has been expressly decided, in Hayward v. Hague, 4 Esp. N. P. C. 93, that it is not necessary to make a personal demand of the money.

ABBOTT, Ld. C. J. I should be very sorry to differ from Mr. Justice Lawrence, who decided that case; but I own I have a very strong opinion against considering a letter written by the plaintiff's attorney, demanding the sum tendered, as evidence of a demand to support the plaintiff's issue. I think, that at the time of the demand, the defendant should have an opportunity of paying the money demanded. Under all the circumstances of this case I should advise the parties to withdraw a juror. "ntland for the plaintiff. A juror was accordingly withdrawn.

gham for the defendant.

MACINTOSH v. HAYDON.—p. 362.

The drawer of a bill of exchange accepted generally (after the 1 & 2 G. 4, c. 78), added the words, "payable at Ransom and Co., bankers, London," without the knowledge of the acceptor, and then endorsed it for valuable consideration, the bill being over due, and the endorsee privy to the alteration: Held, that the acceptor was discharged.

This was an action by the endorsee against the acceptor of a bill of exchange drawn by F. Unwin, and payable to his order.

The declaration alleged a general acceptance.

It appeared in proof, that after the bill became due, Unwin applied to the plaintiff to advance money on the bill; the plaintiff objected because the bill was not accepted payable at a banker's; upon which Unwin wrote under the defendant's acceptance, the words "Payable at Messrs. Ransom and Co., bankers, London," and the plaintiff took the bill. The bill was drawn after the passing of 1 & 2 G. 4, c. 78, and the defendant was not privy to the alteration.

It was contended for the defence, that this alteration of the bill discharged the acceptor, inasmuch as it added a new obligation, namely, an undertaking to pay at a particular place, and entailed all the liabilities arising out of a default at a particular place. The case of Cowie v. Halsall, 4 B. & A. 197, which

occurred before the statute, was referred to.

Gurney for the plaintiff, argued that since the statute the alteration is immaterial, the situation of the acceptor being the same under an acceptance of this form, as under a general one, and that as no demand was necessary against an

acceptor, the party could not be in any way prejudiced.

ABBOTT, Ld. C. J. It is quite true that in strict law no demand is necessary against an acceptor, but in practice a demand is usual, and ought to be made before proceedings are instituted; and it might make a material difference in the costs, if a solvent acceptor, against whom proceedings had been instituted without a demand, were promptly to apply to the Court. But it would, perhaps, be going too far to say that in this view only, the alteration would be so far material as to vitrate the bill; but there is another view in which the words added, materially alter the character of the bill. Suppose the endorsee, who was cognisant of such an alteration, were to pass the bill whilst current, to another person, without communicating the fact, and he to a third. The right of the last endorsee to sue his immediate endorser would, as the bill appears, be complete upon default made at the bankers, and notice thereof; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such nonpayment. I am of opinion, therefore, that the alteration is in a material part of the bill, and the defendant is in consequence discharged. Nonsuit.(a)

Gurney for the plaintiff.

Marryatt and Chitty for the defendant.

(a) Tidmarsh v. Grover, 1 M. & S. 735.

STONE and Another v. MARSH, STRACEY, and GRAHAM.—p. 364.

Payment by bankers to one of several trustees, of the proceeds of stock sold out under a joint power of attorney from the trustees, does not discharge the bankers as against the other trustees, unless p.eviously authorized by them.

This was an issue directed by the Lord Chancellor to try whether, before and at the date and suing forth of certain commissions of bankrupt, or of either of them, that is to say, a certain commission against the defendants, dated the 16th of September, 1824, and a certain commission against Henry Fauntleroy, dated

the 29th October, 1824, the said defendants and the said Henry Fauntleroy were indebted to the plaintiffs, in the sum of 16,000l., or in any and what sum.

The parties were prohibited by the Chancellor's order from taking any objection to the final determination of the issue, on the ground that the said Henry Fauntleroy was interested as a trustee jointly with the said plaintiffs, and also as a partner with the said defendants; and power was given to examine the parties as witnesses.

The plaintiffs and Henry Fauntleroy were joint trustees under the will of Sir. T. B. Plaistow, and had amongst other property the sum of 17,601l navy five per cents. standing in their joint names. The defendants Marsh, Stracey, and Graham were bankers, in partnership with Fauntleroy, and conducted their business in Berners Street, Westminster. The bankruptcy of the defendants arose out of the discovery of forgeries, to an immense amount, committed by Fauntleroy, of powers of attorney to sell out stock, for one of which forgeries he was executed. Up to the time of these disclosures the business and credit of the house had been extensive.

The claim of the plaintiffs was for 16,000l., the proceeds of the sale of part of the stock standing in the joint names of them and Fauntleroy, under a power of attorney forged by Fauntleroy, which proceeds, it was contended, had come

into the possession and use of the defendants.

For the plaintiffs it was proved, that the stock had been sold out by a London broker, under orders received from the house in Berners Street, in two several sams, one on the 26th May, 1819, producing 7105*l*.; the other on the 28th of May, 1819, producing 8904*l*. 17s. 8*d*. The demand to act on the power of attorney (which professed to authorize the partners, or either of them, to sell out the stock) was in the handwriting of Stracey. The receipt for the first sum was signed by Stracey, as attorney to the trustees, that for the second by Graham. The proceeds were paid by the broker into the banking house of Martin and Co., in the city, on account of the house in Berners Street, and an account was rendered by the broker to Marsh and Co., giving them credit for half the brokerage on the sales. Martin and Co. were the city bankers of Marsh and Co., and a regular pass-book was kept, in which Marsh and Co. were credited by Martin and Co. for the proceeds paid in by the broker.

A paper in Graham's handwriting was found in Fauntleroy's desk, of which

the following is a copy :---

"26th May, 1819." 15,000l. odd, navy 5s. 7,105l. paid to Martin and Co. on the 26th, and on the 28th 8,900l., to make up the account to raise 16,000l., money of H. F., Dehagan & Stone."

The account rendered by the broker was also found in the house.

For the defendants it was shown, that the power of attorney was forged by Fauntleroy; that he had exercised the principal control and management of the affairs of the bank, and that though the money had been paid into Martin and Co., it had, in fact, never been paid into the house in Berners Street, Fauntleroy having contrived to intercept it, and to keep the defendants in ignorance of the real application of the moneys received. That the mode of business was, for the accounts with Martin and Co. to be transferred from the pass-book into a book called the house-book kept in Berners Street; that this had always been done by Fauntleroy, the partners relying on the house-book in which the accounts were apparently correct, and corresponded with the other books in which the clerks and the partners usually made their entries. That by keeping the passbook as much as possible out of their view, he had defrauded the partnership; and in fact, there were deficiencies to their loss of more than 100,000l. accountant, who had been employed by the assignces to examine the books of the bankrupts, stated that in the course of ten years there were entries in the passbook of sums paid in to Martin and Co. to the credit of Marsh and Co., to the amount of upwards of 500,000l., none of which appeared in the house-book; that on the other hand there were entries in the house-book, of sums to the amount of upwards of 370,000l. as paid by the partnership to Martin and Co,

none of which appeared in the pass-book as really paid. All the defendants were examined, and stated that they had interfered but little with the business, and had relied altogether on the knowledge of business and honesty of Faunt-leroy, who always sent into the city to the bank of England, the powers of attorney to be passed, and that the partner who happened to be in the city at any particular time, as matter of course acted on the powers of attorney found at the bank; and authorized the broker to effect the sales, and receive the proceeds. They had no recollection, or knowledge of this particular transaction, beyond what appeared on the papers. Only one instance was shown of an entry in the pass-book by any other partner than Fauntleroy.

The plaintiffs were indemnified by the bank of England, who had engaged to replace the stock to their credit, on condition of the plaintiffs pursuing their

claim for a dividend, against the assignees of the defendants.

Upon these facts it was contended for the plaintiffs, that the defendants had, in fact, received money, the produce of the property of the plaintiffs; that the moment the money was paid to Martin and Co., the recognised agents of the defendants, the defendants became accountable, and could not relieve themselves otherwise than by showing the application of the money, to the use of all the trustees, out of whose funds it had come; that the defendants could not set up as a defence their own negligence in allowing one of their partners to appropriate it; nor could they be allowed to say that it had been acquired by a felony of one of the partnership.

For the defendants it was urged:—First, that no debt could be founded on and arise out of a felony; that the party whose name had been forged could not adopt, and recognise the forgery so as to found a civil right upon it, it being against the policy of the criminal law to allow the party affected by a felony, in

any way to sanction or turn it to his advantage.

Secondly, that, in point of fact, the plaintiffs had not been injured, and had not lost their property, inasmuch as the transfer under a forged power worked no alteration of property; and that they, therefore, still remained owners of the stock, and could call upon the bank of England to answer for both the principal and dividends. Davis v. Bank of England, 2 Bingh. 393.

Thirdly, that even if the defendants were fixed by the payment of the money to Martin and Co. on their account, still that they were discharged by the repayment of it to Fauntleroy, one of the parties whose property it was, and into

whose hands and use it appeared by the evidence to have come.

ABBOTT, Ld. C. J., in summing up to the jury. The question in this case has evidently arisen out of the forgery of this power of attorney; but as the considerations on that point are entirely matter of law, and involve very great difficulty, I think the parties ought to have the benefit of more mature deliberation than can be given here to that point. The only way that this question can be put to you, is to assume that the power is valid, and then see whether or no the defendants are answerable for this sum of money; and we must view the question as if the same person were not answerable on both sides. Now taking this power as valid, you find that it authorizes all and each of the partners to act upon it; that two of them do in fact act; each signs the receipt for the part transferred by him; the broker receives the money and pays it to Martin and Co., to the credit of Marsh and Co., and sends the account to Marsh and Co. Upon these facts the money most unquestionably was paid to Marsh and Co. or to their credit. But then it is said that they are not answerable, because, by their peculiar and extraordinary mode of conducting their business, the money never found its way to their use. That may be good, as between them and Fauntleroy, but as between them and the plaintiffs it cannot by possibility be any defence, that they have suffered one of their own partners to embezzle it. But they say, also, that Fauntleroy was one of the persons entitled, and that he has drawn it out, and, therefore, they are not answerable. Now if two persons give a power of attorney to bankers to sell out their joint stock, the bankers ought to place the proceeds to their joint account, and both ought to draw. If it is meant that the money should be paid to one, an authority Vol. XXI.—97 3 T

ought to be given to that effect to the bankers: that, in my experience, has been the ordinary practice. If you are of opinion that this is the usual mode of dealing, then, as against the other two, it is no defence that the payment has been made to one only of several who are jointly entitled to receive it. If, according to the ordinary course of business, he was not solely entitled to receive this money, then payment to him is no discharge, and you will find your verdict accordingly.

Verdict for plaintiffs 16,000l.

The Attorney-General, Bosanguet, Serjt., Bolland, and Tindal, for the

plaintiffs.

Scarlett, Gurney, Campbell, and F. Pollock, for the defendants.

SITTINGS AFTER HILARY TERM, IN C. P.

7 GEO. IV.-1826.

HUME and Another v. BOLLAND and Others, Assignees of the Estate and Effects of WILLIAM MARSH, JOSIAS HENRY STRACEY, GEORGE EDWARD GRAHAM, and HENRY FAUNTLEROY, Bankrupts.—p. 371.

Where bankers employed to receive dividends in the funds, had in their own books credited their employers with the dividends as received, and had allowed them to draw without having any other funds in their hands: Held, that the bankers were bound by the entries so acted on, though not communicated, and that they could not set up as a defence, that the entries had been fraudulently made by one of the partners, the money never having been received by the house.

This was an issue directed by the Lord Chancellor to try, whether at the date and suing forth of the commissions of bankruptcy therein mentioned, that is to say, that against the three first bankrupts, dated 16th of September, 1824, and that against Fauntleroy, 29th of October, 1824, the said bankrupts were indebted to the said plaintiffs and Henry Fauntleroy, as trustees under a certain deed therein mentioned, in the sum of 11771. 16s. 6d., or in any other, and what sum

The Lord Chancellor's order prohibited the parties from taking any objection to the final determination of the issue, on the ground that Henry Fauntleroy was interested jointly with the plaintiffs as a trustee, and jointly with the bank-rupts as a partner.

The bankrupts carried on business in partnership as bankers, in Berners Street, Westminster, and up to the time of their failure were in high and exten-

sive credit.

The plaintiffs and Henry Fauntleroy, one of the bankrupts, by deed of the 9th of August, 1810, stood possessed of certain sums standing in their joint names, in the public funds, which are specified in the account mentioned below, in trust, to pay the dividends on the same to Colonel Bellis, in his lifetime, and after his death upon certain trusts, for the benefit of his widow and children, of whom Frances, Emily, and Eliza were three.

Fauntleroy acted alone in the trusts of this deed, and, during the life of Colonel Bellis, kept an account with him, and the dividends were regularly paid as they became due; at his death, which took place on the 23d January, 1824, an account was opened in the books of the banking-house, entitled "The trustees of Bellis, in account with Marsh and Co.;" and several sums of money were from time to time placed to the credit of the trustees, in respect of the dividends on the several sums in the public funds, and they were from time to time debited with the several sums of money paid by Fauntleroy, in execution of the trusts of the said deed.

In the beginning of September 1824, it was discovered by the plaintiffs, who had not before interfered with the trust property, that all the stock vested in them and Fauntleroy by the trust deeds, except 6000l. consols, had been sold out by Fauntleroy, under forged powers of attorney. The dates of the sales did not appear, but it was admitted that they were previous to the accruing of the dividends in question. Upon this discovery further investigations took place at the Bank of England, and similar forgeries by Fauntleroy to an enormous amount were discovered, and for one of them he was executed on the 30th Nov., 1824.

The defendants, upon application by the solicitor of the plaintiffs, had rendered the following account, as standing in the bankrupts' books at the time of the bankruptcy.

The Trustees of Bellis (in Account with Marsh and Co).

1824.				£.	8.	đ.	1824.		£.	8.	đ.
April 29th Fras. Bellis	•		-	10	0	0	April 9th	Divd. 5300 4 per			
Eliza do.	•	•	-	10	0	0	•	cents	106	0	0
30th B. P. Bill -	•	•	-	20	0	0		Do. 4600 Redd. 3			
June 16th Stamps -	-	-	-	0	4	6		per cents	690	0	0
Emily Bellis	•	-		20	0	0	July 9th	Do. 10,000 Imperial			
Do	•	-	•	20	0	0	•	3 per cents	150	0	0
Fras. do.	•	•	-	20	0	0		Do. 18,375 4 per			
Aug. 10th Emily do.	•	-	-	20	0	0		cents	367	10	0
Fras. do.	•	-	•	95	6	0		Do. 6000 3 per cents	90	0	0
Eliza do.	•	-	-	10	0	0		-			
Stamp do.	•	-	-	0	3	0					
Sept. 13th To Balance	-	•	•	1177	16	6					
								•			
				1403	10	0			1403	10	0
							Sent. 13th	By Balance	1177	16	-6

Of the dividends mentioned in this account, that on the 6000%. 3 per cents, was the only one really received by the bank.

The entries in the receiving day books, crediting the trustees for the dividends, from which the book containing the account was made up, were mostly in Faunt-

leroy's handwriting, one was in that of a clerk.

For the plaintiffs it was contended, that the bankrupts having given credit in their books for the dividends, and having allowed the persons beneficially interested to draw upon the faith of them, were precluded from denying the receipt of the money. That Fauntleroy acted in the character of partner in the house, in making the entries of dividends received, and in allowing the payments: that the partners were bound by his dealings with their customers in the ordinary course of business, and could not be allowed to set up their own negligence as a defence against the liabilities induced by his conduct. Shaw v. Picton, 4 B. & C. 715; Rapp v. Latham, 2 B. & A. 795; Skyring v. Greenwood, 4 B. & C. 281; Sandilands v. Marsh, 2 B. & A. 673.

For the defence it was urged, that the partners were not bound by Fauntleroy's acts; that he had received the dividends and dealt with them as a trustee, no power of attorney having been given to the house to receive the dividends; and that as Fauntleroy had not, in fact, paid those for which he had debited the house, they were not responsible. That Fauntleroy had, in fact, had the management and control of the business of the bank, and that this was known to the plaintiffs. That the plaintiffs were equally bound by Fauntleroy's acts, and had been negligent in not taking care to see that the stock continued in their names; no part of the proceeds of which had reached the bank. That the defendants were not bound by the entries in their own books, unless communicated to the parties interested. Simson v. Ingham, 2 B. & C. 65.(a) And in this case the entries were false in fact, and so made by Fauntleroy, in fraud of the other partners. That there were only two modes in which a legal claim could be established against the house, either as for money had and received, which was

negatived by the evidence, or by an account stated, which was also negatived, as the entries had not been communicated.

It was also contended, that the plaintiffs had still their remedy both for the stock and the dividends against the Bank of England, the transfer under a forged power of attorney being void. Davis v. England, 2 Bing. 393. And it was proved that the Bank of England had engaged to indemnify the plaintiffs for both, in case they did all they could to procure a dividend from the assignees for the benefit of the Bank.

The plaintiff's witnesses, and the clerks in the banking house had been cross-examined in order to explain the mode by which the books and business of the house had been conducted, and the false entries were traced through the different books in such a way, as to show that wherever a false entry of a receipt was made, there was a corresponding false one of a payment, and the balauce book, on which the partners entirely relied, always showed a clear and correct account.

BEST, C. J., in summing up to the jury, after stating the issue, said, The plaintiffs are entitled to the whole of the money or none. It is not necessary to consider in this case what may be the effect of a transfer under a forged power of attorney, or the right to the stock transferred; if it were, I should certainly act on the recent decision in this Court. This Court has determined that such a transfer is entirely void, and makes no alteration in the property of the stock transferred, and after what has recently passed, (a) it may be proper to state, that there is no disposition in any of the Judges who decided that case to recede from their opinion. In this case, the first question for your consideration will be, in what character Fauntleroy acted in the disposition of these dividends, or pretended dividends; whether as trustee merely, or as a partner in the banking-That he received these dividends, or pretended to receive them as a trustee merely, there can be no doubt. No power of attorney to the house was given or was necessary to enable him to receive them, but if he pretended afterwards to dispose of them in his character of a partner, and the partners by their conduct have adopted and sanctioned his acts, they are undoubtedly liable. That Fauntleroy gave his co-trustees to understand that he had received this money is clear; if he did this in the character of a partner in the house, the house is bound; if you give a man to understand that you have received money on his account, he has a right to act upon that understanding. Now you find that throughout this business, the house have in their own books dealt with this as money received; the entries of dividends to the credit of the trustees, are traced from book to book. I fully agree with the case of Simson v. Ingham; in that case it was rightly held that parties are not bound by their uncommunicated entries; but here you find payments made to the trustees on the credit of them; when that was done, the trustees had a right to consider the money as received by the bank, and might have arrested the partners for it. Whether they knew or not of these entries, they are bound by them when so acted on; they ought to have known of them, and are responsible for them. If you believe that Fauntleroy dealt with this supposed money with the assent of his partners, your verdict must be for the plaintiffs; but as other questions have been raised, which may be material in the Court from whence this case comes, I will take your opinion whether, first, the plaintiffs as trustees have been guilty of any negligence; secondly, whether the partners have been guilty of negligence.

The jury returned a verdict, that Fauntleroy dealt with these dividends as a partner in the house, and with the assent of his partners; that the plaintiffs were guilty of no negligence; that the partners were guilty of gross negligence.

Verdiet for the plaintiffs, 1177l. 16s. 6d. Adams, Serjt., Tindal, Turner, and Rogers, for the plaintiffs. Wilde, Serjt., Campbell, and F. Pollock, for the defendants.

⁽a) The judgment of the Court of Common Pleas in Davis v. The Bank of England, has been reversed in the King's Bench for the insufficiency of one of the counts in the declaration. not noticed in the arguments in this Court.

POINGDESTRE v. The Corporation of the ROYAL EXCHANGE.—p. 378.

Where a ship partially damaged, has been repaired by the owners, the insurers are only liable to the amount of two-thirds of the cost of repair, unless circumstances be shown to take the case out of the ordinary rule of deduction of one-third for the benefit to the owners from the repairs.

This was an action on a policy of insurance on the ship Glatton. The ship had suffered a partial loss on the voyage insured, and had been repaired. The

defendants had paid two-thirds of the costs of repairs.

The only question in the cause was stated in the admission agreed upon by the parties, as follows:—"That in making up the statement, on which the sum paid by the defendants was calculated, a deduction of one-third of the costs of the repairs done to the ship, had been made, being, as the defendants contend, the usual deduction, made for the benefit derived by a ship owner from the repairs of a ship, and commonly termed a deduction of new for old, and the right to which deduction is the only question to be tried; and the verdict is to be for the plaintiff or defendants, according to the determination of such right."

The ship was ten years old, and had, just before the voyage, undergone a thorough repair, and on her return was again completely repaired. The damage done was chiefly in the new part in the first repair. A vessel so repaired was stated to be capable of five or six voyages; and on her second repair she was as

complete as on her first.

The plaintiff contended, that this was similar to a case in which a new ship, or one newly repaired, should be damaged in going down the river, and put back to repair, when a deduction of one-third, or any deduction, would be manifestly

unjust, and indeed did not obtain in practice.

For the defendants it was urged, that the mode of calculating average, by deducting one-third of the repair, was the constant usage, according to which the parties must be taken to contract; that it was a rule framed with a view to avoid the difficulty of calculating minutely the actual benefit to the owner from the repairs in every case. Da Costa v. Newnham, 2 T. R. 407; Palmer v. Black-

burn, 1 Bing. 61; Stevens on Average, 158.

On Bosanquet, Serjt., proposing to call merchants and insurers to prove the usage, Best, C. J., interposed and said, that it would scarcely be insisted by the plaintiff, that witnesses should be called to establish that usage before a special jury of London, every one of whom must be perfectly cognisant of the fact of the usage. The jury assented to this, and the Lord Chief Justice then said—It is quite notorious that the rule in practice to ascertain the rate of indemnity, is that which has been adopted in this case; that rule is not one of law, nor is it universal; but in ordinary cases it is impossible to have proof of the actudeterioration of the vessel by the wear and tear of a voyage; unless, therefore, you see anything in this case to take it out of the rule, you ought to act on it.

Verdict for the defendants.

Taddy, Serjt., and Maule, for the plaintiff.

Bosanquet, Serjt., and W. Kaye for the defendants.

DOE dem. LEWIS v. COLES.—p. 380.

The plaintiff in ejectment has a right to an amendment of the record, upon payment of the costs of the application, against a defendant, who refuses to give up the possession. If the defendant consents to give up possession, the plaintiff must pay the whole costs, up to the time of the application.

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SITTINGS AFTER EASTER TERM, IN K B.

7 GEO. IV.-1826.

DOMAN v. DIBDEN.-p. 381.

If a bill, payable at a given time after date, be for a specified sum, "with lawful interest for the same," interest shall be computed from the date.

This was an action by the drawer against the acceptor of the following bill of exchange:—

"London, 17th of May, 1825.

"Eight months after date pay me or my order the sum of 100% for value received, with lowful interest for the same.

"J. H. DOMAN."

Comyn, for the plaintiff, applied to the Court to know from what time the interest was to be calculated, whether from the date of the bill, or from the period at which it became due.

Abbott, Ld. C. J. I think the plaintiff is entitled to interest from the date of the bill.

Verdict for the plaintiff.(a)

Comyn for the plaintiff. The cause was undefended.

(a) See Kennerly v. Nash, 1 Stark. N. P. C. 452; Hopper v. Richmond, ibid. 507. Bayley on Bills, 279, 4th edition.

ROSE v. BLAKEMORE.—p. 382.

The retrospective clause in 3 G. 4, c. 75 (marriage act), is not repealed by statute 4 G. 4, c. 76.

If a witness declines to answer a question, no inference of the truth of the fact inquired into may be drawn from that circumstance.

This was an action for criminal conversation with the plaintiff's wife.

It appeared that one of the parties at the time of the marriage was under age, and illegitimate; and there was nothing to show whether they were married by license or by bans. The marriage took place before the passing of the marriage act 3 G. 4, c. 75, and the parties at the time of the passing of that act were of full age, and living together as husband and wife.

Brougham, for the defendant, objected that there was no sufficient proof of the marriage. Before the passing of the act 3 G. 4, c. 75, such a marriage, if by license, was invalid. That act contained a retrospective clause legalizing such marriages in certain cases, under which clause the marriage in question certainly was included; but that act was repealed by the statute 4 G. 4, c. 76, and in the repealing act there was no retrospective clause. Under the new act, therefore, such a marriage, if illegal when contracted, was not legalized; and as it was not shown that the marriage in question was by bans, it originally was, and still continued, illegal.

ABBOTT, Ld. C. J. The statute 4 G. 4, c. 76, repeals the statute 3 G. 4, c. 75, except as to things done under its provisions, and except "so far as it repealed any former act, or any clause, matter, or thing therein contained, s. 1." The retrospective clause. s. 2, in the act 3 G. 4, c. 75, did operate with respect to the particular marriages to which it applied, as a repeal of the clauses in the former marriage act, 26 G. 2, c. 33, which rendered them invalid; it therefore was not repealed by the subsequent statute, and the marriage is perfectly good, even if his license; if by bans, it was so even before the passing of the act 3 G. 4, c. 75

In the course of the cause a witness refused to answer a question, whether he had published a particular hand-bill, on the ground that he had been threatened with a prosecution for the publication; and ABBOTT, Ld. C. J., held the excuse sufficient. Brougham, in addressing the jury for the defendant, put it to them that the witness really must have been concerned in the publication, for that a denial of it, if he could deny it, would not injure him; on which ABBOTT, Ld. C. J., interposed, and said that no such inference ought to be drawn; that there was an end of the protection of a witness, if a demurrer to the question were to be taken as an admission of the fact inquired into. Brougham suggested that the winess could not be affected by the inference which he drew from his conduct; that the witness's statement that the circumstance had taken place would be evidence against him on another occasion, but not so any inference drawn by third persons; but ABBOTT, Ld. C. J., adhering to the opinion he had expressed, Brougham did not further press the argument upon the jury.

Verdict for the plaintiff, damages, 150%.

Scarlett, E. Lawes, and Bingham, for the plaintiff. Brougham and Tindal for the defendant.

So also in the case of The King v. Watson, 2 Stark. N. P. C. 158, Holroyd, J., is reported to have used these expressions:—"I have understood the rule to be, that if you propose a question to a witness, and he declines to answer it, his not answering can have no effect with the jury." And see Lord Eldon's opinion in Lloyd v. Passingham, 16 Ves. 64, to the same effect.

Not withstanding the deference due to these high authorities, it may perhaps be doubted whether these dicta be not inconsistent with the general principle, on which the rules concerning the right of witnesses to refuse an answer to questions have been established; or whether, at least, they ought not to be confined to those cases where the objection to the question is, that it tends to subject the witness to infamy; where the objection is, that the answering the question may subject him to forfeiture, penalty, or punishment (which was the nature of the objection in the principal case; for the hand-bill was not produced, so that there was no evidence that the publication was discreditable to him, or that, if established, it would render him liable to punishment, but only that there was an intention of founding criminal proceedings upon it, it seems open to contend, that there is no reason why comments should not be made on the fact of the witness's refusal to answer, with a view to satisfy the jury of the truth of the fact sug-

gested in the question.

It would seem that the witness is sufficiently secured from penalties, punishment, or forfeiture, if he is not compelled to say anything which would be evidence against him in proceedings instituted with those objects; and as neither the inferences of counsel, nor the opinion of the jury, could have that effect, it appears as unreasonable to prevent counsel from drawing the one, as it is impossible to prevent the jury from forming the other. The conclusion, indeed, is so obvious, that the only way of preventing the jury from forming: the story declaring, consistently with the opinion said to have been expressed by Lord Ellenborough in Rex v. Lewis, A Esp. N. P. C. 225, and by Lord Alvanley in Macbride v. Macbride, ibid. 242, not merely that the question need not be answered, but that it ought not to be asked. It is, however, to be observed, that both these were cases where the tendency of the question was to degrade the witness, not to subject him to penal consequences; and Lord Alvanley expressly confined his epinion to questions "which have a direct and immediate effect to diagrace or disparage the witness." With respect to such questions, there may be more reason to adopt the principle laid down by Abbott, Ld. C. J., in the principal case, and by Holroyd, J., in Rex v. Watson; as the ill opinion of the jury, and of the persons present in court, forms part of that diagrace and infamy from which the Court is to protect the witness. Yet even in these cases, the inference heing so obvious, where the witness declines to answer, the only complete protection is to refuse to allow the question; and this course, though supported by the cases cited above, does not seem to be according to the general current of authority, and is certainly at variance with general and unopposed practice.

BRYAN v. LEWIS .- p. 386.

If a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods which he has contracted to deliver: he cannot maintain an action for damages for non-performance of the contract.

This was an action against a broker for negligence in the sale of a certain quantity of nutmegs.

Nonsuit.(a)

In February 1823, the defendant sold the nutmegs to one Dawson, to be

delivered on the 6th of May following.

The warrants for the nutmegs were tendered to the purchaser on the 6th of May, but he was unable to pay for them. It also appeared that Dawson was a minor, and a person of no property or expectations.

It was proved that the plaintiff was not the owner of the nutmegs at the time of making the contract, and that he had bought them on the following 9th of

March.

A question was likewise made whether the defendant had been employed by

the plaintiff to sell the nutmegs, or by a person of the name of Sentence.

Abbott, Ld. C. J. I am clearly of opinion that this action cannot be maintained; I have always thought, and shall continue to think, until I am told by the House of Lords that I am wrong, that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and to buy goods which he has contracted to deliver, he cannot maintain an action upon such a contract. Such a contract amounts, on the part of the vendor, to a wager on the price of the commodity, and is attended with the most mischievous consequences.

Campbell, for the plaintiff, observed, that however beneficial such a law might be, it would at first introduce a most material change in the proceedings of the

Royal Exchange.

ABBOTT, Ld. C. J. The law is not new, and if it had been acted upon during the last twelve months, much of that distress which now presses upon the community would have been avoided. I am anxious my opinion should be known, that if wrong it may be corrected, and if right that it may be acted upon. How-ever, to give the plaintiff an opportunity of having my opinion reviewed, I shall put it to the jury to say whether the defendant was employed by the plaintiff to sell the nutmegs.

The jury found that the defendant was not employed by the plaintiff to sell

the nutnegs, upon which the plaintiff was nonsuited.

Gurney and Campbell for the plaintiff. Scarlett and Comyn for the defendant.

(a) Under the civil law it is not essential to the validity of the contract of sale, that the seller should at the time of making the contract have the ownership of the thing sold: "Acceders oportet rem de quâ tradenda contrahatur. Quales res sunt omnes que sunt in commercio; etiam spes veluti jactus retis; res future......et res aliene." Heinecc. Elem. Jur. Itb. iii. iii. xxiv. Pothier, in his essay on this contract, observes, "Le contrat de vente ne consiste pas dans la translation de la propriété de la chose vendue; il suffit pour qu'il soit valable que le vendeur se soit valablement obligé de faire avoir à l'acheteur la chose vendue, et l'obligation qu'il en a contractée ne laisse pas d'être valable, quoiqu'il ne soit pas en son pouvoir de la remplir par le refus que fait le propriétaire de la chose de consentir à la vente; il suffit que ce que le vendeur a promis sit été quelque chose de possible en soi quoiqu'il ne fût pas en son que le vendeur a promis ait été quelque chose de possible en soi quoiqu'il ne fût pas en son pouvoir." De Conte de Vente, part i. sect. 2. See Blackstone's definition of sale, 2 Black. Comm. 446, and the judgment of Lord Chancellor Parker, in Cuddie v. Rutter, Vin. Abr. vol. v. p. 540, S. C. 1 Peere Williams, 570.

THORPE & UXOR v. BOOTH.—p. 388.

The statute of limitations is no bar to an action on a promissory note, payable "24 months after demand," if presented for payment within six years before the action commenced.

This was an action against the maker of a promissory note. The defendant pleaded the general issue and the statute of limitations. The note had been given to the plaintiff's wife before her marriage. The following is a copy of the note:-

[&]quot; March 12, 1813. "Twenty-four months after demand, I promise to pay my sister, Frances oth, the sum of seven hundred pounds. Јоѕерн Воотн."

The note was presented for payment on the 28th of June, 1823.

Scarlett, for the defendant, contended that he was entitled to a verdict, as no evidence had been given by the plaintiff, to take the case out of the statute. In Christie v. Fonsick, Selw. N. P. 361, 6th edit., Mansfield, C. J., is said to have held, that on notes payable on demand, the statute runs from the date of the note, and not from the time of the demand.

Gurney and H. I. Stephen, for the plaintiff, contended that it was unnecessary to give any such evidence, as the cause of action did not accrue until twentyfour months after demand made; and no demand was made upon the defendant until June 1823. They cited Holmes v. Kerrison, 2 Taunt. 323, as an authority.

ABBOTT, Ld. C. J. This is certainly a point of some doubt and difficulty; but I am of opinion, on the authority of Holmes v. Kerrison, that the statute of limitations will not in the present case be a bar to the plaintiff's right to recover on this promissory note. But that my opinion, if wrong, may be corrected, I shall give the defendant liberty to move to enter a nonsuit.

Verdict for the plaintiff.(a)

Gurney and H. I. Stephen for the plaintiff. Scarlett and Abraham for the defendant.

In the following Trinity Term, Scarlett moved for a rule to show cause why a nonsuit should not be entered, but the Court refused the rule.

(a) See the authorities collected, Manning's Dig. Index, 202.

SITTINGS AFTER EASTER TERM, IN C. P.

7 GEO. IV.—1826.

MERLE and Another, Assignees of BROOKES, a Bankrupt, v. MORE .p. 390.

In an action by the assignees of a bankrupt, the bankrupt may allow his attorney before the bankruptcy to give in evidence privileged communications, though offered as proof of the act of bankruptcy.

Assumpsit. The act of bankruptcy, relied on by the plaintiffs, was an assignment by Brookes, by deed, of all his property, which it was contended was fraudulent. And in order to prove the circumstances under which the deed was executed, the attorney of Brookes, who prepared the deed, was called, and asked to a communication made to him by his client. On its being objected that the communications spoken to were privileged, and therefore inadmissible, Wilde, Serjt., proposed that the bankrupt, who was present, should waive his privilege, and allow the attorney to give the evidence.

Vaughan, Serjt., resisted this, and argued that this would, in effect, be making the bankrupt a witness to prove his own bankruptcy, for which purpose he was

by settled rule of law incompetent.

BEST, C. J. I think the privilege is the privilege of the client, and he may waive it. If the bankrupt is present, and consents to the witness giving the evidence, I shall receive it.

This was then done by the bankrupt, and the plaintiffs obtained a verdict.(a)

(a) The incompetency of the bankrupt to support the commission, is said to be founded on the interest of the bankrupt in the verdict, and the consequent danger of falsehood. It is evi-

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Wilde, Serjt., and F. Pollock, for the plaintiffs. Vaughan and Lawes, Serjts., for the defendant.

dent that this reason does not apply to the competency of the bankrupt to waive the privilege, as the credibility of the witness cannot depend on the person by whom his permission to speak is given. The position that the client may waive his privilege, is laid down in the treatises on evidence, but no authority is given, and the case is certainly of very rare occurrence. The subject was much discussed in the proceedings before the House of Lords concerning the abuses in Green with Hospital, and in three instances on that occasion were the clients, after objection by their former counsel, allowed to waive their privilige, and the evidence was received. Howell's State Trials, vol. xxi. pp. 341, 358, 408. In the principal case the evidence proposed might have been admitted as not within the privilege, the communication not having been made with a view to a cause then existing, or about to be commenced. Williams v. Mundie; supra, 697.

MACDOUGAL v YOUNG .-- p. 892.

In an action for tithes under 37 H. 8, c. 12 (London tithe act), evidence that the statute and decree have been acted on in the different parishes in London is admissible to prove that the decree has been enrolled, no enrolment being found in the present records of the Court of Chancery.

ROWE v. GRENFEL.(a)—p. 396.

In trover for copper ore raised under the plaintiff's land. Held, that the presumption that the right to the minerals accompanied the fee simple of the land might be rebutted by the absence of enjoyment of the minerals by the plaintiff, and the user by persons not the owners of the soil.

TROVER for 100 tons of copper.

The defendant was proved to have converted to his own use a certain quantity of copper which had been raised under Lemellyn Moor; and, to prove that this copper belonged to the plaintiff, it was shown, that Lemellyn Moor was part of an estate of thirty-six acres, called Nansmellyn. The plaintiff became possessed of this estate in 1814, as the witness said, by purchase; but no deeds nor payment of purchase-money were shown. From 1814 up to the present time he had occupied and farmed the estate; had cut down and planted trees, and had built and pulled down out-houses; and, in fact, had had undisputed enjoyment of the surface of the land. But at the time of his coming into possession there was a shaft for tin, and one for copper, which had recently been worked by certain persons called the Palk Company, who had raised tin from it. In 1820, the plaintiff sunk two shafts, and raised some copper, which the East Crinnis Adventurers, who were the real defendants in this case, seized and sold, and continued to seize all the plaintiff raised until 1821, when they took possession of the mine, and continued working it, and selling the copper, up to the time of the action.

Upon the plaintiff's counsel closing his case here, ABBOTT, I.d. C. J., said that the plaintiff must be called; but on *Pell*, Serjt., pressing that the case might go to the jury, in order that he might have the benefit of a bill of exceptions to the direction, his lordship proceeded to sum up.

The question for you to consider in this case is, whether the ore raised under Lemellyn Moor belongs to the plaintiff; and this action is maintainable in two respects, either possession, which as against a wrong-doer is sufficient; or, if the plaintiff was not in possession, then in respect of his right or title. Now, in

⁽a) This case would have been reported in a former number but for the bill of exceptions tendered at the trial; as we cannot find that the bill of exceptions is likely to be proceeded on, we seried it here.

regard to the first question, it can hardly be contended that the plaintiff had ever any actual possession, the ore purchased by the defendant having been raised by persons adverse to him. If that be so, you are next to consider had be right or Speaking generally, the possession of lands is evidence that the possessor has the highest interest known to the law, and a fee-simple will be presumed; and in various cases it will be presumed that the fee-simple of the land carries with it the right to the minerals; but that presumption is not universal, because in mining countries the right to the minerals and the fee-simple of the soil are frequently in different persons; the two things are frequently for many generations separate: and we know that in conveyances of lands the minerals are not ancommonly excepted. It is for a jury, therefore, to exercise their discretion on all the circumstances before them to ascertain this question. It appears that the plaintiff came into possession of this estate in 1814, and from that time has held it under circumstances from which you may certainly presume the fee-simple of the land to be in him; and then you are to say whether you will also presume a title in him to all the minerals under the surface. Now you find that shortly before the plaintiff came into possession, some other persons, not the owners of the soil, had sunk shafts, had worked the mines, and, amongst the ore, copper in small quantities had appeared. In 1820 the plaintiff sinks a shaft for copper, and raises a few tons. This the East Crinnis Company take away, and from time to time carry what further he raises until 1821, when they take possession of the mine, and have continued working it ever since.

Now looking at the possession and enjoyment of the land, and at the want and absence of enjoyment of the minerals, both before and after the plaintiff became possessed of the land, it is for you to say whether he has made out to your satis-

faction that these minerals belonged to him.

Verdict for the defendant; upon which a bill of exceptions was tendered.

Pell, Wilde, Serjts., C. F. Williams, Erskine, and Carter, for the plaintiff. Adams, Selwyn, R. Buyly, Manning, and Tucker, for the defendants.

SITTINGS IN AND AFTER TRINITY TERM, IN K. B.

7 GEO. IV.—1826.

REX v. ROWLAND and Others.—p. 401.

In an indictment against several persons, the counsel for the prosecution has a right, before opening his case, to the acquittal of any defendant he intends to call as a witness.

This was an indictment for a conspiracy. Before the case was opened, Scar-Lett, for the prosecution, applied to have two of the defendants acquitted, that he might call them as witnesses.

On the counsel for the other defendants observing, that he supposed he had no power of objecting, ABBOTT, Ld. C. J., said, I think you have not; they

must be acquitted now.(a)

Verdict of guilty against all the other defendants, except the elder

Scarlett and Brodrick for the prosecution.

Gurney for the defendants.

(a) In trespass, if one, whom the plaintiff designed to make use of as a witness, be by mistake made a defendant, the Court will, on motion, give leave to omit him, and have his name struck out of the record, even after issue joined; for the plaintiff can in no case examine a defendant, though nothing he proved against him. Bull. N. P. 285.

As to the right of a defendant, against whom nothing is proved, to be acquitted in order to

give evidence for his co-defendants, see Wright v. Paulin, supra, 716.

SANDERSON v. NESTOR.—p. 402.

The withdrawing a junior by consent of the parties is no bar to a future suit on the same cause

ENDORSEE against the acceptor of a bill of exchange.

An action had been brought in Ireland by the plaintiff against the defendant on the same bill, when, by the consent of the parties, a juror was withdrawn.

Scarlett contended, that this was an agreement between the parties to termi-

nate the dispute, and was therefore a bar to the present action.

ABBOTT, Ld. C. J., was of opinion that the action was not barred, and the plaintiff had a verdict for 900%.

The Attorney-General, Gurney, and Abraham, for the plaintiff.

Scarlett and Chitty for the defendant.

GLOVER v. THOMPSON.—p. 403.

An action may be maintained on a lost bill of exchange, if the loss did not happen till after the bill became due: If the payee of a hill of exchange delivers it, with his name endorsed on it, to another, no proof is required of the handwriting of the endorsement.

Assumpsit by endorsee of a bill of exchange against the acceptor.

The bill was lost. The clerk of the plaintiff's attorney proved that he had lost a bill from which he had drawn the declaration in the cause, and that it was correctly set out in the count. He proved also, that before the loss of the bill it had been shown to one Reynolds, and that the loss occurred after the cause was set down for trial. The record showed that this was after the maturity of the bill as stated there. Reynolds being called, proved that the bill shown him had an acceptance in the defendant's handwriting. Pugh, another witness, proved that he had received from the drawer, who was also the endorser, a bill endorsed with his name, corresponding with the bill set out in the record, and had delivered it to the plaintiff; and that both these transactions were for value. The plaintiff's attorney then proved that he had received the bill on which the action was brought from the plaintiff, and handed it to his own clerk, directing him to draw a declaration from it, which he saw him do. The draft of the declaration was then put in, and read as evidence of the bill.

ABBOTT, Ld. C. J. (the cause being undefended), said that the proof was perfectly satisfactory. Verdict for the plaintiff.

Platt for the plaintiff.

In Hansard v. Robinson, Sittings after Michaelmas Term, 1826, which was also an action by the endorsee against the acceptor of a bill lost after it became due, Compbell and Patteres, for the defendent absence of the by the endorsee against the acceptor of a bill lost after it became due, Compbell and Fallam, for the defendant, objected that the action could not be supported without production of the bill; that the only remedy was in equity; and they cited Pierson v. Hutchinson, 2 Camp. 211; Davis v. Dodd, 4 Taunt. 602, and Poole v. Smith, Holt, N. P. C. 144. For the plaintiff, Garage and Chitty cited Long v. Bailie, 2 Campb. 214, n.; Williamson v. Clementa, 1 Taunt. 523; Brown v. Messiter, 3 M. & S. 281, the principal case, and Dart v. Hinks, King's Bench Sittings after Michaelmas term, 1820, which he cited from one of the briefs in the cause, but it did not appear whether the point was around did not appear whether the point was argued.

LITTLEDALE, J., expressed a strong opinion against the right of the plaintiff to recover, and directed a nonsuit, with liberty to the plaintiff to move to enter a verdict.

See also Dangerfield v. Wilby. 4 Esp. N. P. C. 159; Mayer v. Johnson, 3 Campb. 324; Champion v. Terry, 3 Br. & B. 259.

MYERS v. TAYLOR .- p. 404.

A plea puis darrein continuance may be put in at nisi prius upon paper.

ALEWYN and Another v. PRYOR and Another.-p. 406.

In action by vendes, for non-delivery of goods: Held, that in an agreement "for the delivery of goods on arrival, to be delivered with all convenient speed, but not to exceed a given day," the arrival in time for delivery by that day is a condition precedent; and if they do not so arrive (without default in vendor), the agreement is null.

THIS was an action for a breach of contract in not delivering certain quantities

of Galipoli oil, in pursuance of the following contract:

"London, 30th March, 1825. Sold this day, by order of Messrs. Pryor, Turner, and Co., all the Galipoli oil on board the Thomas, Captain Nichols, above ninety tuns, say thirty to forty tuns (more or less) direct from Galipoli, on arrival in Great Britain, at 54l. per tun of 236 gallons, duty paid, usual allowance for dirt, grease, and water; to be delivered by sellers on a wharf in Great Britain, to be appointed by the buyers, with all convenient speed, but not to exceed the 30th day of June next, and taken at the king's landing scale, and to be paid for in fourteen days from landing in ready money, allowing seven months discount. The above oil to be delivered to the buyers in bond, and the present duty of 15l. 13s. per tun of 252 gallons, and seven months' discount thereon, to be deducted. Signed, Stephen Cleasby, broker. N. B. The above-mentioned vessel to call off Falmouth for orders."

The ship did not arrive till the 4th or 5th of July, 1825, and therefore the oil could not be delivered before the 30th of June: on the arrival of the vessel the oil was tendered, but the plaintiffs declined to accept it, and brought the

present action.

Scarlett and F. Pollock objected that the arrival was a condition precedent to the sale, and that the sellers meant, not to warrant the arrival of the oil by the 30th of June, but that if the oil did not arrive sooner, the buyer would not be bound to accept it.

ABBOTT, Ld. C. J., expressed himself clearly of opinion that such was the

construction of the contract in point of law, and directed a nonsuit.

Marryatt and Campbell for the plaintiffs.

Scarlett and F. Pollock for the defendant.

See Boyd v. Siffkin, 2 Campb. 326. Hawes v. Humble, ibid. 327, n. Idle v.Thornton, 3 Campb. 274. Shadforth v. Higgin, ibid. 385. Busk v. Spence, 4 Campb. 329.

EAST INDIA COMPANY v. PRINCE and Another, Assignees, &c.—p. 407.

A. without authority endorses a bill of exchange to A. & B., who receive the amount from the acceptor. Semble that the acceptor, discovering the money to have been paid on a mistake of facts, may recover it either as money had and received by A. & B. to his use, or as money paid by him to A.'s. An acknowledgment, to take a case out of the statute of limitations, may be inferred from the conduct of the party, without any verbal promise or admission. Therefore, where the acceptor, under the circumstances above stated, being sued by the party, to whom the bill really belonged, gave notice to A. & B. that, in the event of a verdict passing against him, he should be entitled to recover the sum previously paid on the bills from the parties to whom it was paid, and A. & B. in consequence advised particular proceedings in the defence, and continued during the whole course of the action to be consulted and advised upon it; this was held sufficient evidence to warrant the jury in finding an

acknowledgment by A. of a debt due by him, so as to enable the acceptor to secceed in an action against him for money paid, or to prove under a commission of bankrupt against him, notwithstanding the statute of limitations.

This was an issue out of Chancery, to try whether on the 1st of July, 1822, the plaintiffs had any debt provable against the separate estate of James Card, a bankrupt, under a commission issued against him on November 10th, 1821.

The debt, if any, arose in respect of several bills of exchange drawn in India upon the plaintiffs, in the year 1809, and accepted by them. They were all payable to W. Hope, Esq., a gentleman resident in India, and transmitted by him to the bankrupt Card, in London. . Card managed Hope's affairs in England under a power of attorney (which is particularly set out in Murray v. East India Company, 5 B. & A. 204), and supposing that that power authorized him to endorse bills for Hope, he endorsed the bills in question, as per procuration of Hope, to Messrs. Davies and Card, a firm in which he was himself a partner. These endorsements were made after the death of Hope; but this circumstance was not known to the plaintiffs or to Card at the time when the bills became due; at which time the plaintiffs paid them to the bankers of Messrs. Davies and Card, and the money so paid was afterwards paid over to Messrs. Davies and The plaintiffs, at the time of their paying the bills, were fully Card themselves. cognisant of the terms of the power. The administrator of Hope, in 1816 (within six years after administration granted to him, but more than six years after the payment of the bills) sued the plaintiffs on the bills, and obtained judgment in his favour in Michaelmas Term, 1821, on the ground that the terms of the power of attorney did not authorize Card to endorse bills for Hope.

To take the debt out of the operation of the statute of limitations, the following evidence was given. Before the commencement of the action of Murray r. East India Company, certain proceedings had been instituted by the representatives of Hope against the Company, which after some time were discontinued, and that action was brought. On April 17th, 1812, very shortly after the commencement of those proceedings, Mr. Smith, the attorney for the Company, wrote the following letter to Mr. Healing, the attorney for Mr. Murray, the then plaintiff, in answer to a proposal that the action then contemplated should be tried in assumpsit, to which form of action the Company were then supposed not

to be liable.(a)

"Sir,—In answer to your letter of this day I beg to say that, as in the event of Mr. Murray's recovering against the East India Company, the money paid by them on the bills of exchange in question, they will be entitled to recover the same back from the parties to whom it was paid, I cannot, on the part of the Company, consent to waive any objection to the form of the proceedings, without their previous concurrence."

A copy of this letter was sent to Messrs. Vizard and Hutchinson, the attorneys for Messrs. Davies and Card, who, on April 20th, wrote to Mr. Smith at

follows :---

"Sir,—We are much obliged to you for the copy of Mr. Healing's letter, and of your answer, upon which we have seen Messrs. Davies and Card, who instruct us to say, that under the peculiar circumstances of the demand, they cannot consent to waive any objection to the form of the proceedings proposed to be adopted."

No other express intimation of any intention to hold Davies and Card, or either of them, liable, was given till after the judgment recovered against the Company in Murray v. East India Company in 1821. During the whole course of the original proceedings, and of the substituted action of Murray v. East India Company, Davies and Card were constantly consulted on the part of the East India Company, and received intimation of every step taken in the cause; they advised, and attended consultations on it till the dissolution of their partnership, about 1815; and subsequently to that time both Card and Davies were consulted, and acted in the same manner.

Marryatt for the defendants. The issue is, whether there was any debt due from Card to the plaintiffs so as to charge Card's separate estate provable under the commission. He then proceeded to argue, 1st, That there was no debt due at all; the plaintiffs having acted with full knowledge of the circumstances, or, at least, with the same knowledge that Card had: for no one knew of Hope's 2dly, That there was no debt due from Card individually; the proper action, if any, being an action of money had and received, against Davies and 3dly, That the action against Card, if any could be maintained, would be an action for the tort committed by him in improperly endorsing the bills; and, therefore, for unliquidated damages. 4thly, That at all events, there being a debt jointly due from Davies and Card, that the plaintiffs could not prove against the separate estate of one, except for the purpose of dissenting from his certificate: and, 5thly, That at all events it could not be proved, as not having accrued within six years of the act of bankruptcy; for the statute is only prevented from operating where there is a promise to pay, or at least a direct acknowledgment of liability, not a mere admission that the debt is unpaid.

The points arising on the nature of the debt, and its provability under the commission, were reserved, by the concurrence of the parties, for the opinion of the Court; and no notice therefore is taken of them here, except as far as they were necessarily involved in the remaining question as to the statute of limit

ations.

ABBOTT, Ld. C. J., in summing up to the jury on that question, said, that for the purposes at least of that question, the words of the issue might be considered equivalent to these,—whether there were at the time in question a separate debt due from Card to the plaintiffs. The questions arising on the bankruptcy need not be discussed here; but two questions necessarily arise; first, whether, independently of the bankruptcy and statute, there were any and what debt due from Card to the plaintiffs; because upon that question will depend the construction to be put on the evidence given to take the case out of the statute: and, secondly, whether, if there be such a debt, there is evidence to take it out of the operation of the statute.

Independently of the bankruptcy and statute of limitations, I am of opinion that there was a separate debt due from Card to the plaintiffs. The money being paid under a mistake of fact as well as of law, may be recovered on discovery of the mistake of fact, that is, of Mr. Hope's death. But then the defendants say, that the money was money had and received by Davies and Card to the use of the plaintiffs. But I think it is equally correctly described as money paid by the plaintiffs to the use of Card, he having taken upon himself to give a title to

the bill, and having first put it into circulation.

Then as to the statute of limitations, it appears that the action by Murray was commenced more than six years after the payment of the bills; that both Davies and Card were informed of the action, attended consultations, advised on the mode of proceeding, and were continually informed of the progress of the action; but that no intimation was given to either of them till after judgment was obtained against the Company, of any intention to hold them or either of them liable, unless such an intimation be contained in the letter of the 17th of April, 1812. If such an intimation were then given, the conduct of the party receiv-

ing it would have looked strongly like an acknowledgment.

He then stated that letter and the answer returned to it by Messrs. Vizard and Hutchinson, and then said, the whole question resolves itself into this: Are you of opinion that Card then consented to be considered as liable to pay to the East India Company? for if he then did, you must clearly infer from his continuing the same conduct afterwards, that he continued to contemplate the same liability. The present defence made for him is not merely that their claim is barred by the statute, but that, on several grounds taken, he was never liable to them, and this may be material for your consideration: the question for you is, whether at the time that he received this intimation, and continued acting in aid of the plaintiffs, he considered himself liable, and consented to be so considered.

The jury, which was special, found for the plaintiffs.

Tindall, S. G., Scarlett, Gurney, Bosanquet, Serjt., and Carter, for the plaintiffs.

Marryatt, Campbell, and Evans, for the defendants.

WEBBER v. VENN.-p. 413.

Notice of set-off can only be given where the general issue is pleaded, without any other plea.

HAWSE and Another v. CROWE, Assignee of RAMSBOTTOM .- p. 414.

If a vendee under terms to pay for goods on delivery, obtains possession of them by giving a check, which is afterwards dishonoured, he gains no property in the goods, if at the time of giving the check he had no reasonable ground to expect that it would be paid.

TROVER for tallow.

The plaintiffs sold the tallow in question to Ramsbottom under an agreement, the principal stipulations of which were, that the goods should be delivered in London, that the plaintiffs should give fourteen days' notice of delivery, and

that Ramsbottom should pay for them on delivery.

On the day of delivery, Ramsbottom came to the counting-house of the plaintiffs, asked for and received the delivery orders for the tallow, and gave a check for 1400l. drawn by himself on the cashier of the Bank of England, payable to the plaintiffs. It is the custom of the Bank of England never to permit overdrawing; and accordingly, Ramsbottom having on that day only 2l. 16s. 6d. in their hands, the check was dishonoured. The plaintiffs immediately gave notice to the warehouseman in whose custody the tallows were, not to deliver; but the tallow had already been transferred to one Forrester. Subsequently, however, the transactions with Forrester were rescinded, and the warehouseman delivered the tallow to Crowe, as assignee of Ramsbottom, under a commission of bank-rupt issued against Ramsbottom in the mean time.

ABBOTT, Ld. C. J. The right of Forrester to the tallow was determined before this action was brought, and Crowe claims only as assignee of Ramsbottom. The question therefore is, whether Ramsbottom, when he obtained the delivery orders and gave the check, intended to obtain possession of the tallow on the terms of the contract, namely, "payment on delivery," or not. If he had reasonable ground to expect that the check would be paid, the transaction was not fraudulent, and the property would pass to him: if he had not reasonable ground for so expecting, the transaction was fraudulent, and the plaintiffs are entitled to recover.

Gurney and Campbell for the plaintiffs. Scarlett and Barnewall for the defendant.

See Gladstone v. Hadwen, 1 M. & S. 517; Taylor v. Plumer, 3 M. & S. 563; Noble v. Adams, 7 Taunt. 59; Earl of Bristol v. Wilsmore, 1 B. & C. 514; Kilby v. Wilson, supra, 726

TULLOCK v. DUNN and Another, Executors of HANLEY.-p. 416.

In an action against several executors, pleas general issue and statute of limitations: Held, that neither a mere acknowledgment of the debt by all the executors, nor an express promise y one of them, takes the case out of the statute: there must be an express promise by all.

THE declaration contained the usual money counts, stating promises both by the testator and by the executors. Pleas, general issue, statute of limitations, and a set-off.

The testator died more than six years before the action was brought, and both the executors had within six years acknowledged that the plaintiff's demand of 2301. was due, and one of them expressly promised that it should be paid. The others had made no such promise, there being some doubt whether the payment would be sanctioned by the family.

Scarlett for the plaintiff contended, that inasmuch as the defendants had put no plea on the record denying assets, they must be taken to be in a condition to pay, and that the acknowledgment of the justice of the demand by both, and the express promise of one of them, were sufficient to take the case out of the

ABBOTT, Ld. C. J. I am of opinion that the plaintiff must be nonsuited: the only count on which he can pretend to recover, is on the account stated and promise to pay by the executors; I think, as against an executor, an acknowledgment merely is not sufficient to take the case out of the statute; there must be an express promise. The promise by one only is not enough to entitle the plaintiff to recover; there ought to be a promise by both.

Scarlett and Lawes for the plaintiff.

Marryatt for the defendant.

(a) See the judgments of the learned judges in Atkins v. Tredgold, 2 B. & C. 23.

GEORGE v. PRITCHARD .-- p. 417.

In action by vendee against vendor of a lease, for the deposit: Held, that the vendor is not bound to produce his lessor's title without an express stipulation to that effect.

Assumpsit on a special agreement to sell and assign to the plaintiff a lease of a public-house, of which the defendant was possessed, and other premises, for the sum of 2850l.; with an averment that the defendant undertook to make out a good and perfect title to the lease. There were also the usual money counts.

The agreement, on which the action was brought, contained no stipulation for the defendant's title. A deposit of 100% was paid under it, and the defendant produced an abstract of his title to the premises, without any account of that of the landlord. The attorney for the plaintiff insisted on the title of the

landlord being produced, and on refusal rescinded the contract, and brought this action for the deposit. The lease had sixty-four years to run.

Abbott, Ld. C. J. I think this action is not maintainable. On looking to the agreement, I do not find a syllable to warrant the averment in the declaration, that the defendant undertook to make out a good title to the lease. Without such a stipulation, a party selling a lease is not bound to produce his landlord's title, a thing which in most cases would be utterly impossible. The cases the other way are only cases in equity, (a) and although it might be true that a vendor, on a bill for a specific performance, could not compel a purchaser to take a lease, without showing the lessor's title, still I shall hold that, in a court of law, the purchaser cannot recover his deposit on account of such title not being produced, unless the vendor has expressly contracted to furnish his lessor's title. The plaintiff must be called. Nonsuit.

Gurney and F. Pollock for the plaintiff.

Scarlett for the defendant.

⁽a) Purvis v. Rayer, 9 Price, 488, and the cases cited there.

SITTINGS IN AND AFTER TRINITY TERM, IN C. P.

7 GEO. IV.-1826.

WEBBER v. NICHOLAS .-- p. 419.

In an action for a malicious arrest, the plaintifi cannot recover damages for the extra costs.

CASE for a malicious arrest.

Wilde, Serjt., for the plaintiff, claimed the extra costs as part of the damages, and stated, that Lord Ellenborough had decided in Sandback v. Thomas, I Starkie, N. P. C. 306, subsequently in the case of Sinelair v. Eldred, 4 Taunt. 7, that such costs were recoverable.

BEST, C. J. I should myself have thought that my Lord Ellenborough's opinion was the correct one; but I must hold myself bound by the decision of

this Court, against the authority of a single judge at Nisi Prius.

Verdict for the plaintiff.(a)

Vaughan and Wilde, Serjts., and Chitty, for the plaintiff. Spankie, Serjt., and Short, for the defendant.

(a) Doe v. Davis, 1 Esp. 358; Purton v. Honnor, 1 B. & P. 205.

GRAY v. HILL .- p. 420.

The plaintiff repaired certain leasehold premises held by the defendant under a covenant to repair, on a parol promise by the defendant to assign him his lease: Held, that the defendant, upon refusal to assign, was liable on an implied assumpsit to pay the plaintiff for such repairs.

Assumpsit, on a special agreement, to assign to the plaintiff a lease of certain premises, of which the defendant was possessed, in consideration that the plaintiff would put the premises in good and sufficient repair, within the covenant of the defendant in the lease. Averment, that the plaintiff did put the premises in repair, and breach that the defendant refused to assign the lease. There was a count for work and labour, and the usual money counts.

It was proved, that the premises had been admitted by the defendant to be in extreme want of repair, and that the landlord had given the defendant notice of his intention to sue him on the covenant, unless the premises were put into sufficient repair within a certain time. Upon this it was verbally agreed between the plaintiff and the defendant, that the plaintiff should repair the premises, and the defendant would assign his lease to him. The plaintiff expended a considerable sum of money on the premises, and put them in complete repair. Upon his demanding an assignment of the lease, the defendant refused.

Vaughan, Serjt., for the defendant, contended, that the agreement was void under the statute of frauds, and the plaintiff could therefore not recover damages for the breach of it; the plaintiff undertook the repairs under the promise of an

assignment, which promise was not binding.

Wilde, Serjt. The defendant has had the benefit of the plaintiff's labour, and money expended at his request, and though he is not legally liable to assign the lease, the law upon his refusal implies a promise to compensate the plaintiff. 2 Phillipps's Evidence, 67.

BEST, C. J. The objection is a most dishonest one, but, if legal, must prevail. The 4th section of the statute is decisive against the plaintiff on the special count, but I think the plaintiff entitled to a verdict on the others. The plaintiff has rended this money for the benefit, and at the instance of, the defendant; the

law will therefore imply a promise not touched by the statute, nor within the danger of perjury guarded against by it; the agreement is executed on the part of the plaintiff, and the defendant is legally liable to remunerate him for what he has done.

The cause was then referred.

Wilde, Serjt., and Chitty, for the plaintiff. Vaughan, Serjt., and Justice, for the defendant.

WAKLEY v. JOHNSON.—p. 422.

In an action for libel, general evidence that the plaintiff has been in the habit of libelling the defendant is inadmissible.

CASE for a libel.

The libel complained of, was published in a periodical work called the Medico-Chirurgical Journal, to which the defendant, a physician, was a contributor. The plaintiff was editor of another medical and surgical work, called the Lancet, and a witness for the plaintiff was asked in cross-examination, whether he did not know that the plaintiff had frequently published in the Lancet matters reflecting on the character of the defendant.

The question was objected to by the counsel for the plaintiff, on the authority of May v. Brown, 3 B. & C. 113, and it was argued that such libels were the subject of cross actions, and the question involved the opinion of the witness on

writings which ought, if admissible at all, to be submitted to the jury.

For the defendant, Vaughan and Wilde, Serjts., contended, that in May v. Brown such evidence was received at Nisi Prius, and not decided against in the arguments in Banco; that such evidence was received in mitigation in Finnerty v. Tipper, 2 Campb. 76; that if the libel complained of be in letters, other parts of the corespondence are admissible; that here the parties were engaged in hostile discussions, and the effect on readers of the libel published by the defendant would be materially affected by the knowledge that they were so engaged.

REST, C. J. The question is too extensive, and calls on the witness to give his opinion on any libels the plaintiff may at any time have published of the defendant in the Lancet. Such libels are the subject of cross actions, and the proper remedy of the defendant was to have appealed to the laws of his country, and not to have sought redress by libelling the plaintiff. The case of May v. Brown, though it decides that particular libels are inadmissible, does not in express terms determine the general question to be inadmissible, but I think the judgments of the learned judges in that case fairly warrant this conclusion. In cases of oral slander, slanderous words of the plaintiff, spoken at the same time, are admissible; and so are letters in a correspondence relating to the same subjectmatters. The question here is not so limited, and cannot be out.

Denman, C. S., and Kelly, for the plaintiff. Vaughan and Wilde, Serjts., for the defendant.

PERRING and Others v. DUNSTON .- p. 426.

A joint and several promissory note, at a shorter date than six months, signed by more than six individuals, not appearing to be made by persons in partnership for the purposes of banking, may be good and valid in law.

This was an action on a joint and several promissory note to be signed by seven persons besides the defendant, and was for 1000l. payable at three months to plaintiffs or order.

Adams, Serjt., for the defendant, objected, that the note was void, being or the face of it an infringement of the privilege granted to the Bank of England, under 21 G. 3, c. 60, s. 12, and he cited Broughton v. Manchester Waterworks, 3 B. & A. 1, and he distinguished this case from Wigan v. Fowler, 1 Stark, N. P. C. 459, on the ground that in that case the note did not appear on the face

of it to be made by more than six persons.

BEST, C. J. I agree with the opinion given by Lord Ellenborough in Wigan v. Fowler, and I think that, taking all the Bank acts (8 & 9 W. & M. c. 20; 6 Anne, c. 22, s. 9; 15 G. 2, c. 13, s. 5; 21 G. 3, c. 60, s. 12) together, the object of the legislature was to give protection against rival Banks only. It does not appear that this note has any relation to persons in partnership for the purposes of banking. The case of Broughton v. Manchester Waterworks goes upon the fact of the defendants being a corporation. I think the note valid.

Verdict, by consent, for the defendant's proportion.(a)

Taddy, Serjt., and Campbell, for the plaintiff.

Adams, Serjt., for the defendant.

(a) The clause in the 15 G. 2, c. 13, which incapacitates corporations or partnerships of more than six persons from being acceptors of bills of exchange, or making promissory notes, draws no distinction between the two classes so incapacitated. It seems, therefore, that the case of Wigan v. Fowler, 1 Stark. N. P. C. 459, if recognised as an authority to show that partnerships of more than six persons may accept bills, or make notes, unless they are established for banking purposes, would equally prove that corporations, not established for banking purposes, may do so also, as far at least as any objection arising on the Bank acts is relied on to prevent them. In the case, however, of Broughton v. Manchester Waterworks Company, 3 B. & A. 1, the illegality of such acceptances by corporations was assumed by all the judges, and as they all concurred in distinguishing the case from Wigan v. Fowler, on the ground that in Wigan v. Fowler the irregularity did not appear on the face of the note, and on that ground early it is clear that they considered the note there as really irregular under the Bank acts.

The reasons, therefore, given by Best, C. J., in favour of the validity of the note in the principal case, seem opposed to the opinion of the judges in Broughton v. Manchester Waterworks Company. But, even if the authority of that case be adhered to, the decision is the principal case seems right, on the ground that the making of a promissory note by more than six persons, not appearing by the terms of the note, or in any way shown, to be connected (a) The clause in the 15 G. 2, c. 13, which incapacitates corporations or partnerships of more

than six persons, not appearing by the terms of the note, or in any way shown, to be connected together in any other transaction, is not a making of a note by persons "united or to be united in covenants or partnership, exceeding the number of aix persons," according to the words of

the statute.

SNOOK v. SOUTHWOOD.—p. 429.

Where the plaintiff had obtained a special jury, but had neglected duly to summon them: Held, on the defendant's objecting to proceeding in the cause, that on the appearance of some of the special jurors the plaintiff was entitled to pray a tales, and to proceed in the trial.

POMEROY v. BADDELEY.—p. 430.

When the witnesses in a cause are ordered out of Court, the attorney in the cause may remain, and be afterwards called as a witness.

THIS was an issue from the Vice-Chancellor, to try whether a commission of bankrupt against Roger Pomeroy the younger was good and valid in law.

Wilde, Serjt., for the defendant, applied to the Court, that the witnesses intended to be called on both sides should go out of Court. Williams insisted that the attorney for the defendant, whom it was intended to call for the defendant, should leave the Court, or he would not be received.

On Wilde, Serjt., stating that the attendance of the attorney was necessary to enable him to conduct the cause, LITTLEDALE, J., said that an attorney was not within the rule, and might remain, and still be admissible as a witness, his assistance being in most cases absolutely necessary to the proper conduct of a cause. (a) Verdict for the defendant.

C. F. Williams, Selwyn, and Manning, for the plaintiff. Wilde, Serit., Merewether, and Erskine, for the defendant.

(a) Cont. Rex v. Webb, coram Best, J., 1819, Stark. Evidence, Part IV., 1733; where however, it does not appear that application was made to allow the witness to remain.

REX v. ELLIS.-432.

An examination of a prisoner charged with a felony, taken without threat or promise, by questions put by the magistrate, is, notwithstanding, admissible in evidence.

This was an indictment for felony, which had been removed by certiorari into the Court of King's Bench, and was sent down for trial by writ of Nisi

The examination of the prisoner, taken before the committing magistrate, was offered in evidence.

It appeared that part of the examination was elicited by questions put by the magistrate, the prisoner having claimed the right of his attorney's attendance and assistance, which the magistrate had refused to permit. No threat or promise was used by the magistrate.

It was objected by Wilde, Serjt., on the authority of Rex v. Wilson, 1 Holt, N. P. C. 597, that an examination so obtained was inadmissible against a pri-

LITTLEDALE, J. It is stated in Starkie's Evidence, Appendix, Part IV. 52, where the case quoted is also noticed, that Mr. J. Holroyd received an examination to which there was this objection; I think his decision the correct one, and that the evidence is upon principle admissible.

His Lordship then suggested, that as the prisoner had been refused professional assistance, the case should not be further pressed: this was assented to by the

counsel for the prosecution, and the prisoner was acquitted.

C. F. Williams, Tyrrel, and Coleridge, for the prosecution.

Wilde, Serjt., and Praed, for the prisoner.

REX v. DOWLING and Another.—p. 433.

In an indictment for felony, it is not necessary to prove affirmatively, for the prosecution, that such a parish as that laid in the indictment, exists in the county.

BUSHEL and Others, Assignees of W. MILLS, a Bankrupt, v. BAR-RETT.—p. 434.

A judgment for conspiracy, to bribe a person summoned as a witness on an information against the revenue laws) not to appear before the justices of the peace, renders the person convicted incompetent as a witness.

Trover. For the plaintiffs, the bankrupt, who had received his certificate and released his assignees, was called as a witness. He was objected to as incompetent, by reason of his infamy. To support the objection, an examined copy of a judgment of the Court of King's Bench, against the said W. Mills and Samuel Pain, on an information by the Attorney-General, was put in. The information charged, that a certain information was laid before two justices of the peace against the said W. Mills for harbouring and concealing smuggled spirits, whereby a forfeiture of 100% had accrued to the informer; that one J. Hunt was summoned to appear as a witness before the said justices, on the hearing of the said information; and that the said W. Mills and Samuel Pain, wickedly and maliciously intending to obstruct, &c., the due course of law and justice, did wickedly and maliciously, and unlawfully, &c., conspire to persuade and hinder the said Hunt from appearing as a witness; and in pursuance of said conspiracy did promise the said Hunt a certain sum of money to induce him to absent himself, &c., and the said Hunt did in consequence of such unlawful promise absent himself, &c.; of which offence the said W. Mills and Samuel Pain were convicted, and the said W. Mills was adjudged to pay a fine of 200l.

In support of this objection it was contended that the witness stood convicted of an offence, the tendency of which was to introduce falsehood in the course of justice, and to obstruct the due administration thereof; and Clancey's case, Fortescue, 208, was relied on as directly in point.

For the plaintiff it was argued, that in Clancey's case the witness had received an infamous judgment, and that in that case, the judicial proceeding from which

the witness had been bribed to absent himself, affected life.

GASELEE, J., after consulting with LITTLEDALE, J., said, I entertain no doubt on the subject; the essence of the offence of which the witness is convicted is the attempt to pervert the course of justice, and that by corrupting a witness. The magnitude of the judicial proceeding which it is attempted to obstruct is immaterial; the attempt to pervert is the same, whether it be on a charge for high treason or a misdeameanor: nor is it necessary that the crime be visited with an infamous judgment. This is directly within the principle of Clancey's case, and the witness must be rejected.

Tounton and C. F. Williams for the plaintiffs. Wilde, Serjt., and Jeremy, for the defendant.

M'KENZIE v. HANCOCK.—p. 436.

In assumpsit for the breach of warranty of soundness of a horse, the defendant having refused to take back the horse, the plaintiff is entitled to recover for the keep for such time only as would be required to re-sell the horse to the best advantage.

This was an action of assumpsit on the warranty of a horse. The declaration contained the usual allegation, that "the plaintiff had been put to great charges and expense in and about the feeding, keeping, and taking care of the horse."

It was proved on the part of the plaintiff, that he had offered to return the horse to the defendant on discovering its unsoundness, but that the defendant refused to receive him. The plaintiff also gave evidence of the expenses of keeping him till the commencement of the action.

LITTLEDALE, J., in his directions to the jury, said, that with respect to the

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expenses of keeping the horse, though a contrary doctrine very generally prevailed, he was of opinion that the plaintiff was entitled to recover these expenses for such a period only as, under all the circumstances of the case, the jury might fairly consider a reasonable time for the purpose of re-selling the horse; that the practice of recovering damages for the keep of the horse in actions of this sort was entirely of modern date. According to the old doctrine, it was the duty of the purchaser, upon refusal of the seller to rescind the contract by taking back the horse, to sell him immediately; and for this reason, declarations in actions upon warranties, in the old entries, contain no statement of such damages. He thought, however, that the plaintiff was entitled to recover these expenses for so long a time as might reasonably be occupied in endeavouring to sell the horse to the best advantage.

Verdict for the plaintiff.

C. F. Williams and Carter for the plaintiff. Wilde, Serjt., and Gunning, for the defendant.

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L In an action against a magistrate for false imprisonment; Held, that a conviction filed at the quarter-sessions was no justification of the defendant, where it appeared to have been framed upon a different statute from that of the commitment.

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2. If an attorney pays into his bankers, money of his clients, mixing it with his own, and

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3. The conduct of a cause, by an attorney, in the name of A. B., does not make A. B. liable in trespass for acts done under a fi. fa. in such cause, without some evidence of a retainer. Crook v. Wright.

In an action on an attorney's bill: Held, although the plaintiff could not recover a particular item, because "the fees, charges, and disbursements," included in it were not specified pursuant to the statute 2 G. 2, c. 23, that he might nevertheless recover the residue of the bill, as to which the provisions of the statute had been complied with. Drew v. Clifford.

5. "Attending A. and B., the proposed bail of the defendant, and examining them as to their competency to justify." "Attending the plaintiff in several actions commenced against the defendant, and arranging with him to take cognovits therein," are taxable items in an attorney's bill within the 2 G. 2, c. 23, s. 23. Watt v. Collins. 753

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Held also, that goods of the bankrupt lying in wharf in the names of his agents, and for which he had given delivery orders in his own name, were not within the statute, there being no reputed ownership. Arboun v. Williams.

The assignee of a bankrupt, lessee of certain premises, chosen on 15th Nov. 1823, kept the bankrupt in the premises, carrying on the business for the benefit of the creditors until April following, and himself occasionally superintended. But on the 22d Dec. 1823, disclaimed the lease by letter to the landlord: Held, that the assignee, notwithstanding such disclaimer, had elected to accept the lease by using the premises for the benefit of the creditors. Clark v. Hume.

4. Payment by weekly instalments in discharge of a debt for goods sold to the bankrupt, is not a payment "in the usual and ordinary course of trade and dealing," so as to be protected by the 19 G. 2, c. 32, s. 1. Bolton v. Jager. 748

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See LACHES.

1. A bill having been dated by mistake 1822, instead of 1823, the agent of the drawer and acceptor, to whom it had been given to be delivered to the endorsee, without their knowledge or consent, corrected the mistake: Held that such alteration did not vacate the bill. Brutt v. Picard. 698

2. The plaintiffs, bankers, discounted for the defendants, bill-brokers, a bill of exchange which the latter did not endorse. The signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged: Held that the defendants were liable to refund the money, and that the fact of their having paid over the amount to the endorsee for whom they were brokers, would not relieve them from their liability. Fuller v. Smith.

3. Where the drawer of a bill of exchange had no effects in the hands of the acceptor from the time of drawing the bill, till it became due, but the acceptor had received from the drawer, prior to this bill on which the action was brought, acceptances of the drawer, upon which he had raised money, some of which acceptances had been returned dishonoured, and others were outstanding: Held, that the drawer was entitled to notice of dishonour of the bill.

When notice of intention to dispute the consideration of a bill or note has been given, and the plaintiff's witnesses have been crosse-examined to that point, the plaintiff must give such evidence as he has to offer in proof of the consideration in the first instance, and will not be allowed to do so in reply. Spooner v. Gardiner. 707

4. If a bill, payable at a given time after date, be for a specified sum, "with lawful interest for the same," interest shall be computed from the date. Doman v. Dibden. 774

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In an action against the drawer of a bill of exchange dated "Manchester:" Held, that it was sufficient evidence of his having had notice of its dishonour, to prove that a letter containing such notice, had been put into the post-office in London, directed to him "Manchester." Mans v. Moors. 743
 The drawer of a bill of exchange accepted

5. The drawer of a bill of exchange accepted generally (after the 1 & 2 G. 4, c. 78, added the words, "payable at Ransom and Co., bankers, London," without the knowledge of the acceptor, and then endorsed it for valuable consideration, the bill being over

due, and the endorsee privy to the alteration: Held, that the acceptor was discharged. Macintosh v. Haydon. 767

9. A. without authority endorses a bill of exchange to A. & B., who receive the amount from the acceptor. Semble that the acceptor, discovering the money to have been paid on a mistake of facts, may recover it either as money had and received by A. & B. to his use, or as money paid by him to A.'s. An acknowledgment, to take a case out of the statute of limitations, may be inferred from the conduct of the party, without any verbal promise or admission. Therefore, where the acceptor, under the circumstances above stated, being sued by the party, to whom the bills really belonged, gave notice to A. & B. that, in the event of a verdict passing against him, he should be entitled to recover the sum previously paid on the bills from the parties to whom it was paid, and A. & B. in consequence advised particular pro ceedings in the defence, and continued during the whole course of the action to be consulted and advised upon it; this was held sufficient evidence to warrant the jury in finding an acknowledgment by A. of a debt due by him, so as to enable the acceptor to succeed in an action against him for money paid, or to prove under a commission of bankrupt against him, notwithstanding the statute of limitations. East India Company v. Prince.

O. A joint and several promissory note, at a shorter date than six months, signed by more than six individuals, not appearing to be made by persons in partnership for the purposes of banking, may be good and valid in

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In an action on an attorney's bill: Held, that searching at the judgment office to assertain whether satisfaction had been entered on the roll in an action between A. and B., and also whether issue had been entered in such action; also whether issue had been docketed in such action, were not taxable items within the 2 G. 2, c. 23, s. 23. Fenton v. Correa.

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3. A memorandum by a wharfinger of the receipt of goods to be shipped in a particular manner, may be given in evidence to show the terms on which they were received, without a stamp, although the value of the goods was above 201; the wharfage being of a less amount. Chadwick v. Sills. 694

4. A letter, which had been in the possession of the defendant, was filed in the Court of Chancery pursuant to an order of that court: held that secondary evidence of it was not admissible, it being in the power of either party upon application to that court, to produce it. Williams v. Munnings. 695

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9. A witness who had never seen the defendant, but had corresponded with a person of the defendant's name, living at Plymouth Dock, where the defendant resided, and where, according to other evidence, there was no other person of that name, stated that the handwriting of certain letters was that of the person with whom he had corresponded. Held that this evidence was sufficient to admit the letters to be read against the defendant. Harrington V. Fry. 709

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 The declarations of a former holder of a bill of exchange, made during his possessor, are evidence against a subsequent endorse. Pocock v. Billings.

13. In questions of pedigree, declarations tending to show the person making them estitled to a remainder upon failure of issue of the then possessor of an estate; held admissible for the plaintiff claiming under that person, if made ante litem mortam. Handwriting of an ancient paper may be proved by the opinion of a witness, first comparing it with other authentic old writings at the time of the trial. Doe dem. Tilman v. Tarver. 710

14. The plaintiff in assumpsit gave in evidence an admission of the defendant, that he owed 1471. on a bill of exchange which had been returned dishonoured; held that such acknowledgment was admissible, though no notice to produce the bill had been given: held also that interest was not recoverable unless the bill was produced.

Where two endorsements of the same

Where two endorsements of the same party appeared on a bill of exchange, with an intermediate one of another person; held that the first endorsement must be presumed to have been made before the bill became despendent to the property of the property of the party of

Fryer v. Brown.

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15. A letter directed "Mr. Haynes, Bristol," containing notice of the dishonour of a bill, was proved to have been put into the post office; held that this was not sufficient proof of notice, the direction being too general to raise a presumption that the letter reached the particular individual intended. Walter. Haynes.

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16. In order to show that a defendant had caused and procured a printed libel to be inserted in a newspaper; a reporter to a public newspaper proved that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by the defendant for the purpose of such publication, and that the newspaper then produced was exactly the same, with the exception of one or two slight alterations, not affecting the sense: Held, that what the reporter published, in consequence of what passed with the defendant, might be considered as published by the defendant; but that the newspaper could not be read in evidence, without producing the written account delivered by the witness to the editor. Adams v. Kelly.

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19. An indictment for perjury in setting out the record of a conviction at the Middlesex sessions, stated an adjournment to have been made by Const. Esq., and A. B. C. & D. and others their fellows, &c., justices. An examined copy of the record of conviction when produced, stated the adjournment to have been made by Const. Esq., and E. F. G. and others, &c.: Held, that this defect might be cured by parol evidence of an adjournment made by the persons named in the indict-ment: Held, that no such evidence being given, the variance was fatal. Semble. A minute-book in which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not itself a record so as to be admissible in evidence as a proof of the fact there stated. Rex v. Bellamy.

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28. In an action against the acceptor of a bill of exchange, where defendant's attorney had given notice to the plaintiff to produce all papers relating to a bill described, as the bill in question and said to be "accepted by the said defendant:" Held, that such notice was prima facie evidence of the defendant's acceptance. Holt v. Squire.

29. To prove a pedigree, the declarations of the husband of one of the family are admissible though he was not otherwise related to the family. Doe d. Northey v. Harrey.

30. In an indictment for perjury committed on the trial of a cause, it is sufficient for the prosecutor to prove all the evidence given by the defendant, referable to the fact on which perjury is assigned. Proof of the evidence set out, by a witness who speaks from memory, but will not swear that he has given the whole of the defendant's former testimony, but says that he has stated to the best of his recollection all that was material to the present inquiry and relating to the transaction in question, and is positive nothing was said qualifying the evidence proved, is sufficient to go to the jury. Rez v. Rowley.

31. In an action of slander for imputing felony, with a count for maliciously charging the plaintiff with theft before a justice, to which the defendant pleaded the general issue, and also pleas in justification of the slander, averring that the charge of felony was true: Held, that evidence of general good character was not admissible for the plaintiff. Cornwall v. Richardson.

32. The statute 6 G. 4, c. 133, s. 7, enacting that the common seal of the society of apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate, to which such seal is affixed, does not make such certificate evidence, without proof that the seal affixed is the genuine seal of the society. Chadwick v. Bunning. 759
33. Quære, Whether the non-arrival of a ship

at her port of destination is evidence of her loss where the crew have been heard of after

the vessel sailed, and after she is said to have been lost. Bryan v. Wagstaff. 761

34. The enrolment of a lease under 1 and 2 G. 4, c. 52, s. 8, which enacts, that a deed so enrolled "shall be as good and available in law, and of the like force and effect in all respects, as if the same had been enrolled in any of His Majesty's courts of record at Westminster, or as if a memorial of any such deed had been entered or registered in the office or offices appointed for registering deeds and other conveyances of lands and terements in the counties in which the same are situate," is not admissible as evidence of the deed, without proof of the execution. Jenkins v. Biddulph.

35. Semble, that a letter demanding payment of a debt, sent by the plaintiff's attorney. and received by the defendant, is not sufficient evidence of a demand, on the issue of a prior demand, and refusal to a plea of tender. Semble, that the demand should be personal, that the plaintiff may have an opportunity at the time, of paying the money demanded. Edwards v. Yeates. 766

 The declarations of a bankrupt made before the bankruptcy, are not admissible to prove the trading, in an action by the assignees. Bromley v. King. 739
 Held that a qualified acknowledgment of a

37. Held that a qualified acknowledgment of a sum due to the plaintiff, would not entitle him to recover upon a count on an account entated. Evans v. Verity. 741

38. In trover for copper ore raised under the plaintiff's land. Held, that the presumption that the right to the minerals accompanied the fee simple of the land might be rebutted by the absence of enjoyment of the minerals by the plaintiff, and the user by persons not the owners of the soil. Rows v. Greenfel. 778

39. An examination of a prisoner charged with a felony, taken without threat or promise, by questions put by the magistrate, is, notwithstanding, admissible in evidence. Res. v. 789.

40. In an indictment for felony, it is not necessary to prove affirmatively, for the prosecution, that such a parish as that laid in indictment, exists in the county. Rex v. Dowling. 789

EXECUTOR.

See LIMITATIONS, STATUTE OF.

FORCIBLE ENTRY. See WITNESS. 3.

FRAUDULENT SALE

A sale to a creditor of personal property, by a person in embarrassed circumstances, without any change of possession, is valid unless made with a fraudulent intention to defeat other creditors. The continuance of possession is not conclusive evidence of fraud.

Eastwood v. Brown. 759

FRAUDS, STATUTE OF.

A delivery order for wine lying in the London Docks, given by the vendor to the vendee, held not to be a sufficient acceptance of the wine to take the case out of the statute of frauds. Bentall v. Burns. 712

GAMING HOUSE.

Keeping a public gaming house is not an infamous crime, so as to render a person convicted thereof incompetent as a witness. Rex v. Grant.
749

GUARANTEE.

A bond conditioned to indemnify, and save harmless the obligees, for "such sums as they, in their banking business, should within ten years advance or pay, or be liable to advance or pay for or on account of their accepting, discounting, &c., any bill of exchange, notes, &c., which A. B. should from time to time draw upon or make payable, &c., at their house; and also other sums which they, within the period aforesaid, should otherwise lay out, pay, &c., on the

credit of the said A. B., or on his account; and also all such wages and allowances for advancing, paying, &c., such bills, &c., advances, payments, engagements, and accommodations, not exceeding the sum of 5000L in the whole, together with interest on such advances, &c.: Held to guaranty running accounts and not satisfied by the first payment of 5000L: Held also, that such boad ought to be stamped with a 9L stamp under 55 G. 3, c. 184, Schedule, Part I, title Bead. Williams v. Rawlinson.

HUSBAND AND WIFE.

1. A widow cannot be asked to disclose conversations between herself and her late husband. Doker v. Hasler. 732

2. In an indictment on 3 & 4 W. & M. c. 9, a.

5. against a married woman, it is sufficient, where the husband does not cohabit with her, to state that the lodging was let to the wife; for the statement may be either according to the fact, or the legal operation. Rez v. Harrell.

756

3. Indictment against the wife of W. S. and others, for a conspiracy in procuring W. S. to marry: Held, that W. S. was not a competent witness in support of the prosecution. Held, that in all cases where husband and wife are admissible witnesses against each other, they are also admissible for each other. Res v. Serjeant.

IMMORAL CONSIDERATION.

See LANDLORD AND TENANT, &

INSOLVENT.

A. B. being insolvent, conveyed by deed all his estate to trustees for the benefit of his creditors, with a proviso, that "if all and every the creditors of the said A. B., whose debts do amount to more than 5L, shall refuse to execute, or otherwise consent to this deed within six months from the date thereof, the said deed shall be void to all intents and purposes."

Held that a lease vested in the trustees, could not be defeated under this proviso without an express refusal of every creditor above 5*l*. to execute or consent. Holms v. 717

INSURANCE.

1. Where a ship partially damaged, has been repaired by the owners, the insurers are only liable to the amount of two-thirds of the cost of repair, unless circumstances be shown to take the case out of the ordinary rule of deduction of one-third for the benefit to the owners from the repairs. Poingdestre v. The Corporation of the Royal Echange. 773

2. In an action on a policy of insurance, where a loss is to be inferred from the want of intelligence, the plaintiff must distinctly prove that when the vessel left the port of outfit, she was bound upon the voyage insured. Koster v. Innes.

INTEREST.

In debt on bond in the penalty of 1204. conditioned for the repayment of the same sum with lawful interest: Held, that interest was recoverable beyond the penalty, to the amount of the damages laid in the declaration. Francis v. Wilson. 711

JURY.

See PRACTICE.

- A jury sworn on an indictment, clearly bad in point of law, may be discharged by the judge from giving a verdict. Rex v. Deacon.
- A wager was deposited with a stakeholder on the event of a dog-fight, to be paid over to the winner after the event was determined. The money was not demanded of the stakeholder until after the event was determined. The Judge discharged the jury from giving any verdict. Egerton v. Furzman. 735

LACHES.

Held that the acceptors of bills of exchange, payable at a banker's in London, were not discharged from their liability, although the holder neglected to present them for payment at the banker's before they failed, which was several weeks after the bills became due; and although the acceptors at all times, up to the failure of the bankers, had a balance in their hands sufficient to cover the acceptances. Turner v. Haden. 736

LANDLORD AND TENANT.

- 1. A tenant verbally agreed "to pay all taxes:"
 Held, that under this agreement he was bound to pay the land-tax although it was not specifically mentioned. Amfield v. White.
- 2. In an action for use and occupation of a lodging under a weekly tenancy, where it did not appear that the lodging was originally let for the purposes of prostitution: Held, that the plaintiff could not recover the weekly rent, which accrued after he was fully informed, that the defendant occupied the lodging for the purposes of prostitution. Jennings v. Throgmorton. 744
 3. A tenant of a house from year to year, not
- 3. A tenant of a house from year to year, not under any agreement to repair, may quit, without previous notice to his landlord, on the premises becoming unsafe and useless from want of repairs; and such tenant is not liable in an action for use and occupation, for any rent after the occupation has ceased to be beneficial. Edwards v. Etherington. 748
- 4. Where the occupier under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, on the terms of the agreement, and the landlord may distrain. Mann v. Lovejoy. 765
- 5. A tenant under covenant to repair, cannot maintain an action on the 14 G. 3, c. 78 (the London building act), against his landlord, for a moiety of the expense of rebuilding a party-wall, which being out of repair, the tenant pulled down and rebuilt at the joint expense of himself and the occupier of the adjoining house, to whom he had given the notice required by the statute, in his landlord's name, but without his authority. Piscy v. Rogers.

LEASE.

The plaintiff repaired certain leasehold premises held by the defendant under a covenant to repair, on a parol promise by the defendant to assign him his lease: Held, that the defendant, upon refusal to assign, was liable on an implied assumpsit to pay the plaintiff for such repairs. Gray v. Hill. 786

LIBEL.

 In an action for a libel, the defendant has a right to have the whole of the publication read, from which the passages charged are extracts. Cooke v. Hughes.

extracts. Cooke v. Hughes. 713
2. It is not libellous fairly to comment on a petition relating to matters of general interest, which has been presented to parliament, and published. The petitioner cannot maintain an action of libel for such comments, unless his private character he vilified; although the publication of the petition be not shown to be his act. Dunne v. Anderson. 753

In an action for libel, general evidence that
the plaintiff has been in the habit of libelling
the defendant is inadmissible. Wakley v.
Johnson. 787

LIEN.

 A livery stable keeper may, by express agreement, have a lien for the keep of horses; where the owner of horses in the possession of a livery stable keeper who had such lien, fraudulently took them out of his possession: Held, that the livery stable keeper might, without force, retake the horses, and that the lien would revive. Wallace v. Woodgate. 731

gate.
731
2. A banker who has discounted bills for a customer, or accepted bills for his accommodation, has, while such bills remain unpaid, a lien on any negotiable securities of that customer, which may come to his hands, and

may put the same in suit.

And even where taking into account the bills on both sides, the customer has a balance in his favour of a sum pot equal to the amount of any one of them, this surplus cannot be appropriated to any one of the bills, in reduction of the claim of the banker suing any of the parties to the bill. Bolland v. Bygravs.

LIMITATIONS, STATUTE OF.

See BILLS OF EXCHANGE, 17.

In an action against several executors, pleas general issue and statute of limitations: Held, that neither a mere acknowledgment of the debt by all the executors, nor an express promise by one of them, takes the case out of the statute: there must be an express promise by all. Tullock v. Dunn. 784

MARRIAGE ACT.

See Page 689.

NEW TRIAL.
See Evidence, 1.

NOTICE TO PRODUCE PAPERS.

See EVIDENCE, 15.

In an action of trespass, notice having been given to the defendant to produce a written paper which had been delivered to A. B., under whom defendant justified, and under whose directions he acted: Held, that the

plaintiff was not entitled to give secondary evidence of the contents. Evans v. Swett.

OATH.

A witness who declines swearing on the New Testament although he professes Christianity, may be allowed to swear on the Old Testament, if he considers that mode binding on his conscience. Edmonds v. Rowe. 705

ORDER.

A. gives B. an order on his bankers, directing them "to hold over from his private account 400! to the disposal of B." The bankers accept the order. Held that such order was revocable, and might be countermanded before payment made to B., or appropriation to his credit. Gibson v. Minett. 703

OUTLAWRY.

On a writ of error to reverse an outlawry, because the defendant was beyond seas if it be any answer that he went there for the purpose of avoiding the outlawry); it is enough that he went to avoid outlawry in the action; it need not appear that he went in contemplation of the particular proceedings which did actually terminate in the outlawry. Bryan v. Wagstoff.

PAROL EVIDENCE.

Parol evidence is admissible to prove matters deposed by a party on his examination before commissioners of bankrupt, material to the inquiry, such matters not being contained in the written examination taken by the commissioners. Rowland v. Ashby. 740

PARTY WALL.

See LANDLORD AND TRNANT. 5.

PARTNER.

The plaintiffs purchased by the order of T. and Co. of Ryder, to whom they were known as brokers, 110 bales of cotton. The contract was regularly entered in the plaintiff's books as a purchase and sale by brokers, and brokerage charged to both parties. Bought and sold notes were delivered, not disclosing the names of principals, but charging brokerage to both. T. and Co. and Ryder were not known to each other as concerned in the dealings. The plaintiffs paid Ryder for the cottons, and handed them over to T. and Co. with a bill of parcels in their own names: Held, that the plaintiffs were principals in the purchase of Ryder, and sale to T. and Co.

A partnership cannot acquire property in goods obtained by the fraud of one of the partners, to which the rest are not privy.

Kilby v. Wilson. 726

PATENT.

Patent for a mode of making a medicine by a particular combination of three known substances. The specification not describing those substances by their known names, but

held bad; those methods not being to the combination, nor part of the Savory v. Price.

PEDIGREE.

See EVIDENCE, 13, 29.

PERJURY.

See EVIDENCE, 30. PRACTICE, 5.

In an answer in chancery to a bill filed against the defendant, for the specific performance of an agreement relating to the purchase of land: 't he defendant had relied on the statute of frauds (the agreement not being in writing), and had also denied having entered into any such agreement. Upon this denial in his answer the defendant was indicted for perjury. Held, that the denial of an agreement which by the statute of frauds was not binding on the parties was immaterial and irrelevant, and that the defendant was entited to his acquittal. Rex v. Dunston.

PLEADING.

- 1. Where the four first counts of a declaration were on bills of exchange, and there was a demurrer and joinder to the two first, and general issue to the rest, and unica taxatio, &c.: Held, that the plaintiff having proved only two bills was not obliged to place these to the counts demurred to, but was entitled to nominal damages on those counts, and to the amount of the bills on the rest of the declaration. Marshall v. Grifts.
- 2. The declaration in trespass contained five counts, each charging several assaults. The defendant pleaded first not guilty, secondly, that the assaults in the different counts were one and the same, and then justified. Replication, de injuria, &c., generally, and issue thereon. Held, that the plaintiff could not recover on any other assault than the one specified in the plea. Gale v. Dalrysple.

PRACTICE.

See PLEADING, 1. ASSAULT, 2.

1. In indictments for misdemeanors at the instance of private prosecutors, when both defendant and prosecutor have brought down their records, and entered them with the marshal, the defendant's first, the prosecutor's lower in the list, trial must take place

tor's lower in the list, trial must take place in the order of entry. Rex v. Halse. 695
2. A prisoner upon being arraigned stated that he was deaf, and when the indictment was read over to him, apparently did not hear; the judge directed a jury to be empannelled to try whether he stood mute by the act of God, or out of malice. Rex v. Hamilton.

3. On the trial of an issue from the Court of Chancery, with power to the plaintiff to examine the defendant as a witness; Held, that as a matter of right, plaintiff's counsel might cross-examine the defendant, although called as his witness; the defendant standing in a situation necessarily adverse. Clarke v. Saffery.

fery.

4. A co-defendant against whom the plaints has given no evidence, has no right to an acquittal to be made a witness, until all the other evidence for the defendants is finished. Wright v. Paulin.

716

 A judge at Nisi Prius may refuse to try an indictment clearly bad in point of law. An indictment for perjury, not averring the matters falsely sworn to, to be material, nor showing them to be so, is within this authority. Rez v. Tremearne. 721

6. On a trial for a misdemeanor in K. B. a defendant is not entitled to the assistance of counsel to cross-examine witnesses when he reserves to himself the right of addressing the jury; but counsel may argue for him any point of law that arises, and suggest the questions to be put to the witness. Rez v. Parkins. 723

7. In an action for a libel, where the general issue is pleaded, and also special pleas in justification, the plaintiff may, in the outset, give all the evidence he intends to offer to rebut such justification, or he may do so in reply to evidence produced by the defendant, but he is not entitled to give part of such evidence in the first instance, and to reserve the remainder for reply to the defendant's case. Brownev. Murray. 745
8. In an action of assault and battery, and a

8. In an action of assault and battery, and a plea of justification only, and issue thereon, the defendant's counsel has a right to begin, the affirmative of the issue being on him. The onus of proving damages does not give the plaintiff's counsel a right to begin. Bedell v. Russell.

2. Two prisoners indicted for horse-stealing in county A., were found in joint possession of two horses in that county, which they had jointly taken at different times and places in county B. Held, that evidence could be given of one only of the takings in county B., each taking being a separate felony, and that the prosecutor's counsel must elect on which to proceed. Rex v. Smith. 755

proceed. Rex v. Smith. 755

10. A Judge at Nisi Prius has no jurisdiction to try an indictment for perjury at common law found at the quarter sessions, and removed by certiorari into the King's Bench; an indictment so found being void. Rex v. Haynes. 756

11. A sheriff's officer employed by an attorney to make arrests on mesne process, issued at the suit of his clients, may sue the attorney for the fees usually allowed for such arrests, on the taxation of costs by the Master, though such fees exceed the sum allowed to the sheriff and bailiff by the 23 H. 6, c. 10.

Townshend v. Carpenter. 760

12. Notice to produce a letter relating to the matters in dispute, served on the attorney of the party, on the evening next but one before the trial; held sufficient to let in secondary evidence of the contents, though the party was out of England. Bryan v. Wagstoff.

13. In order to let in secondary evidence of a letter, the notice to produce must specify the letter intended; notice to produce "all letters, papers, and documents touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered," is too general. France v. Lucy.

14. If a witness declines to answer a question, no inference of the truth of the fact inquired into may be drawn from that circumstance. Rose v. Blakemore. 774

15. In an indictment against several persons, the counsel for the prosecution has a right, before opening his case, to the acquittal of any defendant he intends to call as a witness. Rex v. Rowland. 779

A plea puis darrein continuance may be put in at nisi prius upon paper. Myers v. Taylor. 781

17. Where the plaintiff had obtained a special jury, but had neglected duly to summon them: Held, on the defendant's objecting to proceeding in the cause, that on the appearance of some of the special jurors the plaintiff was entitled to pray a toles, and to proceed in the trial. Snock v. Southwood. 788

18. When the witnesses in a cause are ordered out of Court, the attorney in the cause may remain, and be afterwards called as a witness. Pomeroy v. Baddeley. 788

PRIMAGE.

Where there is a written agreement between the master and owners of a ship, not montioning primage, and the owners have received payments in respect of primage from the freighters: Held, that the master, by usage of trade, is entitled to such payments.

Charleton v. Cotesworth. 725

PRINCIPAL AND AGENT.

See Attorney, 2, 3.

The defendant, a linen-draper in Yorkshire, had in several instances employed A. B., as his agent, to purchase on credit goods of the plaintiffs, linen-drapers in London. A. B., without the authority of the defendant, orders goods in his name to be sent by the usual conveyance, and intercepts them to his own use: Held, that the defendant is liable for such goods, he having by the previous dealings authorized the plaintiffs to treat A. B. as his agent. Todd v. Robinson. 736

2. A factor places goods in the hands of a broker as security for an advance to himself, and with directions to sell. The goods are sold before any revocation of these directions: the principal cannot maintain trover against the broker. Stierneld v. Holden. 737

PRIVILEGE. See ATTORNEY.

In an action by the assignees of a bankrupt, the bankrupt may allow his attorney before the bankruptcy to give in evidence privileged communications, though offered as proof of the act of bankruptcy. Merle v. Moore. 777

SALE.

See AUCTION. FRAUDULENT SALE.

The plaintiff had verbally agreed with J. E. for the purchase of certain houses; the defendant in writing, agreed to give the plaintiff 40L for his bargain, the houses were afterwards at plaintiff's request conveyed to the nominee of the defendant: Held, that the transfer of the parol bargain was a sufficient consideration for the promise of the defendant. Seaman v. Price. 731

2. If a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods which he has contracted to deliver; he cannot maintain an action for damages for non-performance of the contract. Bryan v. Lewis.

3. In action by vendee, for non-delivery c goods: Held, that in an agreement " for delivery of goods on arrival, to be delivered with all convenient speed, but not to exceed a given day," the arrival in time for delivery by that day is a condition precedent; and if they do not so arrive (without default in vendor), the agreement is null. Alewyn v. Pryor. 781

4. If a vendee under terms to pay for goods on delivery, obtains possession of them by giving a check, which is afterwards dishonoured, he gains no property in the goods, if at the time of giving the check he had no reasonable ground to expect that it would be paid. Hause v. Crowe. 784

5. In action by vendee against vendor of a lease, for the deposit: Held, that the vendor is not bound to produce his lessor's title without an express stipulation to that effect. George v. Pritchard. 785

SET-OFF.

See PLEADING.

Notice of set-off can only be given where the general issue is pleaded, without any other plea. Webber v. Venn. 784

SHIP.

See INSURANCE.

The registered owner of a ship is not liable for repairs, unless actually done upon his credit. Legal ownership is primå facie evidence of liability, which may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner's having ceased to interfere with the management of the ship. Jennings v. Griffiths. 700

SLANDER.

See EVIDENCE, 32.

STOPPAGE IN TRANSITU.

A wharfinger, who, on receiving an order from A. to "transfer, weigh, and deliver or rehouse" certain tallows to B., with an endorsement by B. to "transfer, weight, and deliver" them to the plaintiffs, gives a written acknowledgment to the plaintiffs, that he holds the tallows on their account, cannot, upon B. becoming insolvent, set up as a defence for not delivering the tallows to the plaintiffs, A.'s right to stop in transitu: the plaintiffs have purchased bona fide from B., although A. sold to B. at so much per cwt., and the tallows have not been weighed.

Semble. An owner of goods lying in wharf, who, upon sale of them, gives an order on the wharfinger to "transfer, weigh, and deliver or re-house" them to his vendee, loses his right to stop in transitu against all who acquire to bona fide title by purchase from such vendee. Hause v. Watson. 691

TITHE.

In an action for tithes under 37 H. 8, c. 12, (London tithe act), evidence that the statute and decree have been acted on in the different parishes in London is admissible to prove that the decree has been enrolled, no enrollment being found in the present records of the Court of Chancery. Macdougal v. ung. 778

TROVER.

Where goods lent on hire have been wrong fully taken in execution by the sheriff: Held, that the owner cannot maintain trove against the sheriff, he not having the right of possession as well as the right of property at the time of the sale. Paix v. Whittaker.

USURY.

Merchants in London agree with the defendants, British merchants residing at Gibraltar, to consign goods to them for sale upon a del credere commission; that the London correspondents of the defendants, on the consignment of the goods to the order of the defendants, shall on their account accept bills at ninety days, drawn by the consignors, for two-thirds the invoice price; that the defendants shall charge the amount of the bills in Gibraltar currency, with the exchange, and 6 per cent. interest from the dates. The consignors to be allowed 6 per cent. interest on balances in the bands of the defendants, that being legal interest at Gibraltar, and the usual mode of remitting from Gibraltar being by bills on London at ninety days: Held, that such agreement is not surrious. Harvey v. Archbold.

VARIANCE.

See PERJURY.

1. In an action on a bail-bond. The condition set out in the record was "to answer the said plaintiff in a plea of trespass, and also to a plea to be exhibited against said defendant for 60l. upon promises." The bond, when produced, did not contain the words "upon promises:" variance held fatal. Baker v. Newbegin.

2. In an indictment for perjury in an answer to a bill in Chancery, the bill was described as exhibited against three persons only, A, B., and C. The bill, upon being produced, was against four, A., B., C., and D.: Held that this was no variance. Rex v. Penell.

3. An indictment for a nuisance to a highway stated it to be a way for all the liege subjects, &c., to go, &c., with their "horses, coache, carts, and carriages." The evidence was, that carts of a particular description, and loaded in a particular manner, could not pass along this highway: Held that this was not a misdescription, it not being laid as a highway for all carts, carriages, &c. Rav. Lyon.

4. On an indictment for perjury alleged to have been committed by the defendant as a witness in a civil action, it appeared that the evidence given on that trial by the defendant, contained all the matter charged as perjury, but other statements, not varying the sense, intervened between the matters set out: Held to be no variance, although in the indictment the evidence appeared to have been given continuously. Res. v. Solomons.

5. In an action against the sheriff on the 8 Ann. c. 14, for taking goods off the premises without paying rent, the declaration stated, that the sheriff, "by virtue of, and under pretence of a certain writ of our said lord the king before the king himself, before that time sued forth, &c., took the goods," &c. The

writ under which the goods were seized issued from the Common Pleas: Held, a fatal variance. Sheldon v. Whittaker. 748 6. In case against the sheriff for an escape, the

Intal variance. Anedon V. Wittaker. 748 6. In case against the sheriff for an escape, the declaration stated that the plaintiffs sued out an attachment of privilege, "by which said writ our lord the king commanded the defendants, &c., to attach A. B., &c., to answer the said plaintiffs of a plea of trespass on the case, to the damage of the said plaintiffs of thirty peunds," &c. The writ produced did not contain the words, "to the damage," &c. Held no variance. Cousins v. Brown.

VENDOR AND VENDEE.

In case against the vendor of a public-house, for fraudulent misrepresentations of the business of the house; evidence of the actual value of the premises, is admissible in reduction of damages, but not as a bar to the action. Pearson v. Wheeler. 758

WAGER.

WARRANTY.

1. Certain sheep, spparently healthy and sound in every respect, were sold warranted sound. Two months afterwards great part of them died. There was nothing to connect the disease of which they died with their previous condition; but it was, in the opinion of farmers and breeders, an hereditary disease, called the goggles, and incapable of discovery until its fatal appearance; held, that this disease was an unsoundness existing at the time of the sale, the jury being of opinion, that "it existed in the constitution of the sheep at that time." Jolife v. Bendell.

2. In assumpsit for the breach of warranty of

soundness of a horse, the defendant having refused to take back the horse, the plaintiff is entitled to recover for the keep for such time only as would be required to re-sell the horse to the best advantage. M'Kenziev. Hancock. 790

WINDOWS.

Where the owner of a house divided it into two tenements, and let one of them, held that the lessee was liable to an action on the case for obstructing windows existing in the landlord's house at the time of the demise, though of recent construction, and though no stipulation was made against the obstruction. Riviere v. Bewer.

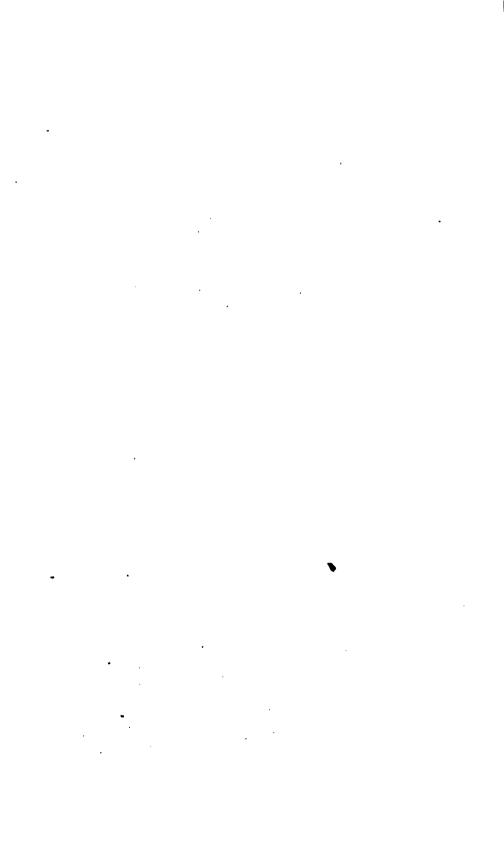
WITNESS.

See EVIDENCE. GAMING HOUSE.

- In an action of deceit, an insolvent to whom
 the plaintiff has furnished goods on the representation of the defendant, is a competent
 witness to prove that the defendant represented him as a person fit to be trusted.
 Brant v. Robinson. 701
- 2. A witness on the voir dire stated that the lessor of the plaintiff had formerly assigned to him the premises in question for a temporary purpose, that he had given up the deed to lessor of the plaintiff, and had never had any possession of the premises: Held that the witness was incompetent by reason of interest. Doe ex d. Scales v. Bragg. 708

 On an indictment for a forcible entry and detainer under the statutes of R. 2, and Jac. 1, the party grieved is not a competent witness. Rex v. Bevan.

4. A judgment for conspiracy, to bribe a person (summoned as a witness on an information against the revenue laws) not to appear before the justices of the peace, renders the person convicted incompetent as a witness. Bushel v. Barratt. 790



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